

**THE REGULATION OF “BODY ART” IN THE MILITARY:
PIERCING THE VEIL OF SERVICE MEMBERS’
CONSTITUTIONAL RIGHTS**

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*[T]he world will not stop and think—it never does, it is not its way; its way is to generalize from a single sample.*²

Mark Twain

I. Introduction

A service member’s body is never exclusively his own—that is readily apparent. The military can dictate both physical restrictions and physical requirements such as hair length,³ body fat percentages,⁴ physical training standards,⁵ consumption of alcohol or drugs,⁶ even forbidding sexual acts between consenting adults.⁷ It seems then, to make perfect sense, that the military would be able to dictate legitimately whether military members

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2. Jim Zwick, *Mark Twain* (visited Sept. 7, 1999) <<http://marktwain.miningco.com>> (providing additional quotations of Mark Twain).

3. U.S. DEP’T OF ARMY, REG. 670-1, para. 1-8A, WEAR AND APPEARANCE OF ARMY UNIFORMS AND INSIGNIA (1 Sept. 1992) [hereinafter AR 670-1].

4. U.S. DEP’T OF ARMY, REG. 600-9, THE ARMY WEIGHT CONTROL PROGRAM (1 Sept. 1986).

5. U.S. DEP’T OF ARMY, FIELD MANUAL 21-20, PHYSICAL FITNESS (28 Aug. 1985).

6. U.S. DEP’T OF ARMY, REG. 600-85, ALCOHOL AND DRUG ABUSE PREVENTION AND CONTROL PROGRAM (21 Oct. 1988).

7. UCMJ art. 125 (1998) (prohibiting sodomy).

can poke holes in, brand, or place other tattoo "art" on their bodies. The issue, however, is not that straightforward.

Given how effectively the United States military operates, it is safe to assert that the vast majority of service members adhere to the restrictions placed on them, regardless of whether they understand the reasoning behind the policies. Soldiers realize that they have surrendered their bodies (and a good portion of their free will) to the defense of the United States Constitution.⁸ Military members understand the sacrifices of military service.

Despite the majority's willingness to adhere to the rules, the military should still articulate to service members and to the public why various restrictions are necessary.⁹ This is true in the area of "body art"—especially in light of potential Constitutional infringements on military members' personal affairs or private rights. Explaining why restrictions are neces-

8. See 10 U.S.C.A. § 502 (West 1998) (stating the enlisted oath of office); 5 U.S.C.A. § 331 (West 1998) (stating the officer oath of office). See also *United States Army* (visited Feb. 16, 1999), <<http://members.aol.com/sapper11t/index.html>> (citing the Army oath of enlistment, the Army oath of officer for officers, the Army Code of Conduct, and the Soldier's Creed).

9. The military frequently informs soldiers and the public why certain infringements are necessary. See, e.g., Message, 080433Z Mar 99, Dep't of Army, DAPE-HR-L, subject: Army Immunization Policy (AR 600-20, para 5-4) (8 Mar. 1999) (explaining the immunization policy) [hereinafter *Army Immunization Policy*]. The revision of the immunization policy provides:

[C]ommanders will ensure that soldiers are continually educated concerning the intent and rationale behind both routine and theater-specific or threat-specific military immunization standards. Immunizations required by AR 40-562 or other legal directive may be given involuntarily . . . [t]he intent of this authorization is to protect health and overall effectiveness of the command, as well as the health of the individual soldier. In cases where involuntary immunization is considered, the following limitations apply. (A) Actions will not be taken to involuntarily immunize soldiers. If a soldier declines to be immunized the commander will: (I) ensure the soldier understands the purpose of the vaccine, (II) [e]nsure that the soldier has been advised of the possibility that disease may be naturally present in a possible area of operation or may be used as a biological weapon against the United States or its allies, (III) [e]nsure the service member is educated about the vaccine and has been able to discuss any objections with medical authorities.

Id.

sary gives our institution legitimacy and a sense of fairness. It also makes our policy decisions legally defensible.

It is difficult to take issue with the propriety of the military services dictating the wear of the military uniform or the proscription of openly visible “body art”¹⁰ while on duty. The premise of this article is not to advocate that the military should completely abandon its policy against certain forms of body art. This article does not advocate that the military should permit soldiers with extremist-type viewpoints to display symbols of their beliefs on their bodies. The prohibition against displaying racist, extremist, or gang-related symbols in the form of body art, in almost all circumstances, is necessary to maintain good order, discipline, and readiness.¹¹

The underlying theme of this article is, instead, to explore more closely the Army’s body art policy and its legality; to compare the other military services’ policies to the Army’s policy; and to examine whether the Army policy, as written, is justified, necessary, and practical.¹² This article explores the notion that the Army’s new “body art” policy simply goes too far.

II. Body Art and the Service Policies

A. What is “Body Art?”

“Body art” is one of the nation’s newest fashion trends.¹³ It seems as though no sector of society is immune from the craze—young and old,

10. See *infra* notes 16, 17, 18 and accompanying text defining body art.

11. See Major Walter M. Hudson, *Racial Extremism in the Army*, 159 MIL. L. REV. 1 (1999).

12. This article will not explore other more invasive body arts such as sub-skin implants (implanting objects beneath the skin to cause a raising of the skin with the underlying appearance in the shape of the implant) or scarification (cutting skin with the intention of leaving a scar in the shape of the wound). The military does not address these body alterations in the new Army body art policy. Arguably, however, these other techniques of self-expression may be regulated by the military in a similar fashion that other forms of body art are now regulated, even though not specifically provided for under the current regulation. Further, the Army’s body art policy does not include other body modifications that may appear “natural” to an onlooker such as facelifts, rhinoplasty, liposuction, breast augmentation and reduction, and hair transplants, to note a few. Some of these body modifications are not only authorized by the Army, but are also performed by the Army. See generally U.S. DEP’T OF ARMY, REG. 40-3, MEDICAL, DENTAL, AND VETERINARY CARE (15 Feb. 1985).

women and men, educated and uneducated,¹⁴ civilians and military.¹⁵ "Body art" is a term used to connote the different methods a person may use to change the natural appearance of his body through various "additions." "Body art" includes such things as tattooing,¹⁶ body piercing,¹⁷ and branding.¹⁸ In all its forms, body art exists in the military.¹⁹

There are an infinite number of reasons why people obtain body art.²⁰ A person could be motivated by the look, the feel, or the personal meaning behind the body art.²¹ Whatever the reason for obtaining it—two things are clear. First, the meaning behind the body art, whatever its form, is personal

13. Body art has become so popular that in 1997, the American Body Art Association (ABAA) was founded. The mission of the ABAA is to educate tattooists and piercers in proper sterile, aseptic techniques; educate clientele for proper after-care of new body art; provide a liaison between practitioners and lawmakers to ensure the continued growth of our industry without undue regulation; provide practitioners with training and certification in aseptic techniques, basic business principles, to allow a forum to speak freely on all issues related to the industry; assist practitioners in determining applicable laws and regulations in their respective locale. See *American Body Art Association* (visited Feb. 22, 1999) <<http://body-art.com/abaa1.html>>. See generally Karam Radwan, *You've Got WHAT Put in Your Tongue?*, LEICESTER MERCURY (Pa.), Oct. 9, 1998, at 12 (exploring why "more and more young people are having holes punched in them for fashion"); David Horn Jr., *Yuma Teens Withstand Pain For Popular Body Piercings*, THE ASSOCIATED PRESS STATE & LOCAL WIRE, Sept. 23, 1998.

14. One piercing parlor is even listed in the Library of Congress *Who's Who*, 1998. "Tribal Ways" tattooing parlor received this listing because of local press coverage as experts in the field. See, e.g., *Tribal Ways* (visited Mar. 15, 1999) <<http://www.tribal-ways.com/tribal.html>>; WOMEN'S SPORTS AND FITNESS, Mar. 1999, at 4 (containing an advertisement for Bacardi Rum). The advertisement displays a woman holding a mixed drink. The woman's sweater is short enough to show her bare stomach. Her naval is pierced with a small gold hoop. The caption in the advertisement reads: "Banker by day. Bacardi by night." *Id.*

15. See Gemma Tarlach, *Tattoos, Body Piercing Becoming More Popular*, PRESS JOURNAL (Pa.), Jan. 1, 1999, at C11. See also Lisa Hoffman, *That Better Be a Bullet in Your Nose, Soldier*, PHILADELPHIA DAILY NEWS, June 12, 1998; AIR FORCE NEWS, *Ellsworth Airman Hospitalized With Infection After Body Piercing*, May 26, 1998.

16. Tattooing is a process dating back thousands of years by which skin is marked or colored with a needle by indelible ink. The result is limited only by what one's imagination can dream up—perhaps a picture, a design, a word or phrase. A tattoo can be placed virtually anywhere on the body. See Craig Taylor, *Tattoo* (visited Jan. 19, 1999) <www.miax1.muohio.edu/~taylorw1/history.html>.

17. Body piercing is a form of body decoration whereby "metal rings or other items are attached through holes made in the skin." Body piercing is a relatively simple and inexpensive process. The cost of a piercing can range from \$10 for an earlobe to \$65 for a piercing on the genital region. The jewelry can range in price from \$15, depending on the type of metal used to make the jewelry. See *Passage Piercing* (visited Jan. 16, 1999) <www.interlog.com/~passage/piercing/main.html>.

to its possessor.²² Second, and more importantly in the military context, “body art” is open to the interpretation of those who see it. It is, in part, on this second basis, that the Army began regulating body art.

18. Branding is scarification by applying a heated material (usually metal) to the skin, making a serious burn that eventually becomes a scar. Some have experimented with branding using extremely cold materials (liquid nitrogen). See Shannon Larratt, *BME Branding/Cutting/Scarring FAQ* (visited Mar. 15, 1999) <<http://www.bme.freeq.com/scar/scar-faq.html#1-3>>. See also Joan Whitely, *Branded For Life*, LAS VEGAS REV. J., Oct. 4, 1998, at 1J. Branding is ordinarily done through one of two methods: the laser branding method or the more traditional “striking” method. The laser method involves “burning the skin with a pencil-like instrument that emits an electrical current.” The striking method involves “heating a thin strip of metal, bent into the desired shape, to as hot as 1800 degrees” and striking the skin numerous times until the desired mark is made. Branding is the most permanent form of body art. See generally Antoinette Alexander, *Crossroads-Brand New Fad-It's Hot; Will It Last?*, ASHBURY PARK PRESS (N.J.) Sept. 20, 1998, at AA1.

The French branded convicts on their shoulder with iris petals tied by an encircling band to represent that they were ostracized from civilized society. In England, King Henry the Eighth branded thieves on the cheek with an “S” to indicate they were slaves and outcasts forever. See generally Lonnae O’Neal Parker, *Brand Identities—Some Call Burning Flesh a ‘Rite of Passage’—Others Say It’s An Ugly Throwback To Slavery*, WASH. POST, May 11, 1998, at D1.

19. See, e.g., Senior Master Sergeant Jim Katzaman, *Body Art: The Color Behind the Black and White Rules*, AIR FORCE NEWS, June 18, 1998, at 1 (observing tattoos, brands, and other body decorations have all been present on military members bodies).

20. See generally Shannon Larratt, *BME Branding/Cutting/Scarring FAQ* (visited Mar. 15, 1999) <<http://www.bme.freeq.com/scar/scar-faq.html#1-2>> (providing a discussion as to the reasons why people obtain body art).

21. See Mike Cable, *Where Do You Want Your Tiger?*, LONDON TIMES, Oct. 17., 1998, at A-12 (exploring the reasons why people obtain body art). Some people obtain body art because it marks a transition in life, such as a birthday or the death of a loved one. For others, it could have been the result from a juvenile moment of drunken thoughtlessness. The symbolism of the body art may give the possessor a range of emotions from pride to shame or regret. See also Jeff Ristine, *One Time Neo-Nazi Gives Tips On Fighting Hate*, SAN DIEGO UNION-TRIB., Sept. 26, 1998, at B-1 (exploring an ex-soldier’s story about his entry into a five-year program to remove 29 racist tattoos from his entire body—including swastikas, an “SS” lightning bolt, an Aryan soldier, and other symbols of hate).

22. In some cases, the meaning behind a person’s body art may not be obvious. Only the person who obtained the body art knows for certain why they obtained it and what it means to them. Onlookers may guess what the symbolism represents (and in some cases be correct), however, sometimes body art has a private hidden meaning that is personal to the possessor.

B. Regulating “Body Art” in the Military

1. Army Policy

Only very recently did the Army begin regulating “body art.” The Army’s concern began, in part, as a reaction to an incident in December, 1995, outside Fort Bragg, North Carolina,²³ when an Army soldier (allegedly having ties to white supremacist extremists) randomly shot and killed a black couple.²⁴ The soldier allegedly committed the killings to earn a skinhead tattoo of a spider web on his elbow.²⁵ Given the depraved and disgraceful nature of the crime, the Army as an institution, as well as the Fort Bragg command, felt obligated to respond quickly and with a strong message—a message that would indicate that the Army would not tolerate even the thought of “extremist” affiliation from its members.²⁶ Shortly thereafter, the Army’s first tattoo inspection policy was born.²⁷

The 82d Airborne Division Commanding General at Fort Bragg directed that all commanders conduct physical inspections of their soldiers as part of their routine health and welfare program.²⁸ The command designed the policy to identify tattoos, body markings, or other symbols representing racist beliefs, extremist organizations, or gang affiliation on the soldier’s body not covered by the physical training uniform.²⁹ If a commander found a potentially extremist-type tattoo, the commander was directed to interview the soldier and inquire into the meaning of the symbol and take appropriate action to address the situation.³⁰ Some soldiers met the new inspection system with disapproval.³¹

The initial inspections at Fort Bragg identified a large number of soldiers with tattoos, but only a small number of soldiers with alleged racist,

23. See Scott Mooneyham & Marc Barnes, *Skinhead Tattoo Linked to Race-Related Killings—Court Documents, Testimony Describe Soldiers Alleged Activities*, FAYETTEVILLE OBSERVER-TIMES, Dec. 13, 1995, at B-2 (describing the killings). The article noted that in skinhead terminology, earning the spider-web tattoo meant killing a black person or a gay person.

24. Jim Burmeister was one of the soldiers tried for the killings. His co-conspirator in the murders, Randy Meadows, testified at trial that Burmeister “joked about earning a tattoo that some skinheads wear to show they have killed a black person.” Similarly, Malcolm Wright, another co-conspirator in the murders, alleged to have been with Burmeister during the murders, asserted that “in certain skinhead groups, members wear a spider-web tattoo if they had killed a black person.” See Mooneyham, *supra* note 23. See also Marc Barnes, *Evening of Killing Recounted—Meadows Recalls Shots*, FAYETTEVILLE OBSERVER-TIMES, Feb. 14, 1997, at B-2.

25. See Barnes, *supra* note 24.

extremist, or gang-related tattoos.³² After concluding the initial inspections, the 82d Airborne Commander rescinded and replaced the directive mandating inspections with a more permissive inspection policy.³³

The 82d Airborne Division commander later took command of Fort Lewis and I Corps and instituted a similar tattoo inspection policy.³⁴ The Fort Lewis commanders, like the commanders at Fort Bragg, conducted a post-wide tattoo inspection after the policy was first promulgated.³⁵ As a

26. Memorandum, Commander, XVIII Airborne Corps and Fort Bragg, AFZA-HR-EO, subject: Extremist Groups (13 Dec. 1995). In this memorandum, the then XVIII Airborne Corps Commander, Lieutenant General Henry H. Shelton, the current Chairman of the Joint Chiefs of Staff, reemphasized his command policy regarding extremist organizations stating that "extremists are totally inconsistent with the responsibilities of military service. Active participation by any soldier in this command is prohibited. We are committed to the principles of fair and equitable treatment for all soldiers and family members within XVIII Corps." *Id.* The memorandum directed that commanders, managers, and supervisors immediately conduct chain teaching to educate soldiers on extremist groups. This memorandum noted that on 12 December 1995, the Secretary of the Army conducted a news conference to address the Fayetteville shootings. *Id.* The Secretary of the Army directed that the taped briefing be forwarded for viewing to all officers, noncommissioned officer (NCO) leaders, down to platoon level throughout the Army. On 20 December 1995, the 82d Airborne Division Commander, then Major General George Crocker, promulgated a memorandum supplementing the XVIII Corps Commander's 13 December 1995 memorandum regarding extremism. Major General Crocker's memorandum reemphasized the Army's command policy to prohibit soldiers from actively participating in extremist organizations and again, directed chain teaching by all commanders. The memorandum further advised:

[S]oldiers who are identified as members of extremist organizations should be counseled and warned that such membership is incompatible with the values of military service. A full range of judicial, non-judicial, and administrative options are available to the commanders of soldiers whose behavior constitutes a threat to the discipline and good order of the Army.

Id.

27. See Policy Letter JA 96-03, Office of the Staff Judge Advocate, 82d Airborne Division, AFVC-JA, subject: Inspections for Racist or Gang Symbols/Tattoos (26 Mar. 1998) [hereinafter Policy Letter 96-03] (on file with the author). The results of these inspections were to be reported to the XVIII Airborne Corps higher headquarters, including negative findings. See also Electronic Mail from Colonel Thomas Turner, Chief of Staff, XVIII Airborne Corps, to Sean Byrnes and then-Lieutenant Colonel Robert McFetridge, Staff Judge Advocate, 82d Airborne Division (22 Mar. 1996) (on file with author).

28. Policy Letter 96-03, *supra* note 27. The policy directed that the 82d Replacement Detachment Commander conduct inspections of incoming soldiers as a routine part of the replacement activities for newly assigned personnel.

result of the inspection, the command found no soldiers who possessed racist or gang-related tattoos.³⁶

29. *Id.* The new policy stated that during these inspections soldiers would be required to remove their physical training shirts for inspection. Soldiers would be inspected by leaders of the same sex and the inspections would be conducted in as non-intrusive a manner as possible, with appropriate privacy. There was some confusion about how to implement the policy when it was first promulgated. At least one infantry company commander made his soldiers strip naked to check for tattoos. This resulted in some additional, more specific guidance to commanders. Interview with Major Walter Hudson, Professor, The Army Judge Advocate General's School (Feb. 8, 1999) [hereinafter Hudson Interview]. Major Hudson served as the former Chief of the Military Justice Division, 82d Airborne Division. *See* Information Paper, Lieutenant Colonel Robert McFetridge, Office of the Staff Judge Advocate, subject: Guidance for Commanders On Inspection of Soldiers for Racist, Gang, or Extremist Tattoos (28 Mar. 1996) (indicating the concern about the proper methodology for conducting inspections). Lieutenant Colonel McFetridge noted that "if done wrong, tattoo inspections have great potential for creating serious legal issues." *Id.* The information paper provided additional guidance to commanders and instructed commanders to notify the staff judge advocate office for recommendations on decisions concerning bars to reenlistment.

30. Policy Letter 96-03, *supra* note 27. A commander's response could range from counseling to administratively discharging the soldier for racist or gang-related activities. The policy letter directed commanders to educate themselves on the symbols indicative of involvement in or affiliation with racist beliefs, extremist organizations, or gangs, by consulting with the Division Equal Opportunity Officer. If the symbol was obviously "extremist" or gang related, the commander was to first counsel the soldier and inquire into potential extremist affiliations. If the commander determined that the soldier was an extremist, the commander could bar the soldier from re-enlisting or administratively discharge him depending on the circumstances. If the soldier's tattoo was not obviously racist or extremist, the commander was supposed to ask the soldier what the tattoo meant. If the commander's suspicions were confirmed, the commander was to counsel the soldier that the display of the symbol or involvement in extremist activities is incompatible with military service. The commander was then instructed to take appropriate action in accordance with *Army Regulation (AR) 600-20*. *See* U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY, para. 4-12 (30 Mar. 1988) [hereinafter AR 600-20]; 82D AIRBORNE DIVISION, PAM. 27-2, 82D AIRBORNE DIVISION LEADER'S GUIDE ON IDENTIFYING AND COMBATING EXTREMIST AND GANG-RELATED ACTIVITY (12 Feb. 1997) (providing guidance to commanders to recognize and combat extremist and gang-related activities) [hereinafter FORT BRAGG GUIDE ON IDENTIFYING EXTREMISM]. A list of possible extremists was on file at the 82d Airborne Division Office of the Staff Judge Advocate. *See* Hudson Interview, *supra* note 29. Major Hudson advised that copies of the extremist handbook developed at Fort Bragg were requested by several staff judge advocate offices including at least one Marine staff judge advocate office. Note, however, that the problems with using such a handbook are obvious. First, the handbook surely does not contain all the tattoos/symbols that indicate extremist or gang-related affiliations. Many soldiers with racist or extremist tattoos that are not contained in the handbook are not found to be in violation of the policy because the meaning of their tattoo is not known. Second, once the soldiers learn of the tattoos/symbols that are on the prohibited list, other more non-mainstream symbols for their causes may be used to indicate their affiliations and thus skirt the Army policy.

The Army as an institution also responded to the killings at Fort Bragg. In early 1996, the Secretary of the Army formed the Task Force on Extremist Activities to evaluate whether the Army had a problem with extremism among its members and, if so, whether the Army should revise its policies.³⁷ The Task Force eventually determined that there was “minimal evidence of extremism in the ranks,” yet it recommended that the Army begin screening at initial entry for extremists and other hate group

31. See Paul Woolverton, *Skin Deep: Soldiers Respond To Tattoo Inspections*, FAYETTEVILLE OBSERVER-TIMES, Apr. 12, 1996, at A-22. The article noted that over 14,500 soldiers were inspected at Fort Bragg. Some soldiers asserted that the policy was “unconstitutional and an overreaction on the part of the 82d Airborne.” *Id.* One soldier was quoted in the article as saying “the military is making a bigger mess of it than they have to” and they are inappropriately focusing on people’s skin instead of their actions. See also Scott Mooneyham, *Bragg Inspects Tattoos—All 82d Troops To Be Examined*, FAYETTEVILLE OBSERVER-TIMES, Apr. 11, 1996, at A-12.

32. See Information Paper, Lieutenant Colonel Robert McFetridge, Staff Judge Advocate, 82d Airborne Division, subject: 82d Airborne Division’s Tattoo Inspection Results, 2 May 1996 (on file with author) [hereinafter Results Information Paper]. The information paper indicated that four soldiers were identified through the division inspections. The command investigated the soldiers’ wearing the prohibited tattoos and determined that those soldiers were involved in racist or gang-related activities. The information paper indicated that as a result of the investigation, two soldiers were administratively separated and two were barred from re-enlisting. See Hudson Interview, *supra* note 29. Major Hudson indicated that the commanders found numerous tattoos on the soldiers’ bodies. Commanders did not know what many of the tattoos symbolized or meant. This led the 82d Airborne Division Office of the Staff Judge Advocate to seek out the meanings of many tattoos. The Office of the Staff Judge Advocate kept the names of persons with such tattoos on file until the nature of their tattoo was known. *Id.*

33. See Policy Letter JA 96-06, Colonel Thomas Turner, Chief of Staff, 82d Airborne Division, AFVC-JA, subject: Inspections for Racist or Gang Symbols/Tattoos (20 May 1996) [hereinafter Policy Letter 96-06]. See Memorandum, Colonel Thomas Turner, Chief of Staff, 82d Airborne Division, AFVC-CS, subject: Tattoo Inspection Policy (14 May 1996) [hereinafter Memorandum Tattoo]. The new policy allowed commanders some discretion as to whether to inspect soldiers for improper tattoos. The memorandum provided a more permissive tattoo inspection policy to monitor or respond to indicators that a unit might be developing an unhealthy equal opportunity climate and to ensure that a framework exists for conducting such inspections. The author of the memorandum noted that “[they] found exactly what [they] thought [they] would find, and what [they’ve] been saying all along—the vast majority of paratroopers in this division are proud professionals who have little patience or tolerance for extremists” The new policy continued to require the replacement detachment to inspect new soldiers arriving at Fort Bragg before allowing them to report to their units. See also Policy Letter JA 96-06, Colonel Karl W. Johnson, Chief of Staff, 82d Airborne Division, AFVC-JA, subject: Inspections for Racist or Gang Symbols/Tattoos (15 July 1997) (providing the current policy). The memorandum changed in format and signature approval. No other modifications to the policy were made.

influences.³⁸ The Task Force identified tattoos as a means of extremist identification.³⁹

34. Memorandum, Commander, Lieutenant General G.A. Crocker, AFZH-GA, subject: Extremist Group Involvement (19 June 1997), [hereinafter Extremist Group Involvement Memorandum]. This inspection policy was slightly broader in scope than the Fort Bragg policy in that it provided the commanders with guidance to look for "tattoos or *other ornamentation* that present a threat to military fitness, good order, and discipline" (emphasis added). See The Associated Press, *Former Bragg Head Orders Tattoo Check For 19,000*, NEWS & OBSERVER, RALEIGH (N.C.), Aug. 1, 1997. See also Interview with Major Mike Smidt, Professor, The Army Judge Advocate General's School (Feb. 8, 1999) [hereinafter Smidt Interview]. Major Smidt served as the Chief of Criminal Law Division at Fort Lewis, Washington, from July 1996 through July 1997. Major Smidt indicated that one possible reason for the institution of the Fort Lewis policy was because the headquarters for the white supremacist organization "Aryan Nation" is located in Haydon Lake, Idaho, very near to Fort Lewis and because of other supremacist activities in the Northwest area of the United States. The commanding general did not want to take any chances about a similar racist incident occurring at Fort Lewis as did at Fort Bragg. *Id.*

35. The Fort Lewis command issued catalogs of various prohibited tattoos commanders were to look for. The catalog depicted examples of racist or extremist tattoos such as neo-Nazi swastikas, SS thunderbolts, blue birds, spider webs on elbows, three-leaf clovers and skulls, and the iron cross. Commanders could obtain additional examples of tattoos from the Corps staff. See COMMANDER, LIEUTENANT GENERAL GA CROCKER, AFZH-GA, COMBATING EXTREMISM AT FORT LEWIS AND I CORPS, A GUIDEBOOK FOR COMMANDERS (10 June 1997). The guidebook was based on Fort Bragg's published guidance on identifying extremists. FORT BRAGG GUIDE ON IDENTIFYING EXTREMISM, *supra* note 30.

36. Telephone Interview with Major Ben Kash, Chief of Administrative Law, Fort Lewis, Washington (Feb. 8, 1999) [hereinafter Kash Interview]. See also Smidt Interview, *supra* note 34. Both Major Kash and Major Smidt said that one alleged extremist soldier was identified before the Fort Lewis command instituted the inspection policy. They also indicated that the local command's request to administratively separate that soldier under the Secretary of the Army's authority to discharge a soldier for the good of the service later was rejected. Major Smidt indicated that the separation packet on that soldier was rejected by the Assistant Secretary of the Army for Manpower and Reserve Affairs (ASA (M&RA)) as deficient in supporting evidence. Based on the ASA (M&RA) rejection of the separation, the soldier was retained on active duty. After the initial post-wide inspection, the Fort Lewis commander instituted a discretionary inspection policy and mandated that only the replacement detachment conduct ongoing inspections of incoming soldiers. Extremist Group Involvement Memorandum, *supra* note 34.

37. DEP'T OF ARMY, REPORT, THE SECRETARY OF THE ARMY'S TASK FORCE ON EXTREMIST ACTIVITIES: DEFENDING AMERICA'S VALUES (21 Mar. 1996) [hereinafter TASK FORCE ON EXTREMIST REPORT]. See Anti-Defamation League, *ADL Calls Army Report A Step In Right Direction* (visited Feb. 20, 1999) <www.adl.org/presrele/DiRaB_41/2697_41.html>.

38. See TASK FORCE ON EXTREMIST REPORT, *supra* note 37, at 9, 34. The Task Force found that "[g]ang related activities appear to be more pervasive than extremist activities." *Id.* See also Robert Burns, *Army Should Screen For Supremacists, Panel Says*, DETROIT NEWS, Mar. 22, 1996, at A-12.

On 11 June 1998, the Army's Office of the Deputy Chief of Staff for Personnel (DCSPER) promulgated several changes to the Army's uniform regulation.⁴⁰ Among those changes was the Army's new "body art" policy

39. TASK FORCE ON EXTREMIST REPORT, *supra* note 37, at 27. The report states: "[K]nowledge of tattoo patterns is important for medical personnel involved in the accession process due to the proclivity for members of some extremist groups to get tattoos as part of their initiation or other organizational rituals." *Id.* Possessing tattoos was already a regulatory ground upon which to reject recruits from admission into the Army, though the guidance was somewhat vague. U.S. DEP'T OF ARMY, REG. 40-501, STANDARD OF MEDICAL FITNESS, para. 2-35 (27 Aug. 1995) [hereinafter AR 40-501]. *Army Regulation 40-501* provides that "[t]attoos that will significantly limit effective performance of military service" could be a basis for rejection from military. The regulation did not explain what tattoos might fall into the category of "limiting effective military service." *See* Message, 050607Z Aug. 97, Dep't of Army, DAPE-HR-PR, subject: Separation of Soldiers from Initial Entry Training (IET) for Tattoos (Aug. 1997). In August 1997, Headquarters Department of the Army, Office of the Deputy Chief of Staff for Personnel, Human Resources Directorate, promulgated guidance to Army Training and Doctrine Command (TRADOC). In turn, TRADOC was to provide the guidance to military entrance processing stations as guidance was needed to address the problem of incoming enlistees possessing body art. The guidance provided:

[B]efore separation of any new enlistee, commanders should review the current policy of AR 670-1, paragraph 1-8d., hygiene and body grooming tattoos. Commanders should base IET separation decisions on whether or not soldiers tattoos affect the wear of their uniform "so as not to detract from a soldierly appearance." Tattoos, such as those on the soldiers hands or ankles, should not mean automatic separation, but should be evaluated based on the tattoos size, color, and or design.

Id.

40. Message, 051601Z Jun 98, Dep't of Army, DAPE-HR-PR, subject: Wear and Appearance of Army Uniforms and Insignia (5 June 1998) [hereinafter June 98 Wear and Appearance Message]. *See* AR 670-1, *supra* note 3. *See also* Telephone Interview with Master Sergeant (MSG) Debra Wylie, Headquarters Department of the Army, Office of the Deputy Chief of Staff for Personnel (ODCSPER), Human Resources Directorate, Uniform Policies Officer (Mar. 19, 1999). During the major command (MACOM) sergeants' major conference in July 1997, some sergeants' major raised concerns about soldier body piercing and tattooing. *Id.* As a result of those discussions, an ODCSPER Process Action Team (PAT) was assembled to consider recommendations on possible body art policies. *Id.* In August 1997, the PAT formulated the initial policy and presented it to the DCSPER. The PAT recommendations formed the basis for the uniform policy changes promulgated in June 1998. The primary reason for instituting the policy was to "maintain uniformity of appearance." *Id.*

prohibiting body piercing⁴¹ and prohibiting tattoos and brands prejudicial to good order and discipline or detracting from a soldierly appearance.⁴²

The Army's body art policy led to many practical questions from the field regarding policy implementation.⁴³ The policy was vague on many points, such as how to determine prohibited tattoos, what to do with soldier violations, and whether the policy applied retroactively.⁴⁴ The Army tried again.

In August 1998, the Army published a second message, attempting to clarify the original change to the uniform regulation.⁴⁵ It rescinded the old,

41. June 98 Wear and Appearance Message, *supra* note 40. The new policy provides in pertinent part:

No attaching, affixing or displaying objects, articles, jewelry or ornamentation to or through the skin while in uniform, in civilian clothes while on duty, or in civilian clothes off duty on any military installation or other places under military control, except for earrings for females as outlined paragraph 1-14c, AR 670-1.

Id.

42. *Id.* The new policy guidance states:

Visible tattoos or brands on the neck, face or head are prohibited. Tattoos on other areas of the body that are prejudicial to good order and discipline are prohibited. Additionally, any type of tattoo or brand that is visible while wearing a Class A uniform and detracts from a soldierly appearance is prohibited.

Id. The June 1998 tattoo policy supercedes the tattoo policy stated in paragraph 1-8d, AR 670-1 that provided:

Soldiers are expected to maintain good daily hygiene and wear their uniforms so as not to detract from the overall military appearance. Tattooing in areas of the body, (i.e., face, legs) that would cause the tattoo to be exposed while in Class A uniform, detract from a soldierly appearance.

See AR 670-1, *supra* note 3.

43. *See, e.g.*, Telephone Interview with Lieutenant Colonel Claude Wood, Headquarters Department of the Army, Office of the Deputy Chief of Staff for Personnel, Chief of the Human Resources Directorate (ODSPER-HR) (Feb. 16, 1999) [hereinafter Wood Interview].

44. June 98 Wear and Appearance Message, *supra* note 40.

45. Message, 241710Z Aug 98, Dep't of Army, DAPE-HR-PR, subject: Wear and Appearance of Army Uniforms and Insignia, AR 670-1 (7 Aug. 1998) [hereinafter August 98 Clarifying Message].

male-earring standard⁴⁶ and allowed for female soldiers to wear earrings on the installation while on duty in civilian attire.⁴⁷ The message left the same issues previously noted unresolved.

In December 1998, the Army again published additional guidance on the new body art policy.⁴⁸ This guidance gave more breadth to the policy. The guidance stated that the tattoo policy did not contain a “grandfather clause” that would allow exceptions for those members who obtained tattoos before the policy was promulgated.⁴⁹ The December 1998 guidance provided criteria for commanders to determine prohibited tattoos and what to do in response to a violation.⁵⁰ The message stated that examples of violations may include tattoos that: (1) show an alliance with extremist orga-

46. *Id.* The August 1998 guidance regarding the June 1998 change to *AR 670-1* states that male soldiers are prohibited from wearing earrings on post, whether on duty or off duty. The Army’s old earring policy for males stated that male soldiers were not authorized to wear any type of earring when in uniform or when in civilian clothes on duty. Thus, the old, male-earring policy allowed for the wear of earrings off duty and on post in civilian clothes. See *AR 670-1*, *supra* note 3, para. 1-14c.

47. August 98 Clarifying Message, *supra* note 45. In August 1998, the Army published a second message, attempting to clarify the original change to the uniform regulation. It rescinded the old, male-earring standard and allowed for female soldiers to wear earrings on the installation while on duty in civilian attire. The message left the same issues previously noted unresolved. In accordance with *AR 670-1*, paragraph 1-13B, females could wear approved earrings while in uniform. *Army Regulation 670-1* provides that females on duty in civilian attire may wear earrings in accordance with the uniform regulation (small, spherical, unadorned and made of either gold, diamond, pearl, or silver) unless the commander provided otherwise. See *AR 670-1*, *supra* note 3, para. 1-13b (containing the old, male-earring policy).

48. Message, 310609Z Dec 98, Dep’t of Army, DAPE-HR-PR, subject: Administrative Guidance to Army Tattoo Policy in Accordance With *AR 670-1* (31 Dec. 1998) [hereinafter December 98 Administrative Guidance Message].

49. *Id.* See Wood Interview, *supra* note 43. The ODSPER-HR stated that he is responsible for promulgating policy concerning the wear of the Army uniform. Additional guidance is necessary to help commanders in the field interpret the initial body art policy promulgated in June 1998. *Id.* There is a potential for difficulties with trying to enforce two standards under a grandfather clause, especially in circumstances where a superior would be in violation of the new policy and the superior was enforcing the new guidelines on subordinates. *Id.* Upon that basis, the Army chose a rule that applies equally to all soldiers—regardless of rank, time in service, or the length of time the service member possessed the body art. *Id.*

50. December 98 Administrative Guidance Message, *supra* note 48.

nizations, (2) are indecent,⁵¹ or (3) are unreasonably large or excessive in number.⁵² The policy was expanding.

The message established that the mere visibility of a small inconspicuous tattoo was not prohibited per se.⁵³ Commanders must instead, establish two conditions for a tattoo violation to exist in a Class A uniform.⁵⁴ First, the tattoo must be visible.⁵⁵ Second, it must detract from a soldierly appearance.⁵⁶ Discretion was left to commanders to decide whether a tattoo detracted from a soldierly appearance.⁵⁷

The Army's current policy on body art is embodied in the June 1998 change to uniform regulation and the two subsequent ODCSPER mes-

51. *Id.* The December guidance provides as examples of indecent tattoos, which are grossly offensive to modesty, decency, or propriety; shock the moral sense because of their filthy, or disgusting nature; tend to incite lustful thought; or tend reasonably to corrupt morals or incite libidinous thoughts. *Id.*

52. The December guidance provides that an example of "excessive" tattoos would be "a series of tattoos that covers one limb." *Id.* In a recent Army newsletter, the Director of the Army's Human Resources Directorate, Office of the Deputy Chief of Staff for Personnel provided additional guidance on the Army's new body art policy. See Office of the Chief of the Public Affairs, *Hot Topics—Current Issues for Army Leaders*, Spring 1999 [hereinafter *Hot Topics*]. He stated that "if a soldier has a vine or snake tattoo going all the way from the ankle up the leg, the tattoo would detract from a soldierly appearance." *Id.* at 5-6.

53. December 98 Administrative Guidance Message, *supra* note 48. The December administrative guidance states that "[u]nder most circumstances, inconspicuous, or inoffensive tattoos or brands on areas of the body other than the neck, face or head (i.e. ankle or hand) are not prohibited." *Id.*

54. *Id.* It is unclear from the guidance why the drafters of the guidance chose the Class A uniform as the measuring stick for "visible" uniform violations. The wording of the guidance suggests that tattoo violations may occur in other uniforms, but the drafters only provided guidance for Class A uniform.

55. *Id.*

56. *Id.*

57. See *Hot Topics*, *supra* note 52, at 6. In response to the question, "who determines which tattoos are inappropriate or offensive," the Director of the Army Human Resources Directorate provided:

Commanders make the decisions based upon the policy. All leaders should be involved in the process. Leaders observe soldiers in the work place and off duty. Also, soldiers should report information to their leaders upon identification or observation of soldiers with questionable tattoos. Leaders and commanders will review and observe the questionable tattoos and then counsel the soldiers regarding inappropriate tattoos.

Id. at 4.

sages.⁵⁸ There is currently no Department of Defense guidance in the area of body art. A comparison of the Army's body art policy with the other services' policies highlights the Army's shortcomings.

2. Marine Corps Policy-First to Strike

The Marine Corps was the first service to implement body art restrictions. In 1996, the Marine Corps promulgated changes to its uniform regulation, forbidding Marines to possess any body piercings, while on or off duty, except earrings for women.⁵⁹

The Marine policy also prohibited tattoos or brands on the neck and head.⁶⁰ Other tattoos or brands anywhere else on the body are forbidden if the tattoo is prejudicial to good order, discipline, and morale or is of a nature to bring discredit upon the Marine Corps.⁶¹ The Marine Corps does not further define the parameters of the policy.

58. See *supra* notes 40, 45, and 48.

59. ALMAR Message 194/96, 160900Z, U.S. Marine Corps, MCBL 1020.34, subject: Uniform Regulations Pertaining to Tattoos, Body Piercing and Branding (16 May 1996). Subparagraph 2 states:

[M]arines are associated and identified with the Marine Corps in and out of uniform, and when on or off duty. Therefore, when civilian clothing is worn, Marines will ensure that their dress and personal appearance are conservative and commensurate with the high standards traditionally associated with the Marine Corps. No *eccentricities* of dress will be permitted (emphasis added). Marines are prohibited from: (1) Wearing earrings (applicable to male Marines) and, (2) attaching, affixing, or displaying objects, articles, jewelry or ornamentation to or through their skin. Female Marines, however, may wear earrings consistent [with] paragraph 3009.

Id. The message added the following new paragraph to the Marines uniform regulation cited above: "[t]attoos or brands on the neck and head are prohibited. In other areas of the body, tattoos or brands that are prejudicial to good order and discipline and morale or are of a nature to bring discredit upon the Marine Corps are also prohibited." *Id.*

60. *Id.*

61. *Id.*

3. Air Force Policy—A More Balanced Approach?

In June 1998, during the same month that the Army released its new body art policy, the Air Force released its new body art guidelines.⁶² The Air Force created the policy in the wake of requests from commanders wanting guidance to deal with the growing trend towards service members obtaining body art.⁶³

The new Air Force policy is similar to the Army's policy, except that the Air Force grants more exceptions to the rules prohibiting the wear of body art. Air Force members may wear unexposed⁶⁴ body piercings when wearing a military uniform, performing official duty in civilian attire, or wearing civilian attire on the installation.⁶⁵ The Air Force's guidance also provides that if the piercing impacts a service member's duty performance, it too may be prohibited.⁶⁶

For tattoos, the Air Force carved out two prohibited categories: "unauthorized" and "inappropriate." "Unauthorized" tattoos are defined as those that are obscene; advocate sexual, racial, ethnic or religious discrimination; are prejudicial to good order and discipline; or bring discredit upon the Air Force.⁶⁷ "Inappropriate" tattoos are defined as those that are

62. U.S. DEP'T OF AIR FORCE, AIR FORCE INSTR. 36-2903, DRESS AND APPEARANCE OF AIR FORCE PERSONNEL (IC 98-1, 8 June 1998) [hereinafter AIR FORCE DRESS CHANGE].

63. See *Questions and Answers Concerning Body Art*, AIR FORCE NEWS, June 18, 1998. See also M.J. Ainsley, *Tattoos and Piercings? Not in the Air Force* (visited Feb. 5, 1999) <www.wral-tv.com/news/wral/1998/0706-tattoos-and-piercings/> (indicating that many Air Force personnel voiced their distaste for what they believed to be additional unnecessary restrictions).

64. AIR FORCE DRESS CHANGE, *supra* note 62. Air Force members are "prohibited from attaching, affixing, or displaying objects, articles, jewelry or ornamentation through the ear, nose, tongue, or other exposed body part (which includes visible through the clothing)." *Id.* By implication, the Air Force allows unexposed piercings.

65. *Id.* As additional exceptions to the Air Force the guidance provides:

Females in uniform, or in civilian clothes while on duty, may wear one pair of small, spherical conservative diamond, gold, white pearl, silver pierced or clip earring per earlobe: the earring in each earlobe must match and the earrings must fit tightly without extending below the earlobe. In civilian clothes, off duty but on a military installation, females may wear conservative earrings within sensible limits.

Id.

above the collarbone and visible when wearing an open-collar uniform and those exceeding one-fourth of the exposed body while in uniform.⁶⁸

The Air Force policy requires its members to remove unauthorized tattoos at the service member's expense.⁶⁹ In certain circumstances, however, Air Force personnel may either cover inappropriate tattoos with the uniform or have them removed at Air Force expense.⁷⁰

66. The guidance also allows for stricter rules, if commanders articulate some other rational basis for additional restrictions. *Id.* For example, this would be the case "in those locations where Air Force-wide standards may not be adequate because of cultural sensibilities or mission requirements." *Id.* Another example would be "in a foreign country where tattoos/brands or body ornaments are objectionable to host country citizens or at installations when members are undergoing basic military training, a commander may impose more restrictive rules for military members, even off-duty and off the installation." *Id.* The Air Force states that "factors to consider when making this determination include (but are not limited to): impairing the safe and effective operation of weapons, military equipment or machinery; posing a health or safety hazard to the wearer or others; interfering with the proper wear of special or protective clothing or equipment." *Id.*

67. *Id.*

68. *Id.*

69. The Air Force policy states that covering an unauthorized tattoo is not an option. *Id.*

70. AIR FORCE DRESS CHANGE, *supra* note 62. The Air Force guidance states that the Air Force will not pay for removal of tattoos obtained after the effective date of the new body art policy. The Air Force policy also allows commanders to seek Air Force medical support for voluntary removal. See *Robins Air Force Base*, AIR FORCE NEWS (visited Oct. 30, 1998) <www.robins.af.mil/orgs/abw/support/mss/news/afnews/tattoos.htm>. The Air Force provides two facilities that can remove tattoos: Wilford Hall in San Antonio, Texas, and Travis Air Force Base, California. According to this Internet site, both facilities were receiving a large amount of inquiries concerning body art removal. The method used to remove tattoos at both facilities was the scraping method as opposed to the laser removal method. See *infra* note 225 (describing the methods of tattoo removal). Both facilities, however, were expecting to receive the laser machinery in the near future.

4. Navy Policy—Minimalist

The Navy has not regulated extensively in the area of body art. In July 1998, the Navy promulgated its body piercing policy prohibiting Navy members from wearing body piercings while in uniform or while on base.⁷¹ The Navy policy allowed for off-duty, off-base wear of body piercings as long as the member was "not participating in organized military recreational activities."⁷²

The Navy's tattoo policy is the least restrictive of the services.⁷³ The Navy policy provides that tattoos depicting controlled substances or advocating drug abuse are prohibited at all times on any military installation or under any circumstances that are likely to discredit the Navy.⁷⁴ The Navy's uniform policy is silent on racial or other types of offensive tattoos.⁷⁵ The Navy has no immediate plans to change its uniform regulation regarding body art.⁷⁶

71. U.S. DEP'T OF NAVY, UNIFORM REG., ch. 7, art. 7101.5 (5 Jan. 1999) [hereinafter NAVY UNIFORM REG.]. This guidance states that "[n]o articles, other than earrings for women, shall be attached to or through the ear, nose, or any other body part." *Id.*

72. *Id.* The Navy policy states that "body piercing is not authorized in civilian attire when in a duty status or while in/aboard any ship, craft, aircraft, or any military vehicle or within any base or place under military jurisdiction, or while participating in any organized military recreational activities." The Navy policy also allows commanders to impose stricter prohibitions on body piercings in foreign countries, when it is appropriate. *Id.*

73. NAVY UNIFORM REG., *supra* note 71, ch. 7, art. 7101.3.

74. *Id.*

75. Memorandum, Navy Uniform Matters Office, subject: Navy Uniform Information Newsgram (1 May 1998). Although not contained in the Navy's uniform regulation, the Bureau of Naval Personnel Uniform Matter Officer issued a memorandum containing some informal guidance to the Chief Petty Officers' Community. The memorandum stated that a tattoo above the neckline creates a "permanently unprofessional appearance" that could lead to "substandard performance marks in "military bearing" to a point below the level of recommended for advancement or retention." *Id.* The memorandum also stated that military personnel with unprofessional tattoos on the legs, ankles, or arms can be directed by their commanding officer to permanently wear long sleeve shirts and slacks for women. *Id.* The guidance also provided that "[t]attoos that depict drug use, racism, or affiliation with groups, which discredit the Navy, should be processed for a 'best interests of the service' discharge." *Id.*

III. Analysis of the Army's New "Body Art" Policy

The following analysis explores how the Army's body art policy squares with the First Amendment. In doing so, this article seeks to identify the military interest that is at risk when military members possess various forms of body art. The military interest at risk is then weighed against the personal intrusion on soldiers' First Amendment rights by prohibiting and regulating of body art. Next, this article examines whether the Army's body art policy, as currently written, could lead to constitutional overbreadth or vagueness concerns.

There continues to be confusion in the Army about the new body art policy.⁷⁷ Because of the policy's ambiguities, commanders are in a quandary about making the initial determination that a given tattoo constitutes a violation. Adding to the problem, the guidance is also unclear as to what to do once the commander determines that a soldier is in violation of the body art policy. The issues that arise are countless. For example, how does each commander's discretion play into applying the policy? What constitutes "indecent" under the Army's guidance? In a joint-service environment, which service policy should trump? Practically speaking, does it make sense that the services' policies differ? Should we inspect soldiers' bodies periodically to ensure compliance? Are the policies applied evenhandedly across the board—male and female, officers and enlisted, and to all races? Can a soldier be separated solely for having a tattoo that is forbidden by the new policy? Given the policy's subjectivity and ambiguities, the answer to these questions depends on the interpretation of commanders and judge advocates in the field. The varying interpretations of the policy could lead to arbitrary and capricious policy application.

Besides the practical issues raised by the policy, there are also some concerns about the policy's legality. The Army's body art policy raises

76. Telephone Interview with Boatswain's Mate, Master Chief (BMCM) (Surface Warfare) Cruse, Assistant Head for Navy Uniform Matters, Bureau of the Naval Personnel (Feb. 23, 1999). The Navy has no need to expand its current uniform policy to include any other specific body art because nothing has occurred to indicate that the Navy's policy should be changed. *Id.* Sailors may wear body piercings, to include earrings off base, off duty. The Bureau of Naval Personnel has not been notified of any problems with the current policy and the Navy has no current plans to change their uniform regulation regarding body art. *Id.*

77. Cf. D.E. Wylie, *Uniform Corner, Frequently Asked Questions* (visited Mar. 20, 1999) <http://www.odcsper.army.mil/dape/hr/hr_pr/uniform_corner.asp>. The Army's Office of the Deputy Chief of Staff for Personnel has established a website on the Internet to field questions concerning the uniform policy, to include the body art policy.

free speech, overbreadth and vagueness, as well as potential enforcement issues. Therein lies the legal and practical obstacles to overcome.

Through its new policy, the Army has indicated that it will tolerate some forms of body art while not tolerating other forms. The Army's policy is related to norms—both societal and military. In this context, there exists a "spectrum" of various forms of body art ranging from traditionally acceptable to traditionally unacceptable. Where the body art falls on the spectrum, depends, in part, on how radical or unusual the body art is. Each person's tolerance or taste for body art is different.

In the military context, the clearly "unacceptable" end of the body art spectrum includes such body art as extremist or gang-related tattoos, tattoos on the face or neck, facial piercings, or facial brands. The middle of the spectrum contains body art that falls into a grayer area. This gray area includes body art such as large tattooed areas of the body that are not seen in uniform,⁷⁸ "indecent" or unprofessional tattoos that are not visible in uniform, ornate tattoos that are visible in uniform,⁷⁹ or perhaps visible tattoos that are simply very large and that detract from a soldierly appearance.

The Army's policy regarding body art in this "grayer" area presents unique challenges for commanders. The more acceptable end of the spectrum includes such body art as small tattoos that do not detract from a soldierly appearance or send an inappropriate message, small brands, or earrings on women in dress uniforms.

The following analysis provides a framework to assist in examining the free speech legal issues raised by the Army's new policy. The spectrum is analyzed below in three categories: (1) extremist or gang-related body art, (2) offensive body art, and (3) non-offensive body art. On-duty and off-duty wear of body art is also examined as a sub-category, as is visible verses covered body art. By evaluating the body art in each of these categories, it is easier to see the regulatory line blur.

A. Does the Army's Body Art Policy Impinge on Free Speech?

Many soldiers may instinctively believe that the new body art policy is unconstitutional and improperly limits soldiers' right to free speech.⁸⁰

78. For example, large tattoos that cover the entire back.

79. For example, decorative tattoo tribal bands worn around the ankle or arm.

80. See Woolverton, *supra* note 31.

There is a strong argument, however, that the Supreme Court would uphold the policy's validity on First Amendment grounds.⁸¹ Given the Court's history in the area of examining First Amendment challenges in the military, one might presume the Army's victory in such a battle was a foregone conclusion.⁸² This article takes issue with that presumption.

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech."⁸³ In the civilian context, the govern-

81. *Parker v. Levy*, 417 U.S. 733 (1974) (providing the guiding principle for First Amendment analysis in the military).

While members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections. The fundamental necessity for obedience, and the consequent necessity for the imposition of discipline, may render permissible within the military context that which would be constitutionally impermissible outside of it.

Id. at 758. See generally Captain John A. Carr, *Free Speech in the Military Community: Striking a Balance Between Personal Rights and Military Necessity*, 303 A.F. L. REV. 33 (1998) (exploring free speech issues in the military).

82. See C. Thomas Dienes, *When the First Amendment is Not Preferred—The Military and Other "Special Contexts,"* 56 U. CIN. L. REV. 779, 813 (1987). Dienes notes:

[I]n reading the cases involving first amendment speech by military personnel, one is struck by their marked resemblance. They all reject the first amendment claim; none of them even discusses the importance of the claims being made. Almost all begin with an intensive rendition of statements from precedent on the special characteristics of the separate military society. Seldom does the Court particularize the government's interests as they are actually reflected in the regulation being challenged. Instead, there are generalized references to the need for military preparedness and the importance of duty and discipline in the military context.

Id. See also James M. Hirschhorn, *The Separate Community: Military Uniqueness and Servicemen's Constitutional Rights*, 62 N.C. L. REV. 177 (1984) (reviewing the military's role in explaining the reasoning that courts have accepted to support military restrictions of service members constitutional rights); Kelly E. Henriksen, Note, *Gays, Military, and Judicial Deference: When the Courts Must Reclaim Equal Protection as Their Area of Expertise*, 9 ADMIN. L. J. AM. U. 1273 (1996) (exploring the notion that courts give little more than cursory review to cases in which military deference is critical to the outcome); Karen A. Ruzic, Note, *Military Justice and the Supreme Court's Outdated Standard of Deference: Weiss v. United States*, 70 CHI.-KENT. L. REV. 265 (1994) (presenting the position that the Supreme Court's notion of judicial deference has not kept up with modern times).

ment may enforce reasonable time, place, and manner restrictions that are content neutral, narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.⁸⁴ Except for speech that is unprotected by the First Amendment,⁸⁵ the Supreme Court has held content-based regulations presumptively invalid.⁸⁶ Generally, this presumption is true unless the government has a compelling interest in restricting speech and the regulation is narrowly tailored to meet that interest.⁸⁷

The freedom of speech concept in a military context, however, has much greater limitations.⁸⁸ Although scholars have debated the issue at length, most agree that the First Amendment applies to soldiers.⁸⁹ In military cases, the Supreme Court has said that a "military regulation may restrict speech no more than is reasonably necessary to protect a substantial government interest."⁹⁰ The Supreme Court will consider military member's speech constitutionally unprotected if the speech somehow undermines the effectiveness of the command.⁹¹ In making that determination, courts grant "great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest."⁹² The Supreme Court has emphasized that the military is a "specialized society" and the rules are applied differently to them as compared to the rest of society.⁹³ In fact, the Supreme Court allows prohibitions on

83. U.S. CONST. amend I.

84. *United States v. Grace*, 461 U.S. 171, 177 (1983). The Supreme Court in *Grace* invalidated a federal statute banning expressive picketing and leafletting on public sidewalks outside the Supreme Court when a clear line could be drawn between sidewalks and other grounds that comported with congressional purpose of protecting the building, grounds, and people therein.

85. *See, e.g.*, *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (stating the right of free speech is not absolute at all times and does not include the use of lewd and obscene, profane, libelous and other words which by their very utterance inflict injury or tend to incite an immediate breach of the peace); *New York v. Ferber*, 458 U.S. 747 (1982) (holding that obscene speech is unprotected); *Miller v. California*, 413 U.S. 15 (1973) (obscene speech held constitutionally unprotected).

86. *See R.A.V. v. City of St. Paul*, 505 U.S. 383 (1992) (holding a "hate speech" statute facially invalid under First Amendment and holding that "content-based regulations" are presumptively invalid) (citing *Simon & Schuster, Inc v. Members of N.Y. State Crime Victims Bd.*, 122 S. Ct. 501, 508 (1992)). *See also Texas v. Johnson*, 491 U.S. 397, 406 (1989) (holding that the First Amendment prevents the government from proscribing speech or expressive conduct because of the disapproval of the ideas expressed).

87. *R.A.V.*, 505 U.S. at 385. In other cases, the Supreme Court has used the words "important or substantial." *See United States v. O'Brien*, 391 U.S. 367, 376 (1968).

speech in the military context that would be unconstitutional in a civilian setting.⁹⁴

88. See *Parker v. Levy*, 417 U.S. 733 (1974) (sustaining the court-martial conviction of an Army officer who had counseled enlisted soldiers to refuse to obey orders sending them to Vietnam even though similar speech by civilians would have been protected). See also *Brown v. Glines*, 444 U.S. 348 (1980) (upholding a regulation requiring Air Force members to obtain command approval before circulating petitions on base); *Ethredge v. Hail*, 56 F.3d 1324 (11th Cir. 1995) (holding that military officials may impose regulations on speech as long as the regulations are reasonable, not an effort to suppress expression merely because public officials oppose the speaker's view, and aimed at ensuring military effectiveness); *Thomasson v. Perry*, 80 F.3d 915 (4th Cir. 1996) (the "don't ask, don't tell" statute does not target speech declaring homosexuality; but rather, targets homosexual acts and the propensity to engage in homosexual acts, and thus permissibly uses the speech as evidence).

The Supreme Court in *Brown* said that "a military regulation may restrict no more speech than is necessary to protect a substantial government interest." *Brown*, 444 U.S. at 355. A military commander's authority to bar persons or speech from a base even extends to civilians. See, e.g., *Cafeteria & Restaurant Worker's Union v. McElroy*, 367 U.S. 886, 892-94 (1961).

89. *Chappell v. Wallace*, 462 U.S. 296, 304 (1983) (quoting Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 188 (1962)) ("Citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes."). See *Greer v. Spock*, 424 U.S. 828 (1976) (upholding an Army regulation that prohibited political speeches and demonstrations on base). In *Greer*, Justice Brennan provided the following guidance:

[T]he First Amendment does not evaporate with mere intonation of interests such as national defense, military necessity, or domestic security. . . . [I]n all cases where such interests have been advanced, the inquiry has been whether the exercise of First Amendment rights necessarily must be circumscribed in order to secure those interests. (Brennan, J., dissenting).

Id. See also *General Media Communications v. Perry*, 952 F. Supp. 1072, 1081 (S.D.N.Y. 1997) ("Citizens do not jettison their constitutional rights simply by enlisting in the armed forces . . .").

90. *Brown*, 444 U.S. at 355.

91. *Parker*, 417 U.S. at 743.

92. See *Goldman v. Weinberger*, 475 U.S. 503, 507-08 (1986). The Supreme Court upheld an Air Force regulation prohibiting an Orthodox Jew who was a commissioned officer in the Air Force from wearing a yarmulke, indoors while on duty in uniform. The Court held that the rabbi's First Amendment rights were not violated against a First Amendment challenge. The Supreme Court deferred to the professional judgment of the military authorities that uniform appearance standards are necessary to maintain unity and discipline. *But see* 10 U.S.C.A. § 774 (West 1998) (legislatively overruling *Goldman*). This statute provides for neat and conservative wear of religious apparel while wearing the military uniform unless duty performance were impacted.

The Supreme Court has provided a somewhat nebulous First Amendment standard of review in military settings coupled with great deference towards military judgment. Applying this review standard in the area of body art raises several concerns addressed herein.

1. Extremist or Gang-Related Body Art

It is easier at the far end of the body art spectrum to articulate not merely rational reasons but perhaps compelling reasons why extremist, racist, and gang-related body art should be prohibited, whether covered by the uniform or not.⁹⁵ Extremism, racism, and gang-affiliation are divisive to a military fighting force and contrary to the idea of teamwork fostered within the military environment.⁹⁶ In striking the proper balance between legitimate military needs and individual liberties, the Army has an interest in removing from its ranks soldiers with gang affiliations or extremist political or social views.⁹⁷ This is necessary to sustain the loyalty, morale, and discipline of the fighting force.⁹⁸

The Supreme Court has held that a sufficiently important governmental interest can justify limitations on First Amendment freedoms when speech and non-speech elements are combined in the same course of conduct—such as in the case of a soldier declaring his homosexuality.⁹⁹ The Army's body art policy, as it applies to extremist or gang-related body art, can be compared in some ways to the Army's homosexual exclusion policy.¹⁰⁰ The homosexual policy provides that if a service member states that he is homosexual, the statement alone creates a rebuttable presumption that he will engage in activity that is prohibited by regulation.¹⁰¹ The military has put forward that it is the homosexual activity that becomes the legal basis for the separation—not the mere statement that the person is a homosexual.¹⁰²

Similarly, wearing extremist or gang-related body art may create a presumption that the service member holds beliefs that are contrary to good order and discipline and that he will act or has acted, on those beliefs.¹⁰³ If the soldier rebuts the presumption, the Army may allow him

93. *Parker*, 417 U.S. at 743. See *Burns v. Wilson*, 346 U.S. 137 (1953) (endorsing the military as a separate society and balancing the military's need to safeguard discipline and morale against free speech).

94. See Ross G. Shank, *Speech, Service, and Sex: The Limits of First Amendment Protection of Sexual Expression in the Military*, 51 *VAND. L. REV.* 1093 (1998) (discussing the limits on sexual expression in the military context when that same speech is unreachable in the civilian context). See generally *Parker*, 417 U.S. 733.

to remain in the service.¹⁰⁴ If the soldier does not rebut the presumption,

95. The Army's new body art policy does not attempt to define "extremist" as it relates to extremist body art. *See* December 98 Administrative Guidance, *supra* note 48. This article does not attempt to define what the Army means by "extremist" organizations, although the problems associated with "what" extremist body art may include is more closely analyzed in the vagueness/overbreadth section of this article. Note, however, that the Army has published guidance relating to the extremist activities of Army members. This is a logical place to look for guidance concerning extremist body art. The Army's guidance on extremist organizations is currently in message format as a change to AR 600-20. *See* Message, 201604Z Dec 96, Headquarters, Department of Army, DAPE-ZE, subject: Revised Army Policy on Participation in Extremist Organizations or Activities, para. 4-12C.2.A (20 Dec. 1996); U.S. DEP'T OF ARMY, REG. 600-20, COMMAND POLICY, para. 4-12 (20 Dec. 1996) [hereinafter AR 600-20 (new policy)]. The message states that extremist organizations and activities include:

[O]nes that advocate racial, gender, or ethnic hatred or intolerance; advocate, create, or engage in illegal discrimination based on race, color, sex, religion, or national origin; advocate the use of force or violence or unlawful means to deprive individuals of their rights under the United States Constitution or the laws of the United States, or any state, by unlawful means.

Id. The definition of "extremism" may vary greatly depending on one's interpretation. One scholar has explored the legal implications of the notion of varied definitions in great depth. *See* Hudson, *supra* note 11. Major Hudson states that several categories of extremism—"from left to right"—exist and are not covered by the Army's definition. *Id.* at 9. Major Hudson submits that this may be a deliberate attempt by the Army to "narrow the focus on particular types of extremism." *Id.* Major Hudson notes that the Army's definition of extremist organizations does not include many organizations such as: "communist, socialist, environmentalist, homosexual, libertarian, anti-communist, anti-tax, anti-gun control, and so called "patriot" or anti-government (usually associated with far right and militias) extremists." *Id.*

96. EXTREMIST TASK FORCE REPORT, *supra* note 38. The Secretary of the Army Task Force concluded that "leaders recognize that even a few extremists can have a pronounced dysfunctional impact on the Army's bond with the American people, institutional values, and unit cohesion. AR 600-20, *supra* note 30, ch. 4.1, states:

[M]ilitary discipline is founded upon self-discipline, respect for properly constituted authority, and the embracing of the professional Army ethic with its supporting individual values. Military discipline will be developed by individual and group training to create a mental attitude resulting in proper conduct and prompt obedience to lawful military authority.

Id.

97. *See* Hudson, *supra* note 11. Note, however, it is important for the Army's policy to take notice of the fact that having a particular type of tattoo does not always equate to the soldier having racist or gang-related affiliations.

98. *Id.*

he may be discharged for his affiliations and actions associated with those affiliations rather than his speech (the tattoo).¹⁰⁵ Hence, the Army could

99. *Able v. United States*, 847 F. Supp. 1038 (1994) (citing *United States v. O'Brien*, 391 U.S. 367, 376 (1968) (setting forth the criteria for determining whether a limitation of free speech is necessary). The court in *Able* examined the proposition that the "don't ask, don't tell" homosexual exclusion policy contained both "speech" and "non-speech" elements, in that the statement declaring one's homosexuality is more than just speech because it is also evidence of one's proclivities and potential conduct. See *O'Brien*, 391 U.S. at 377. The Supreme Court noted:

[A] government regulation is sufficiently justified if it is within the constitutional power of the [g]overnment; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id.

100. This idea flowed from a conversation the author had with Major Mike Smidt, Professor, U.S. Army Judge Advocate General's School in December 1998.

101. 10 U.S.C.A. § 654(b)(2) (West 1998). See also DEPARTMENT OF DEFENSE DIRECTIVE 1332.14 (Dec 1993). The DOD directive provides in part, that a service member may be separated from the armed services if he has "engaged in, attempted to engage in, or solicited another or engaged in a homosexual act"; or has "stated that he or she is a homosexual or bisexual . . . unless . . . the member has demonstrated that he or she is not a person who engages in or attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts." *Id.* See also *Able v. United States*, 155 F.3d 628 (1998) (holding that a member's First Amendment right to free speech was not violated by the "don't ask, don't tell" homosexual exclusion policy).

102. See *Steffan v. Perry*, 309 U.S. D.C. 281 (D.C. Cir. 1994) ("The military may reasonably assume that when a member states that he is a homosexual, that means that he either engages or is likely to engage in homosexual conduct."). See also *Pruitt v. Cheney*, 963 F.2d 1160, 1163 (9th Cir. 1991) (holding that a declaration of homosexuality can be admitted as evidence of facts admitted).

103. This is a theoretical proposition posited by the author and is not the Army's announced policy.

104. The Army body art policy as written is actually not clear on this point. It is unclear whether a soldier with body art that violates the letter of the current policy must choose to remove the symbol from his body or automatically face adverse administrative action to include separation from the Army. The language of the administrative guidance suggests that this is the case. See December 98 Administrative Guidance, *supra* note 48.

105. This is a somewhat disturbing proposition given the arguments the Army could possibly make along these lines (for example, a situation in which a soldier has on his body a tattoo of a rainbow). The gay culture has adopted the rainbow as a symbol of the solidarity amongst homosexuals. See *Rainbow World* (visited June 2, 1999) <<http://www.rainbow-world.com>>. Given the Army's policy of excluding homosexuals from the service, the Army could assert that such a tattoo alone would constitute a statement of homosexuality and the basis for adverse action or an investigation.

argue that it is legitimately advancing its objective to sustain loyalty, morale, and discipline rather than improperly suppressing speech.

The resolution of this issue becomes more troublesome, however, when a service member denies holding extremist-type beliefs, but possesses what appears to be “extremist” body art.¹⁰⁶ If the soldier has rebutted the presumption outlined above, the Army policy still prohibits the speech by either directing the soldier to remove the body art or to face adverse action.¹⁰⁷ The Army takes the position that an interest in suppressing or regulating such speech still exists.¹⁰⁸ The Army could argue that

106. See discussion *supra* note 95 (discussing what may constitute “extremist” following the Army extremist policy). See also Keith Aoki, *How “The World Dreams Itself American”—Reflections on the Relationship Between the Expanding Scope of Trademark Protection and Free Speech Norms* (visited June 1, 1999) <<http://www.law.uoregon.edu/~kaoki/LOYOLA.html>>.

The swastika serves to illustrate both the point that the visual messages sent by symbols are multiple and that the embodied meanings change as a result of time and human interaction. The swastika is the world’s oldest known, and most widely dispersed symbol, the swastika spans the history of human existence, originating with prehistoric man and existing in postmodernity. It spans the globe, existing simultaneously in the Americas, Europe and the Orient. Until the present time, and in all places, the swastika was an amulet or charm, a sign of benediction, the visual embodiment of a blessing for long life, good fortune and good luck. This use of the swastika as an amulet represents the universal texts embodied by the swastika; the first rank in the hierarchy of meaning. Additional levels of meaning are also embodied by the swastika in its various forms. As the swastika was adopted by different cultures, it took on multiple texts, and different visual forms of the swastika came to act not only as symbols of good luck, but as symbols of religious, or cultural affiliation. The benign texts embodied by the swastika survived well into the twentieth century where it suddenly became the most vilified symbol of human history. The swastika no longer embodies benign texts, but has come to be recognized as the embodiment of the Nazi party, and later as the embodiment of all the horror of Nazi Germany.

Id.

107. See December 98 Administrative Guidance, *supra* note 48. This would be the case in several scenarios. Take for example, a case in which a soldier once held extremist-type beliefs but no longer does. The Army policy states that a soldier could potentially face adverse administrative action if he chose not to remove the tattoo. Another fact scenario might be a soldier who has a tattoo that does not represent to him what the Army would believe the tattoo/brand represents. Again, based on the Army’s interpretation, it seems the soldier could be forced to either remove the tattoo/brand or face adverse action, to include possible discharge from the Army. *Id.*

mere presence of extremist body art would tend to disrupt morale, incite violence, or create discord among the troops.¹⁰⁹ In this sense, the Army's regulation of inflammatory tattoos is necessary to unit cohesion and to the military mission.¹¹⁰

The Army policy also censors extremist-type body art that is covered by clothing and not readily visible in uniform.¹¹¹ The Army's interest in maintaining unit cohesion, even if extremist-type body art is covered, remains constant. The assertion that others cannot see certain body art because of its location on the body, is somewhat of a fallacy in a military environment. The nature of the Army is such that in close quarters or in a field environment such things as group showers and laundry points necessitate that soldiers disrobe in front of one another. During physical training, more of a soldier's body is visible to fellow soldiers than is normally the case when wearing the daily field or garrison uniform. Also, when receiving medical care, a soldier must frequently disrobe. The Army's interest in avoiding divisiveness among the troops is so great that it can constitutionally prohibit extremist body art, even if the body art is discreetly located and viewed only in rare or unusual circumstances.¹¹²

2. *Indecent Body Art*

The Army policy that prohibits "indecent" body art presents a more difficult constitutional problem.¹¹³ Society determining that certain speech is offensive is not ordinarily a sufficient reason for suppressing that speech.¹¹⁴ The government may constitutionally restrict obscene speech

108. *Id.*

109. See AR 600-20, *supra* note 30.

110. This is analogous to the Army's prohibition on displaying extremist paraphernalia in the barracks. Commanders have the authority to order soldiers to remove symbols, flags, posters, or other displays from barracks if the commander determines that such a display would affect good order and discipline. See AR 600-20 (new policy), *supra* note 95, para. 4-12C.2.C.

111. December 98 Administrative Guidance Message, *supra* note 48.

112. The counter-argument, however, is that the mere risk of others seeing the body art on those rare aforementioned occasions is not sufficient justification for a complete prohibition—particularly given that "extremism" is dependent on interpretation and not all categories of "extremism" are covered by the Army's extremist policy. See, e.g., Hudson Interview, *supra* note 29.

113. The Army policy states that body art is indecent when it is grossly offensive to modesty, decency, or propriety; shocks the morale sense because of its filthy or disgusting nature; tends to incite lustful thought; or tends to corrupt the morals or incite libidinous thoughts. December 98 Administrative Guidance Message, *supra* note 48.

and expressive conduct.¹¹⁵ Obscenity, however, does not necessarily equal indecency.¹¹⁶ Courts have held that the First Amendment may protect indecent material, even when obscene material is not protected.¹¹⁷ There are two reasons why restrictions on “offensive” non-obscene speech violate the First Amendment. First, there is no constitutionally acceptable way to distinguish offensive from inoffensive speech.¹¹⁸ Second, banning non-obscene offensive speech improperly restricts content-based expression protected by the First Amendment.¹¹⁹

One argument to support the prohibition may be that the military has an interest in facilitating the cohesion of military forces—providing a “non-hostile” work environment for all soldiers. Perhaps the sexual nature of

114. *See* F.C.C. v. Pacifica Foundation, 438 U.S. 726, 745 (1978). The Court held that restrictions on “indecent speech broadcast over the airwaves violates the constitutional guarantee of free speech in that the requirements had obvious speech-restrictive effects for viewers and operators, and were not narrowly or reasonably tailored to meet the legitimate objective of protecting children from exposure to patently offensive materials.” *Id.*

115. *Miller v. California*, 413 U.S. 15 (1973) (defining the test for obscenity). The majority opinion provided that obscene material is not protected by the First Amendment. The Court articulated the proper standard as to whether particular material was obscene: whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appealed to the prurient interest, whether the work depicted or described, in a patently offensive way, sexual conduct specifically defined by the applicable state law, as written or authoritatively construed, and whether the work, taken as a whole, lacked serious literary, artistic, political, or scientific value. Obscenity was to be determined by applying “contemporary community standards.” *Id.*

116. *See Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997). The Court held, in part, that the Communications Decency Act of 1996 provisions that prohibited knowing transmission to minors of “indecent” or certain “patently offensive” communications abridge the freedom of speech protected by the First Amendment. The Court imposed an “especially heavy burden on the [f]ederal [g]overnment to explain why a less restrictive provision would not be as effective,” and why the provisions were not narrowly tailored to the goal of protecting minors from potentially harmful materials. *Id.*

117. *Id.* (holding the Communications Decency Act of 1996 (47 U.S.C. §§ 223(a), and 223(d)) provisions, which prohibit knowing transmission to minors of “indecent” or certain “patently offensive” communications, to abridge free speech protected by First Amendment). *See General Media Communications v. Perry*, 952 F. Supp. 1072 (1997) (citing *Sable Communications of California, Inc. v. F.C.C.*, 492 U.S. 115, 126, (1989) (holding that a ban on “dial-a-porn” messages is unconstitutional)). In *General Media Communications*, the United States Court of Appeals for the Second Circuit vacated and remanded the United States District Court for the Southern District of New York decision enjoining the enforcement of the Military Honor and Decency Act of 1996 (10 U.S.C. § 2489a) which barred the sale or rental of “sexually explicit material” by military personnel acting in an official capacity. The district court had granted a permanent injunction barring enforcement of the Act on grounds that it violated the Free Speech Clause of the First Amendment and the Due Process Clause of the Fifth Amendment.

the body art may offend women who make up a large part of the military. The Army may also submit that indecent body art may offend some male soldiers.¹²⁰ Hence, the potential breakdown of unit cohesion and the possible affect on the military mission may allow the Army to prohibit indecent speech.¹²¹

A stronger argument for prohibiting visible indecent tattoos is that the military has an interest in providing appearance standards for its soldiers. When balancing this interest and the soldier's free speech interest, the Army's interest may outweigh the soldier's rights.¹²² In the case where an "indecent" tattoo is not visible in uniform, however, the rationale for upholding a military interest in appearance is weak.¹²³

118. *See Reno*, 521 U.S. at 844. The Supreme Court in that case indicated that "the many ambiguities concerning the scope of its coverage render it problematic for First Amendment purposes." The Court used as an example the undefined terms "indecent" and "patently offensive" as possibly provoking uncertainty among speakers about how the two standards relate to each other and just what they mean. *Id.* The Court found that the vagueness of such a content-based regulation, coupled with its increased deterrent effect as a criminal statute, raise special First Amendment concerns because of its obvious chilling effect on free speech. *Id.* *See also General Media Communications*, 952 F. Supp. at 1074, (interpreting *Cohen v. California*, 403 U.S. 15, 25, (1971) (offensive speech such as "fuck the draft" on the back of a civilian jacket is constitutionally protected by the First Amendment)).

119. *See General Media Communications*, 952 F. Supp. at 1082. Although *General Media Communications* was overturned, and the statute prohibiting the sale of pornography on Department of Defense controlled property was held to be constitutionally valid, the case was not overturned on First Amendment free speech grounds. The case was overturned on the basis that the military has the authority to legitimately dictate what can be sold at military exchanges. Soldiers can still purchase pornography off-post and read it on-post, therefore, the First Amendment rights were not infringed on in any meaningful way. In some cases, the Supreme Court has upheld statutes that appear to impinge on free speech when other than free speech is at issue. *See, e.g., Paris Adult Theater I v. Slaton*, 413 U.S. 49 (1973). *The governmental interest in prohibiting nude dancing is unrelated to the suppression of free expression, since public nudity is the evil the state seeks to prevent, whether or not it is combined with expressive activity.*

120. The contention that unit morale will somehow break down because male soldiers may see other male soldiers' indecent tattoos is, however, a debatable issue.

121. The Army may also argue that "indecent" body art may be service discrediting based on the "general" article of the Uniform Code of Military Justice. *See UCMJ art. 134* (West 1998) (prohibiting conduct which is disorderly or service discrediting).

122. *See, e.g., Goldman v. Weinberger*, 475 U.S. 503 (1986).

3. *Non-Offensive Body Art*¹²⁴

A great deal of body art can be viewed as non-offensive or content-neutral.¹²⁵ Many tattoos are nothing more than designs that appeal to the wearer from an aesthetic point of view. Many piercings are non-offensive and content-neutral in that they are simply decorative studs, precious stones, bars, or metal hoops.¹²⁶ Non-offensive decorative body art may still, nonetheless, constitute symbolic speech.¹²⁷

To determine whether body art is constitutionally protected under a First Amendment analysis, one must first establish that the body art is a form of symbolic speech.¹²⁸ The Supreme Court has interpreted First Amendment protections to reach modes of symbolic speech such as wear-

123. With regards to body art that is generally covered by the uniform, it is difficult to imagine a situation in which a male soldier would be offended by another male soldier's "indecent" body art in the same way that a soldier might be offended by racist, extremist, or gang-related body art. The military's interest in prohibiting indecent body art is not to avoid discord among the troops, for it is unlikely indecent body art would cause the same dissension among the troops that extremist-type body art might cause. The military's interest appears instead to be censorship of a distasteful message.

124. The term "non-offensive" body art in this article is used to describe body art that may simply be decorative and arguably content-neutral.

125. The term "non-offensive and/or content-neutral" is used in this context to apply to body art that could not be legitimately prohibited because of the inappropriate message it conveys. Rather, in some cases, the Army prohibits some body art simply because of its location on the body or the size of the body art.

126. See *Passage Piercing*, *supra* note 17.

127. See *Olesen v. Board of Educ.*, 676 F. Supp. 820 (N.D. Ill. 1987) (holding that male students have an interest in wearing an earring to school). See also *Old Ritual-New Fad*, (visited Mar. 20, 1999) <<http://www2.apsu.edu/www/capsule/tattoo96.htm>> ("Tattoos and piercings seem to be used as a form of personal, artistic and symbolic expression.").

128. See *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968). In *O'Brien*, the Supreme Court laid out the four-part test for whether symbolic speech is entitled to First Amendment protection. The Court said that when "speech" and "non-speech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the non-speech element can justify incidental limitations on First Amendment freedoms. *Id.* The Supreme Court provided the following four-part test:

A government regulation is sufficiently justified if: (1) it is within the constitutional power of the government, (2) it furthers an important or substantial governmental interest, (3) the governmental interest is unrelated to the suppression of free expression, and (4) the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id.

ing black armbands to protest the Vietnam war¹²⁹ and defacing the American flag.¹³⁰ Similarly, body art may be interpreted as symbolic speech. Justifying regulations that affect such speech should be articulated in the same manner as other forms of speech.¹³¹

The Army could argue that body piercing "ornamentation" is not a form of pure speech, but rather an expression of fashion or individuality—and hence not constitutionally protected. Arguably, however, body art conveys some message or the Army would not seek to regulate it. The Army's concern with how the rest of society perceives the military, supports the proposition that body art is symbolic.¹³²

History also supports the proposition that wearing various types of jewelry has traditionally been interpreted as symbolically expressing communication. For example, the wearing of a simple ring on the left hand, third finger sends the message that the ring wearer is married or engaged.¹³³ The wearing of a cross, Star of David, or other religious symbol on a necklace or as an earring may represent religious faith.¹³⁴ Even the wearing of simple decorative precious stones are sometimes said to send messages—such as the oft used phrase "diamonds are forever." Similarly, those who possess body piercings send symbolic messages.¹³⁵ The

129. *Id.*

130. See *Texas v. Johnson*, 491 U.S. 397 (1989); *United States v. Eichman*, 496 U.S. 310 (1990) (finding that flag burning was a symbolic speech).

131. *Tinker v. Des Moines*, 393 U.S. 503 (1969) (wearing a black armband to protest the Vietnam War is a symbolic speech). The majority held that the wearing of armbands entirely divorced from actually or potentially causing disruptive conduct by those participating in it, was closely akin to "pure speech" and is entitled to comprehensive protection under the First Amendment. *Id.* Thus, the school regulation prohibiting students from wearing the armbands violated the students' rights of free speech under the First Amendment. *Id.*

132. ARMY NEWS SERVICE, *Piercings Prohibited For Most Soldiers On Post*, Aug. 11, 1998. Sergeant Major Larry L. Strickland, senior enlisted noncommissioned officer, the Office of the Deputy Chief of Staff for Personnel, was interviewed about the development of the policy and attested that part of the reason for the policy is the following:

[M]ilitary has an image to project to the public, an image can clash against pop culture embraced by young civilians. Inappropriate tattoos, pierced body parts, multi-hue-dyed or sculpted hair designs and other personal appearance fads are just as out of place in today's Army as "duck-tail" haircuts were verboten in the 50s and prophet-length hair during the 60s and 70s.

Id.

intended symbolic message sent is arguably personal and specific to the wearer. As symbolic speech, the military would need to articulate a reasonable basis for prohibiting and regulating body piercing.¹³⁶

133. *See Wedding Traditions* (visited June 2, 1999) <http://wedding.gogrrl.com/link/3_cultural.asp> (describing the tradition of the wedding ring).

A bride's engagement ring and wedding ring are traditionally worn on the third finger of the left hand (the finger next to your little finger). Although there is no precise evidence to explain the origin of this tradition, there are two strongly held beliefs. The first, dating back to the 17th century, is that during a Christian wedding the priest arrived at the fourth finger (counting the thumb) after touching the three fingers on the left hand 'in the name of the Father, the Son and the Holy Ghost'. The second belief refers to an Egyptian belief that the ring finger follows the *vena amoris*, that is, the vein of love that runs directly to the heart.

Id. Consider in this context that wedding rings and engagement vary in shape, simplicity, decorativeness and design—yet each represents something personal to the wearer.

134. *See Biblical Concepts—Religious Symbols* (visited June 1, 1999) <<http://www.biblicalheritage.com/religiou.htm>>. The six-pointed star known in Hebrew as *magen David*, literally, “Shield of David”—the paramount symbol of Judaism—has been used explicitly for a few hundred years. The practice of placing the figure of Jesus on the cross began near the end of the sixth century. *Id.* In fact, throughout history, many symbols have been used as visible reminders of faith and personal spirituality when various religions were unable to profess their faith openly for fear of persecution. *See, e.g., Symbols* (visited June 1, 1999) <http://www.catacombe.roma.it/symb_gb.html>. The term “symbol” referred to a concrete sign or figure, which, according to the author's intention, recalls an idea or a spiritual reality. Such symbols of faith include, the Good Shepherd, the “Orante” (a praying figure with arms open symbolizing the soul living in peace), the monogram of Christ and the fish. *Id.*

135. *See, e.g., Melanie Munson, Ancient Traditions Become Modern Trend* (visited June 1, 1999) <<http://www.cusd.claremont.edu/www/clubs/wolfpacket/dec1896/feat1.html>>. “[O]rnamental uses of body piercing have been used in a vast range of cultures, both ancient and contemporary. Often used for reasons of religious purposes, communication, and decoration, these processes have found their way to being trends from the past to the present.” *Id.*

[E]ar piercing, the trend that has existed longer in the twentieth century than that of any other body part, also has a history of origination. Egyptians first wore large gold hoops, which evolved into smaller earrings that supported pendants. In Babylonia and later in Assyria, earrings were worn by men to denote rank.

Id. “Naval piercing, the main form of body piercing amongst women, is believed to have originated in Egypt where this special privilege was reserved for members of the priesthood and the royal line.” *Id.*

136. *See Tinker, supra* note 131.

In *Goldman v. Weinberger*, the Supreme Court balanced a service members' First Amendment rights against the military's uniform policy.¹³⁷ In *Goldman*, the weight of the balance fell on the side of the uniform policy.¹³⁸ Although *Goldman* concerned a free exercise of religion claim, the same arguments are analogous in a free speech claim.¹³⁹ The Supreme Court gave enormous discretion to the services to dictate what is necessary in a military context.¹⁴⁰ In the same vein, the military will be given great deference to make its own appearance regulations because of its status as a "specialized" and "separate society."¹⁴¹ Applying these concepts in the area of body art, the Supreme Court would likely uphold the military's new body art prohibitions as constitutional.

Perhaps the most difficult area of prohibitions for the military to justify constitutionally is that of non-offensive, non-visible body art. If the body art cannot be seen and it does not affect duty performance, the Army's reach at regulating this type of body art as a form of speech is somewhat tenuous. Take for example, the case of body piercings. The Army's body art policy prohibits all piercings and many content-based tattoos—whether visible or not in uniform.¹⁴² This aspect of the policy prohibits some forms of speech without the balance of a countervailing military interest weighing in favor of restriction of such protected symbolic speech. From a constitutional standpoint, the Army's policy prohibiting body art forms that are not visible in uniform and that do not interfere with duty performance is overly restrictive.¹⁴³ Without some other justifi-

137. See *Goldman v. Weinberger*, 475 U.S. 503 (1986).

138. *Id.*

139. *Id.*

140. *Id.* at 540. In *Goldman*, the Supreme Court found that "[t]he peculiar nature of the Air Force's interest in uniformity" was enough a strong reason to allow for enormous discretion in crafting uniform regulations that may impact on other soldier rights—such as freedom of religion.

141. *Id.* at 507. The Supreme Court stated in *Goldman* that "[c]ourts are ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have."

142. See June 98 Wear and Appearance Message, *supra* note 40.

143. This article does not fully examine the possible religious implications of the new body art policy. The new body art policy does, however, present problems in the religious category. Arguably, the prohibition on non-visible body piercings potentially conflicts with the Department of Defense position regarding religious accommodation. The current statutory policy allows for religious articles that are not visible in uniform. The Army's body art policy does not. See 10 U.S.C.A. § 774 (West 1998) (providing for neat conservative wear of religious apparel).

cation, the constitutional weight of the balance falls in favor of free speech in these cases.

B. Facial Validity of Regulations

The Army's body art policy raises substantial vagueness and overbreadth issues examined herein. This section examines the notion that the policy unfairly goes too far at restricting personal activity that may not affect Army interests. It also explores the difficulties that the Army body-art policy raises for both commanders and soldiers to know what forms of body art are proscribed. Finally, this section examines whether the Army policy fails to provide clear guidance to commanders regarding what is required once a soldier has actually violated the policy.

1. Overbreadth

Military regulations are presumed inherently valid if the regulation has a valid military purpose.¹⁴⁴ The *Manual for Courts-Martial* provides:

The [regulation] must relate to military duty, which includes all activities reasonably necessary to accomplish a military mission, or safeguard or promote the morale, discipline, and usefulness of members of a command and directly connected with the maintenance of good order in the service. The order may not, without such a valid military purpose, interfere with private rights or personal affairs.¹⁴⁵

Based on the above guidance, a commander's regulatory authority is not unlimited.¹⁴⁶ If orders or directives are only tangentially furthering a military objective, are excessively broad in scope, are arbitrary and capricious, or are needlessly abridging a personal right, they are subject to close scrutiny and may be invalid and unenforceable.¹⁴⁷ Applying this standard

144. See *United States v. Martin*, 5 C.M.A. 674, 676 (1952); *United States v. Dykes*, 6 M.J. 744 (N.C.N.R. 1978).

145. MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. IV, para 14-c (2)(a)(iii) (1998). See generally *United States v. Green*, 22 M.J. 711, 716 (A.C.M.R. 1986) cited in *United States v. Womack*, 27 M.J. 630, 633 (A.F.C.M.R. 1988), *aff'd*, 29 M.J. 88 (1989) (holding that a military policy that prohibited soldiers from having alcohol in their system or on their breath was unlawful).

146. *Green*, 22 M.J. at 715.

to the Army's body art policy shows that it cannot withstand a constitutional test.¹⁴⁸

To analyze the body art policy applying the above-stated standard, each military purpose espoused to justify the policy is examined separately below.

a. Appearance

One obvious legitimate purpose of the body art policy may be to regulate the appearance of soldiers. Given the way the Army policy is currently drafted, however, overbreadth problems exist regarding appearance. First, the policy equally regulates both visible and covered body art.¹⁴⁹ Second, the policy applies to soldiers both on and off duty and on and off base.¹⁵⁰ A logical distinction may be made between these categories.

The courts have consistently held that the military may dictate, in many regards, the appearance of its members.¹⁵¹ The deference given to the military in this area is enormous.¹⁵² In some cases, courts have deter-

147. See *United States v. Padgett*, 48 M.J. 273 (1998). See also *United States v. Milldebrandt*, 25 C.M.R. 139 (C.M.A. 1958) (holding that an order directing a service member to disclose personal financial transactions made during leave status was invalid given that it did not relate to military requirements); *United States v. Nation*, 26 C.M.R. 504 (C.M.A. 1958) (holding that a Navy regulation that required a six-month waiting period before applying to marry an alien was overbroad, unreasonable, and unenforceable). *Womack*, 27 M.J. at 633.

148. See generally Opinion 98/0728, Office of The Judge Advocate General, United States Army, subject: Proposed Change to Policy on Body Piercing and Earrings (20 Apr. 1998) (evaluating the overbreadth and vagueness issues of an Army draft provision of the body piercing and earring policy).

149. See June 98 Wear and Appearance Message, *supra* note 40; December Administrative Guidance, *supra* note 48.

150. See June 98 Wear and Appearance Message, *supra* note 40. Although the language of the policy allows for off-duty, off-base, and out of uniform wear of body piercings, the reality is that the policy will not allow for any body piercings. A piercing will close very quickly if the jewelry is removed—often within hours. In addition, the healing process with the jewelry in the piercing can take several months. Soldiers are not in an off-base, off-duty status long enough to allow for the piercing healing process to take place. See also *Sacred Heart Studio* (visited Mar. 20, 1999) <http://www.bodypiercing_cam.com/basicheal.html> (indicating that piercings can take weeks to many months to heal depending on the location of the piercing).

151. See *United States v. Wartsbaugh*, 45 C.M.R. 309 (1972) (prohibiting the wear of a bracelet).

152. *Goldman v. Weinberger*, 475 U.S. 503 (1986).

mined that appearance standards are constitutional even though the military fails to show that the policy regulated the service as intended.¹⁵³

It is appropriate that the military have near-complete discretion to dictate how a soldier appears in uniform (and in civilian clothes to the extent that appearance somehow impacts a military interest). Uniformity is a desired end-state in a military environment.¹⁵⁴ This rationale becomes weaker, however, when the stated reason for the regulation is appearance, but what is actually regulated is not visible in uniform and does not affect appearance or duty performance.¹⁵⁵ Thus, in part, the Army's prohibition against body piercings, which cannot be seen when in uniform (or through the uniform), is overly broad if the policy is based on uniform appearance.¹⁵⁶

The Army's new policy is also internally inconsistent. The first substantive provision of the body art policy prohibits body piercing.¹⁵⁷ A piercing can be placed almost anywhere on a body.¹⁵⁸ Piercings are commonly placed in the belly button, breast, face, or genital regions.¹⁵⁹ Given the possible locations of piercings, some may be covered or hidden by

153. See, e.g., *United States v. Verdi*, 5 M.J. 330 (C.M.A.) (1978) (addressing the length of hair and wig wearing standards). The appellant was convicted of wearing a wig while on duty, in violation of the Air Force regulation proscribing hairpieces. The Air Force uniform regulation provided that "wigs or hairpieces will not be worn while on duty or in uniform except for cosmetic reasons to cover natural baldness or physical disfiguration. If under these conditions a wig or hairpiece is worn, it will conform to Air Force standards." The Air Force's stated reason for the regulation was to promote the safety of property and persons. The Air Force failed to show that the regulation promoted safety of persons or property. *Id.*

154. See *Parker v. Levy*, 417 U.S. 733, 744 (1974); *Greer v. Spock*, 424 U.S. 828, 843-44 (1976) (Powell, J., concurring); *Goldman*, 475 U.S. 540 (citing *Chappell v. Wallace*, 462 U.S. 296, 300 (1983)). Justice Rehnquist stated in *Goldman* that "[t]he military need not encourage debate or tolerate protest to the extent that such tolerance is required of the civilian state by the First Amendment; to accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps." *Id.*

155. For example, a belly button or nipple piercing.

156. See *Kelley v. Johnson*, 425 U.S. 238 (1976) (holding that choice of appearance is an element of liberty).

157. June 98 Wear and Appearance Message, *supra* note 40. An exception is provided for females—females may wear one earring in each ear in accordance with *AR 670-1*.

158. There are many places on the body a person may receive a piercing. These locations include: the earlobe and helix (the upper part of the earlobe); the nostril and septum; the labret (anywhere the lips can accommodate a ring or stud); the tongue; the bridge of the nose; the tragus, antrilagus, crus, & triangular (other parts of the ear that are fleshy and protrude); the naval; the nipple; the labia or clitoris; the penis or scrotum. *Manchester and Leeds Piercing Company* (visited Oct. 30, 1998) <www.bodypiercing.co.uk/face.htm>.

clothing. From an appearance rationale, it seems contradictory, then, that the Army permits covered or discreet content-neutral tattoos and brands, yet does not permit covered or discreet content-neutral body piercings.

The policy also regulates off-duty wear of body piercings, perhaps under the guise of upholding appearance standards. Under the current policy, a female soldier in her quarters on post, in a leave status cannot wear two earrings in one ear.¹⁶⁰ In this case, the nexus to military appearance is weak. The Army has not established that body piercings are any more detracting from a soldierly appearance than a male soldier growing a scraggly beard while off duty or a soldier who simply has poor taste in his choice of clothing. To what extent the military can lawfully control a soldier's physical appearance off duty, while not in uniform, is a question that remains unanswered.

Even the Army's bright-line rule can cause overbreadth problems. Facial tattoos are strictly prohibited.¹⁶¹ The Army policy has not taken into account cosmetic tattoos. Tattoos can be used as permanent eyeliner or permanent lip enhancer.¹⁶² These tattoos clearly violate the letter of the current policy.¹⁶³ It seems somewhat severe, however, to separate someone from the Army or reject them for service on that basis.

Another overbreadth problem the Army may soon encounter is the recent trend towards another type of body art known as "henna."¹⁶⁴ Henna is a form of temporary tattoo that stays on the skin upwards of four weeks.¹⁶⁵ It may become even more prevalent in the military because it is

159. See Alan Scher Zagier, *Fashion is Piercing at Durham Mall*, NEWS & OBSERVER (Raleigh, N.C.) Oct. 13, 1998, at B1.

160. See June 98 Wear and Appearance Message, *supra* note 40. Although this prohibition is not specifically stated in the policy, the policy prohibits any body piercings on-post, and off-duty, except for women who may one earring in each ear (male soldiers may not wear any earrings on-post and off-duty). *Id.* It appears then, by virtue of the policy, that the piercing "limit" on-post, at all times, for female soldiers is one earring in each ear.

161. *Id.* Acknowledging that facial tattoos are an issue, the Director of the Army Human Resources Directorate sated that "if permanent make-up conforms to standards of appearance for wearing make-up as described in AR 670-1 (para 1-8b, p.12)." See Hot Topics, *supra* note 52, at 6. This guidance, however, raises an interesting issue. It seems to suggest that the letter of the body art policy is pliable enough to bend if another regulation allows for such conduct. For example, does this suggest that if the tattoo were a religious symbol, (which might arguably include extremist symbols), then because it would be allowed under the religious accommodation policy, it would not violate the body art policy? See 10 U.S.C.A. § 774 (West 1998) (providing for the accommodation of neat conservative wear of religious articles).

painless, inexpensive, removable, and arguably, not prohibited.¹⁶⁶ How the policy may be re-written to apply to temporary body art, remains to be seen.

b. Health and Safety

Another legitimate purpose of the new policy might be to mitigate potential health or safety risks associated with obtaining body art.¹⁶⁷ There

162. Circumstances that motivate women to undergo this procedure include: active sports participation, allergies to make-up, oily skin which causes make-up to smudge and fade, difficulty applying make-up (poor vision, arthritis), and thinning or loss of one's eyebrows. Another reason for this procedure may be permanent tattooing of the reconstructed areola. Some patients desire the tattooing of discolored skin areas (usually congenital). *See* Richard L. Morris, M.D., F.A.C.S., *Medical Tattooing (Permanent Make-Up)* (visited Mar. 15, 1999) <<http://rlmorrismd.com/tattoo.html>> (providing information concerning the use of tattooing for eyeliner, eyebrows, or lip margins). *See also* New York State Nurses Association, *Tattoos: What Are the Health Risks?* (visited Jan. 19, 1999) <www.nysna.org/pages/news/conneccion/tattoos.htm> (noting that tattooing can also supplement a person's natural attributes such as tattoos used on the face to accentuate eyebrows, eyelashes, or lips).

163. *See* June 98 Wear and Appearance Message, *supra* note 40. Along these same lines, tattoos on the neck or head are also prohibited. *Id.* Exceptions may arguably be reasonable in cases of tattoos in the hairline that are covered with hair.

164. Certain forms of tattooing are temporary. "Henna" is a method of temporary tattooing that originated in India. "Henna" is a "completely painless topical application of a plant extract which stains the skin. Like a tattoo, you may choose the placement and virtually limitless design possibilities. Henna stays on the skin between 2-3 1/2 weeks before it fades from your skin. It looks just like a real tattoo. The application of henna was brought to India by the Moghuls in the 12th century A.D. The use of Mehendi became a traditional aspect of Hindu wedding ceremonies. Before the marriage, all the women in the bridal party would have their hands and sometimes feet decorated. The bride usually receives the most elaborate designs which can extend from her fingertips to her elbows and toes to knees." The cost can range from \$10 to \$60 per piece or \$30/hour for larger art. *Leslie's Henna Portfolio* (visited Jan. 16, 1999) <www.interlog.com/~passage/henna/mainhtml> [hereinafter *Henna Portfolio*]. *See* *Primal Urge, Henna Body Art* (visited Jan. 16, 1999) <www.primal-urge.com/hennadis.htm> (noting the growing popularity of henna tattooing because it is temporary and painless). *See also* Suzanne Koudsi, *Ancient Ritual Becomes Trendy Body Art*, COLUM. NEWS SERVICE, Mar. 26, 1998 <<http://moon.jrn.columbia.edu/CNS/mar26apr1/henna>> (describing the hot new trend started in by women in Hollywood such as Madonna).

165. *See* *Henna Portfolio*, *supra* note 164.

166. *See generally* Henna Arts International, *Henna Mehndiwebring* (visited Mar. 19, 1999) <<http://www.freeyellow.com:8080/members2/hennamehndi>> (providing historical information on henna).

167. *See* *United States v. Wheeler*, 30 C.M.R. 387 (1961); *United States v. Chadwell*, 36 C.M.R. 741 (N.B.R. 1965) (refusing to obtain an inoculation against certain diseases).

are, in fact, serious health risks associated with both the tattooing and the body piercing processes.¹⁶⁸ Whenever the skin is punctured, there is potential risk of transmitting viruses.¹⁶⁹ Tattooing and body piercing with unclean needles or equipment can lead to the transmission of hepatitis B, hepatitis C, HIV infection,¹⁷⁰ and other possible blood borne diseases.¹⁷¹ This risk is great because the Federal Drug Administration has not yet begun to regulate the dye used in tattoos or the equipment used to tattoo and body pierce.¹⁷² Thus, there is no reliable way to ensure the equipment being used is clean.¹⁷³ Branding can also potentially cause serious infections, as can any burn to the skin.¹⁷⁴

Health, however, does not appear to be the reason for the Army's new policy. If it were the primary concern, the policy would ban all forms of body art as a method of health risk prevention. The policy, however, does

168. See generally Division Surgeon, Preventative Medicine, *Tattoos: It's Your Skin, Tattoos Can Carry Serious Risks*, SERVICE NEWS (visited Feb. 5, 1999) <www.tfeagle.army.mil/talon/sep19/story5.html>.

169. *Id.*

170. See, e.g., Lieutenant Colonel (Dr.) Evelyn Bazzara, Preventative-Medicine consultant, Europe Regional Medical Command, Heidelberg, Germany, *Tattoos Linked to HIV*, SOLDIER MAG., Mar. 1999 (presenting story of two soldiers in the Balkans who possibly contracted HIV infection through being tattooed at a Hungarian tattoo parlor).

171. See Deborah Funk, *Silent Epidemic May Spread Faster than AIDS*, ARMY TIMES, July 6, 1998, at 6.

172. *Id.*

173. Safe piercing should be done with a new hypodermic needle. All the tools, jewelry, and packages should be autoclaved (clinically sterilized). The piercing process is simple and safe if done correctly. The area to be pierced should be cleaned with iodine solution and marked with a surgical marker in the place where the piercing will be placed. The area is held with either forceps or a receiver tube (depending on the piercing) to support the area to be pierced. The hollow hypodermic needle is punched through the marked spots. The jewelry, which has been placed at the back-end of the needle, is then pushed through the hole and into place. Precautions should be taken to avoid complications. These precautions include no alcohol 24 hours prior to the piercing; getting a good nights sleep and a good meal an hour before the piercing; and increasing Vitamin C and Zinc intake to speed the healing. See *Passage Piercing* (visited Jan. 16, 1999) <www.interlog.com/~passage/piercing/main.html>.

174. See Shannon Larratt, *BME Branding/Cutting/Scarring FAQ* (visited Mar. 15, 1999) <<http://www.bme.freeq.com/scar/scar-faq.html#1-3>>. The largest risk in the branding process is probably an aesthetic one, however, branding, cutting, and scarification is not a precise art, and according to the literature there are apparently only a few artists with a great deal of experience. There are risks of infection but as with other body art proper care minimizes the risk. Improper technique can be very dangerous. Even experienced branders have trouble getting consistent results. Because the largest risk is that it will look bad, or at least not like it was intended to, simple geometric designs are often used to minimize this problem. *Id.*

not ban all body art although the same health risks are associated with forbidden and allowed body art.

Safety may also be a legitimate purpose for prohibiting body piercing. An exposed body piercing may become caught on something on-the-job and cause an injury to the wearer by being pulled from the skin. Friction against the body piercing may also arguably cause some chaffing-type injury depending on where the piercing is located on the body. These injuries, however, are speculative. A body piercing covered by clothing probably has less of a chance of catching on something and causing injury to the wearer than does a wedding ring, necklace, or identification tags. In addition, in many cases piercings are flush to the skin because they are in the form of studs or ball ornaments. In those cases, the chances of the piercing being caught on something are arguably small.

Even if we assume that safety were the Army's concern, it is difficult to make the same arguments for prohibiting body piercing in a garrison environment or an off-base, off-duty situation as opposed to a field or training environment. Thus, from a safety perspective, the policy is overbroad.

c. Morale and Discipline

The need for harmony and close working relationships is of monumental concern in the military. The body art policy should consider the extent to which various forms of body art actually present a clear danger to discipline, morale, or mission. The military, however, should be "wary of regulations producing a misleading conformity and calm."¹⁷⁵ Regulations should be narrowly fashioned to address concrete Army concerns—not speculative ones.

As for tattoos and brands, the symbolism of the art should be a factor to consider when balancing free speech rights. Some body art, by virtue of its symbolism, may be of a nature to cause dissension among the troops,¹⁷⁶ while content-neutral art would not. Take as an example, an excessively

175. *Brown v. Glines*, 444 U.S. 348, 371 (1980). "The forced absence of peaceful expression only creates the illusion of good order: underlying dissension remains to flow into the more dangerous channels of incitement and disobedience. In that sense, military efficiency is only disserved when first amendment rights are devalued." *Id.* (Brennan J., dissenting).

176. For example, extremist, gang-related, or racist body art.

large tattoo normally covered by clothing, such as on the entire back. It is a tenuous argument that such tattoos are contrary to good order and discipline.

In the case of body piercings, the Army may have a similarly difficult time articulating how morale, good order, and discipline are affected. If the body art is content-neutral, and not visible in uniform, it is unclear how it would cause dissension among the troops. The Army could argue that possessing body art, in and of itself, must somehow affect morale, good order and discipline in a command because body piercing carries with it some negative stigma or connotation. This is a weak argument—especially given the increase in popularity of body piercings that brought about the recent changes in the Army policy.¹⁷⁷

d. Public Perception

Another arguably legitimate reason for prohibiting body art is to protect the public's perception of the military.¹⁷⁸ The Army's concern in this regard is based on antiquated, hackneyed ideas about tattooed persons.

Tattooed persons have, in the past, been labeled by American society as the deviants of society.¹⁷⁹ This label was based primarily on the fact that tattoos were not traditionally a part of mainstream society.¹⁸⁰ Today, however, tattoos have moved from being traditionally unacceptable to a more socially accepted form of "art."¹⁸¹ The same is true for body piercings, as is evidenced by the sheer volume of those obtaining them.¹⁸² In some ways, then, possessing some forms of body art places military members in a more mainstream light.¹⁸³

At least one recent case weakens the position that because body art has become more mainstream, it therefore is more acceptable.¹⁸⁴ The Sev-

177. Hoffman, *supra* note 15.

178. This argument is based on the Army's presumption that service members can somehow be distinguished from the rest of society when in civilian clothes in a way that the military would be associated with the body art they possess.

179. See William Taylor, *Tattoo* (visited Jan. 19, 1999) <<http://miavx1.muohio.edu/~taylor1/bad.htmlx>> (providing historical information about tattooing).

180. People with tattoos have been, however, viewed traditionally as "not wanting to take part in social order." During World War II, tattoos became a "signature" for military personnel. *Id.* According to this author, the most common tattoos displayed by military personnel are that of "Lady Luck," their unit, military division, and the American Eagle. See Taylor, *supra* note 179.

enth Circuit Court of Appeals found that the public's perception is sometimes a legitimate interest to protect when weighed against visible body art.¹⁸⁵ The government, however, should restrict speech no more than is "reasonably necessary to protect the substantial public interest to be protected."¹⁸⁶ The dispositive issue in any case should be whether the restriction bears a rational relation to a legitimate public interest. Given the breadth of the Army's body art policy, there remains a serious question as to whether the body art regulation goes beyond what is necessary to protect the government's possible interest in presenting a positive public image.

181. Some argue that tattoo art has moved from being socially deviant to being socially acceptable based on a shift in cultural values and aesthetic criteria. See Taylor, *supra* note 179. This can in part, be attributed to the fact that hippies from the late 1960s have now taken the seat in top positions in American society and many of them are tattooed. Those in power define mainstream social values transforming the tattoo into an accepted art form. *Id.* See also Neil Springer, *Artist's Approach to His Customers is Only Skin Deep*, CAPITAL DISTRICT BUS. REV. (Mar. 9, 1998). One tattoo artist had this to say about the professional/white collar clientele that come to his shop: "sales of [tattoos] are huge . . . [t]hey're weekend warriors, and tattooing is a form of self-expression for them. To them, a tattoo is freedom—the opposite of what they deal with all week." *Id.*

182. A study was recently conducted by Rutgers University to determine the characteristics of people who have body piercing, tattooing, and branding work performed. The study, published on 13 September 1996, indicated that college students who have their bodies pierced are just like the rest of us, other than having a few extra holes in their bodies. The study indicated that out of 790 persons who responded to the survey, 392 had possessed some form of piercing. The study found that pierced persons come from a variety of racial, cultural, and ethnic backgrounds. See Bekah Wilson, *Survey Say Pierced People are Normal* (visited Jan. 25, 1999) <www.ocol.okstate.edu/issues/1996_Fall/960913/stories/piercing.html>.

183. The prohibition on certain forms of body art (such as indecent tattoos or body piercings) raises interesting questions about whether tattoos would remain a basis for rejection from the service if the draft were reinstated. Considering the recent trend towards obtaining body art, if the presence of body art remained a basis for rejection from service, there is the possibility that an enormous amount of recruits would be turned away. Consider that if such prohibitions were not necessary in time of war, why they would be necessary when maintaining a peacetime force.

184. *Zyback v. Village of Peotone*, 903 F.2d 510 (7th Cir. 1990). The Circuit Court in *Zyback* examined a police force regulation prohibiting male police officers from wearing ear studs in public, even while they are off duty. The court found that although two police had a liberty interest in their appearance, including an interest in wearing an ear stud for fashion reasons, the protection of esprit de corps of the police force, discipline and uniformity are legitimate interests outweighing the officers' interests. *Id.*

185. *Id.*

186. *Brown v. Glines*, 444 U.S. 348, 355 (1980).

2. Vagueness

The Army's body art policy is arguably constitutionally vague because it fails to provide fair notice of the prohibited tattoos and because it allows for arbitrary enforcement.¹⁸⁷ What is and is not vague is difficult to delineate.¹⁸⁸ A law is constitutionally vague if people of common intelligence must necessarily guess at its meaning and differ as to its application.¹⁸⁹ A law must be drawn with sufficient clarity of the proscribed

187. See December 98 Administrative Guidance Message, *supra* note 48.

188. *Culver v. Secretary of the Air Force*, 389 F. Supp. 331, 332 (1975). A helpful exposition of the vagueness doctrine can be found in *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972):

It is the basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that law give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory enforcement. Third, but related, where a vague statute abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of [those] freedoms.

Id.

189. *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926) (holding that vague statutes violate due process because they do not allow fair warning to those who are prosecuted under them). See *United States v. Baker*, 18 U.S.C.M.A. 504 (1969) (holding that rules of construction for statutes generally apply to regulations). The Supreme Court in *Parker v. Levy*, 417 U.S. 733, 752-57 (1974), held that Article 133, UCMJ, is not itself void-for-vagueness. The Court held that a specification alleging a violation of Article 133, UCMJ, (conduct unbecoming an officer and a gentleman, 10 U.S.C. § 933), is adequate for criminal prosecution if sufficient facts are pled which could reasonably be found to constitute conduct unbecoming an officer. See *United States v. Norvell*, 26 M.J. 477, 480 (C.M.A. 1988). In "determining the vagueness of a military disciplinary statute" under Article 133, one must analyze the alleged misconduct "to determine whether it is disgraceful and compromising as contemplated by the statute." *United States v. Van Steenwyk*, 21 M.J. 795, 801-02 (N.M.C.M.R. 1985). Criminal responsibility will attach where a reasonable man under the circumstances could reasonably understand that the statute proscribed that kind of conduct. *Id.* at 801.

conduct so as to inform persons of common intelligence and those given the responsibility to enforce it.¹⁹⁰

The Army's body art policy contains ambiguous language.¹⁹¹ This is of special concern because the Army's body art policy has a potential chilling effect on free speech.¹⁹² The original guidance prohibits tattoos that are prejudicial to good order and discipline, and tattoos or brands that detract from a soldierly appearance.¹⁹³ The phrase "detracting from a soldierly appearance" can vary in application.¹⁹⁴ Some conservative commanders might find the vast majority of tattoos and brands detract from a soldierly appearance while other more liberal commanders may interpret the policy more loosely. Take, for example, persons with decorative tattoo bands around the leg or arm.¹⁹⁵ Whether these tattoos violate the policy is

190. See C. Thomas Dienes, *When the First Amendment is Not Preferred—The Military and Other "Special Contexts,"* 56 U. CIN. L. REV. 779, 812 (1987) (citing *Smith v. Goguen*, 415 U.S. 556 (1974)) (holding a flag misuse statute unconstitutional).

191. December 98 Administrative Guidance message, *supra* note 48.

192. See *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997).

The danger that a statute with vague contours as to its coverage may silence some speakers whose messages would be entitled to constitutional protection under the Federal Constitution's First Amendment provides a further reason for insisting that the statute not be overly broad; a statute's burden on protected speech cannot be justified if such burden could be avoided by a more carefully drafted statute.

Id. The Supreme Court found that although the government had an interest in protecting children from potentially harmful materials, the statute in that case pursued that interest by suppressing a large amount of speech that adults have a constitutional right to send and receive. *Id.*

193. December 98 Administrative Guidance message, *supra* note 48. The policy provides that having a *visible* tattoo is not necessarily a violation of the policy per se. It must also "detract from a soldierly appearance." *Id.*

194. The Supreme Court held in *Parker v. Levy* that Articles 133 and 134 were not void-for-vagueness under the due process clause of the Fifth Amendment, since each Article had been construed by military authorities in such a manner as to at least partially narrow its otherwise broad scope and to supply considerable specificity by way of examples of covered conduct. *Parker*, 417 U.S. at 752-57. In *Parker*, a physician, refused to obey orders to "train special forces aide men, and made public statements urging Negro enlisted men not to go to Vietnam if ordered to do so, and characterizing special forces personnel as liars, thieves, killers of peasants, and murderers of women and children." *Id.* at 733-34. In *Parker*, the defendant could have had "no reasonable doubt" that his conduct was clearly punishable by Articles 133 and 134, UCMJ. *Id.* In the case of tattoos, given the subjectivity of "detracting from a soldierly appearance," conduct that violates the tattoo policy will be much more difficult to pin down and agree on as opposed to the circumstances in *Parker* that made it a clear punishable violation.

unclear. Furthermore, the guidance does not sufficiently address other tattoos such as military tattoos that are unprofessional or distasteful and can be seen in Class A uniform.¹⁹⁶

The Army recognized the potential problems with the original guidance and tried to limit the scope of application by providing additional guidance.¹⁹⁷ The later administrative guidance states that tattoos or brands "may" violate the new policy if they indicate an alliance with an extremist organization, are indecent,¹⁹⁸ or are unreasonably large or excessive in number.¹⁹⁹ This is helpful, but also problematic.

At first blush, the prohibitions against tattoos and brands that illustrate extremist-type affiliations seem simply applied. Problems may arise, however, when a soldier possesses a tattoo that to some people indicates extremist affiliation, but to the soldier means something else.²⁰⁰ Unless a soldier is actually involved in extremist or gang-related activities, it would be safe to assume that ordinarily a soldier would not know what symbols were associated with gang-membership or extremism. Take, for example, a symbol like the Celtic cross. Celtic symbols are noted in Army literature as possible symbols of neo-nazi or skinhead affiliation.²⁰¹ To an Irish Christian, however, the Celtic symbol can symbolize Nordic heritage or religious eternal faith.²⁰² Given the ambiguous guidance, the Army may discipline soldiers or bar them from service in cases where they have done nothing to discredit the Army.²⁰³ Problems such as this allow for potential misinterpretation or oversimplification on the part of commanders. The

195. For example, a tattoo ankle band or arm bands.

196. For example, a female ankle tattoo.

197. December 98 Administrative Guidance message, *supra* note 48.

198. The guidance provides that "indecent" tattoos or brands include those that are grossly offensive to modesty, decency, or propriety; shock the moral sense because of their filthy, or disgusting nature; tend to incite lustful thought or tend reasonably to corrupt morals or incite libidinous thoughts. *Id.*

199. *Id.*

200. See Hudson Interview, *supra* note 29. Major Hudson said that it is very important (and sometimes difficult) to distinguish between tattoos that indicate a pride in cultural heritage (such as black power) versus tattoos that advocate extremism (such as white supremism). Take for example the numerous rangers at Fort Lewis who rushed to cover up otherwise legal tattoos out of fear. One magazine noted that several Army Rangers in the Fort Lewis area sought immediate assistance at laser treatment centers to remove old ranger tattoos. They feared that tattoos of double lightning bolts would be taken as racist because the design was used by Nazi troopers in World War II. See, e.g., *Tattoo Parlors Cleaning Up Around Fort Lewis*, COLUMBIAN (Tacoma, Wash.), Aug. 7, 1997, at B2.

201. See Combating Terrorism Handbook, *supra* note 35.

policy is arguably too subjective and opens the door for possible abuse through expansive interpretation.

Another problem the policy presents is its use of the term “indecent,” which is much broader than obscenity.²⁰⁴ This standard silences some speakers whose speech would be entitled to constitutional protection. The term indecent can be interpreted differently by commanders. Commanders’ sensibilities vary greatly, as can commanders’ tolerances and tastes. This could potentially lead to disparate outcomes in similar cases.

The Army policy also restricts tattoos that are “unreasonably large or excessive.”²⁰⁵ The reason for this prohibition is unclear in cases where the excessively large tattooed area is normally covered by the uniform. For example, if a soldier possesses non-extremist, decorative tattoos that cover his entire back or an entire limb, this violates the letter of the policy.²⁰⁶ It is arguably a drastic measure to prevent such a person from serving in the Army solely on that basis.

Simply put, these guidelines are not easy for commanders to apply. The Army policy, as currently written, runs the risk of impermissibly chill-

202. See *The Celtic Lady's Shop* (visited Mar. 20, 1999) <<http://www.celticlady.com/celt-art.htm>> (describing Celtic art as “the Work of Angels” by Gerald of Wales). Celtic art immersed in the La Tène culture (ca. 5th century B.C.) in parts of Germany, eastern France and surrounding areas of middle Europe by a small band of tribes. Julius Ceasar’s Roman armies were not able to conquer and Romanize the tribes of Ireland so Celtic art and traditions were safeguarded for future generations. Celtic Art incorporates nature with geometric spirals, key work designs and intricate knot work. Celtic knot work painstakingly laps one or more line over and under other lines in the belief that each crossed line will add powerful protection to the wearer. *Id.*

203. At least two cases were raised where soldiers possessed tattoos that were associated with skinhead neo-Nazi groups and the soldiers denied having knowledge of the symbolism of the tattoos. One situation involved a noncommissioned officer with 17 years service who had several tattoos that were allegedly associated with skinhead groups. He explained that the tattoos were symbolic for his Nordic heritage. The NCO’s unit attempted to process him for an administrative discharge, but the discharge was rejected by the Assistant Secretary of the Army for Manpower and Reserve Affairs. See Smidt Interview, *supra* note 34. The other incident involved a Reserve Officer Training Corps (ROTC) cadet who was denied a commission because he had a “spider-web” tattoo on his elbow. The cadet denied he was affiliated with skinhead groups. Kash Interview, *supra* note 36.

204. See *Carey v. Population Services Int’l*, 431 U.S. 678, 701 (1977) (“Where obscenity is not involved, we have consistently held that the fact that protected speech may be offensive to some does not justify its suppression.”).

205. December 98 Administrative Guidance Message, *supra* note 48.

206. *Id.* The guidance provides as examples of excessive tattoos those that “cover one limb.”

ing soldiers' First Amendment rights because it prohibits both unprotected speech and protected speech.²⁰⁷ Hence, the body art policy fails on that point.

C. Difficulties With Enforcement

The current Army policy fails to adequately guide commanders faced with enforcing the new body art policy.

1. When is Adverse Action Warranted?

Commanders need clearer guidance concerning what to do with those soldiers who violate the Army body art policy. Commanders need to understand when and if a soldier should be barred from re-enlisting, administratively separated from the Army, or legally ordered to remove the tattoo art. The Army's guidance does not adequately instruct commanders.²⁰⁸

If a commander determines that a soldier's body art is unauthorized under the guidance, the question remains: is the mere presence of such body art a sufficient basis to administratively separate a soldier from the Army?²⁰⁹ To date, the Army has not discharged any soldiers under the current policy.²¹⁰ The language of the policy suggests that simply possessing an unacceptable tattoo and refusing to have it surgically removed can be enough justification for separation.²¹¹ The guidance does not state what

207. See, e.g., Rob Carson, *Take It Off, and Hurry, Tattooed GIs Plead/Soldiers Responding to Fort Lewis Crackdown Discover Process is Neither Quick Nor Inexpensive*, NEWS TRIB. (Tacoma, Wash.), Aug. 2, 1997, at A1. Soldiers were rushing to have tattoos removed or changed after Fort Lewis instituted its inspection policy. One laser treatment center in the area said it was fielding hundreds of calls a day regarding tattoo removal. *Id.*

208. December 98 Guidance Message, *supra* note 48.

209. The Director, Army Human Resources Directorate provided the following guidance in response to the question as to what to do if a soldier is unwilling to have an offending tattoo removed: (1) make sure the soldier understands the Army tattoo policy, (2) give the soldier the opportunity to seek medical advice about tattoo removal and the associated risks, (3) counsel the soldier that he or she is not in compliance with Army policy, (4) state on the counseling form that the soldier's decision not to have the tattoo removed could result in adverse administrative action, to include discharge from the Army, and (5) battalion commanders will make the decision about which tattoos are not in compliance with Army tattoo policy. See Hot Topics, *supra* note 52, at 7.

authority is used to separate a soldier if a commander finds a body art violation, and the soldier refuses to comply with the uniform policy.²¹²

Making the matter more confusing, the policy instructs commanders not to order the soldier to remove a tattoo or brand.²¹³ Soldier “counseling,” is instead the mandate.²¹⁴ Because a commander cannot order a soldier to remove the tattoo, the only basis for administrative discharge is the possession of a tattoo that violates the policy, apparently coupled with the soldier’s refusal to remove the tattoo after receiving “counseling” about the Army’s tattoo policy and tattoo/brand removal.²¹⁵ Oddly enough, the

210. Wood Interview, *supra* note 43. At least one ROTC cadet, however, was denied a commission as an Army officer because he possessed alleged racist tattoos. See Kash Interview, *supra* note 36. Before instituting the new body art policy, one soldier separation was attempted by the I Corps command and rejected by the ASA (M&RA). See Smidt Interview, *supra* note 36.

211. December 98 Administrative Guidance Message, *supra* note 48. The guidance states:

Commanders may encounter circumstances in which soldiers refuse to have a tattoo or brand removed. The following guidance applies and should be considered: (A) [e]nsure the soldier understands the policy, (B) [e]nsure the soldier has the opportunity to seek medical advice about the process, (C) [c]ounsel the soldier in writing that he or she is not in compliance with Army policy. The counseling will state that the soldier’s decision not to have the tattoo or brand removed could result in adverse administrative action, *to include discharge from the Army.*

Id. (emphasis added).

212. See Hot Topics, *supra* note 52, at 7. The Director of the Army Human Resources Directorate provided that “[t]he command may find it necessary to take administrative action. For example, the commander may bar reenlistment and possibly recommend separation of the soldier who refuses to remove the offending tattoo. But in most cases, we do not recommend giving a direct order to remove the tattoo.” *Id.* The Army may also attempt to administratively separate a soldier under the Secretary of the Army’s authority to discharge a soldier for the good of the service as was attempted at Fort Lewis. See Smidt Interview, *supra* note 36; Kash Interview, *supra* note 36.

213. See December Administrative guidance, *supra* note 48.

214. *Id.*

215. *Id.* See AR 670-1, *supra* note 3. The uniform regulation is not, in and of itself, a punitive regulation. In other words, soldiers are not ordinarily disciplined for merely violating the uniform regulation. Soldiers are normally disciplined (whether punitively or administratively) for uniform violations if they are given an order to comply with a non-punitive regulation and subsequently fail to do so. The basis for the adverse action becomes the refusal to obey an order to comply—not the rogue failure to comply with the uniform regulation.

outcome of the tattoo policy is more severe than the Army's extremist policy itself.²¹⁶

The policy does not address whether a commander's discretion allows for any exceptions to the policy.²¹⁷ Can a higher commander in the chain-of-command determine that a soldier's body art does not detract from a soldierly appearance once a subordinate commander determines that it does detract? Can a board retain a soldier despite the soldier's body art? Again, these remain unanswered questions.

The Army's uniform regulation is not punitive.²¹⁸ A commander must, therefore, base most punitive actions for uniform violations on the soldier's violation of the commander's order to comply with the regulation. This raises the next issue.

2. Can Commanders Force Soldiers to Remove Body Art?

Perhaps one of the more disconcerting parts of the new body art policy is the expectation that a soldier remove his tattoo or brand, or face adverse action.²¹⁹ It seems overly intrusive to force soldiers in all cases to remove body art.²²⁰ Although the Army's policy provides that commanders are not to order soldiers to remove tattoos and brands,²²¹ the Army now

216. The Army's recently implemented extremist policy, embodied in *AR 600-20*, paragraph 4-12C.2.E eliminated the "active" and "passive" distinction between a soldier's involvement in extremist activities seemingly giving more discretion to commander to decide what actions could "threaten good order and discipline." See *AR 600-20*, *supra* note 109. One scholar interpreted the new policy's language, however, to focus its prohibition on "participation in organizations and activities, not mere beliefs." See Hudson, *supra* note 11, at 40. When the Army's extremist policy is read in this way, the scholar submits that "[a] soldier who is a 'mere' member but does not act, distributes no literature, or propogates no views, cannot be prohibited from being a member [in an extremist organization]." *Id.* In other words, mere beliefs are not prohibited—but actions are. *Id.* Juxtapose this interpretation of the Army's extremist policy with the Army's new tattoo policy, which arguably prohibits beliefs without activities.

217. *Id.* See *supra* note 143 discussing religious accommodation procedures.

218. *AR 670-1*, *supra* note 3.

219. December 98 Administrative Guidance Message, *supra* note 48.

220. *But cf.* The Army Immunization Policy, *supra* note 9 (wherein the Army can force a soldier to obtain an immunization).

221. December 98 Administrative Guidance Message, *supra* note 48.

places soldiers in a position wherein they must choose between ending their career or removing the tattoo. This is not a voluntary choice.

After the Army promulgated the initial change to the uniform regulation, many commanders in the field requested guidance concerning tattoos and brands.²²² Subsequent guidance provided that if the soldier chose to have the tattoos removed, the Army's medical command would assist in removing them.²²³ This raised another series of concerns regarding removal procedures and practicalities.

In the case of a body piercing, removal is simple and painless. Other forms of body art, however, present more difficulties. Removal of tattoos and brands²²⁴ is expensive, time consuming, and painful.²²⁵ The military is now faced with spending time and scarce resources to meet the new policy requirements. The medical command must provide both equipment and trained doctors to perform the necessary removals. Soldiers will spend an enormous amount of time being counseled about body art removal, receiving medical care and recovering from the removal procedures, pre-

222. See, e.g., Memorandum, Captain Karl Kronenberger, AFCG-JA-MIL, subject: Problems in the Implementation of the New Policy (1 Oct. 1998) (on file with the author). This memorandum to the Forces Command (FORSCOM) Staff Judge Advocate was drafted by an administrative law attorney assigned to FORSCOM. It outlined the numerous issues raised by the body art policy. The issues were based on questions from the field.

223. December 98 Administrative guidance message, *supra* note 48. The policy states:

The medical command will remove such tattoos or brands when the soldier requests assistance in removal and the soldier is command-referred. However, after the date of this message, the Army may elect not to provide this service for any soldier who voluntarily has a tattoo or brand applied which is in violation of this policy.

Id. This policy was an attempt to alleviate the problems caused by the original policy that left the soldier to figure out how to pay for a removal and where to have it done. According to medical personnel in Germany, this is simply not happening in USAEUR. See Hudson Interview, *supra* note 29.

224. Hypertrophic (raised) scars and keloids (excessive accumulations of scar tissue caused by raised and thickened masses of connective tissue scars) are difficult to treat, with recurrences commonly seen after such treatments as cryosurgery (freezing), excision, radiotherapy (x-rays), and steroid injections. Current laser technology allows for the improvement of such scars by normalized skin texture and color after laser treatment. See Tina S. Alster, MD, *The Washington Institute of Dermatologic Laser Surgery* (visited Mar. 23, 1999) <<http://www.skinlaser.com/scars.htm>>.

sumably in a non-deployable status. Lastly, there is no guarantee the removal process will completely remove a tattoo or brand.²²⁶

3. *Can Soldiers Cover the Body Art as an Option?*

The policy does not address whether covering a tattoo may be an option. Covering the tattoo may constitute a less intrusive means of meeting policy objectives.

Covering the tattoo can be done through a few methods. The first method is to cover the tattoo with clothing. This is a possible concern for females who have tattoos on their legs or ankles that would be visible when wearing the Class A skirt. The prohibitions on some tattoos apply when tattoo is visible in Class A uniform.²²⁷ The tattoo policy does not define what constitutes the Class A uniform for females.²²⁸ This begs the question: can commanders direct females to wear military slacks instead of the

225. Although obtaining a tattoo is relatively inexpensive, removing it can be extremely costly—especially to an average enlisted soldier. Tattooing was once considered “permanent” because, left alone, most tattoos will remain indefinitely on the skin. Over the years, however, several techniques have been developed to remove tattoos. These techniques include: surgery (cutting the tattoo out of the skin), dermabrasion (sanding away layers of skin with a wire brush until the coloring is removed), salabrasion (soaking the tattoo out with a salt solution), scarification (using an acid solution to burn off the tattoo and replace it with a scar), and various laser removal techniques. See Benjamin Walker, Ph.D., *Re: How Do You Take A Tattoo Off Your Body?* (visited Jan. 19, 1999) <www.madsci.org/posts/archives/mar97/859231293.Me.r.html>. See also *Arbutus Laser Center-Tattoo Removal* (visited Jan. 19, 1999) <www.infinity.ca/arbutuslaser/skincond.htm>. The chances of scarring are under five percent and the treatment does not require anesthetic. Arbutus states that tattoos may require two to eight or more treatments for removal to be complete. The factors affecting the amount of treatments include the size, location, and depth of the tattoo.

226. See *Skin Ovations* (visited Dec. 15, 1998) <www.skinovations.com/tattoos.html> (indicating that no laser removal system is guaranteed to remove all ink). Some laser systems permit the “removal of most ink tattoos with a very low risk of scarring.” *Id.* Depending on what process is used, the laser could be particularly effective in the removal of blue, black, or red inks. Laser techniques remove the ink with the energy of light that cause the ink to destruct. The ink is then removed naturally by the body’s filtering system. The laser systems emit energy impulses similar to “the snap of a rubber band or hot bacon grease on the skin.” Green and yellow inks are most difficult to remove.

227. December 98 Administrative guidance message, *supra* note 48. It is interesting that the Army chose the Class A uniform as the appropriate measuring stick for when body art detracts from a military appearance. It would seem that the same concerns exist when a soldier is wearing a physical training uniform as when they are wearing the Class A uniform.

skirt to cover unprofessional tattoos that “detract from a soldierly appearance?”

Another method to cover the tattoo is with make-up or an adhesive strip. If a soldier can adequately cover the tattoo, it seems to be an adequate substitute for removal. The least restrictive means should be used to accomplish the desired military end.²²⁹

4. *Are Searches for Body Art Permitted?*

Another potential problem commanders have is how to enforce the policy.²³⁰ For the body art prohibitions to be effective, there arguably must be some system in place to enforce it.²³¹

Currently, before a soldier enters the service, he is screened for physical markings.²³² The body art prohibition and the minimum entry medical standards are used as a basis to deny entry to those who do not meet policy

228. *Id. Compare* Message, 171800Z Nov 98, Colonel Donald W. Tarter, Director, Recruiting Operations, U.S. Army Recruiting Command, subject: Tattoo Policy Update (providing that Class A uniform for females as described in the new Army body art policy includes the skirt). Applicants who have exposed tattoos in Class A uniform (include the skirt for females) must have a determination as to their enlistment qualifications. Determinations are then forwarded to Headquarters, U.S. Army Recruiting Command (USAREC) for review. *Id.*

229. For example, a tattoo could be covered by super-imposing another tattoo on top of the unauthorized tattoo. This option may seem like an odd choice, but if a soldier would rather obtain a cover-up tattoo versus undergoing a tattoo removal process, this should be an option.

230. *See, e.g.,* Gerry Gilmore, *A Piercing Issue* (visited Mar. 22, 1999) <<http://flud-zone.net/wwwboard/messages/145.html>>. In this article, Master Sergeant Debra Wylie, the Uniform Policies Officer at the Army Office of the Deputy Chief of Staff for Personnel, suggested that one method of enforcement should fall on the soldier's shoulders. She said that “[j]unior soldiers considering getting a tattoo should “just exercise common sense . . . and first ask their noncommissioned officers which type of tattoos aren't appropriate according to AR 670-1.” *Id.* Such a request for guidance on appropriate tattoos arguably is an inappropriate prior restraint on constitutionally protected speech.

231. The standard to date for soldiers already in the Army has been to refrain from conducting inspections unless evidence exists to indicate that there is some reason to conduct an inspection.

232. *See* AR 40-501, *supra* note 39.

standards.²³³ This system is an effective means of controlling the body art of those not yet in the service.

The Army could incorporate "body art inspections" into their periodic physical examination process, which was done at Fort Bragg and Fort Lewis.²³⁴ This may not be the best approach. Not only do such inspections raise possible constitutional issues,²³⁵ but such inspections take an enormous amount of time and resources away from the military mission and yield low returns in terms of finding violators.²³⁶

233. *Id.*

234. To be judicially enforceable, the local regulation must not be arbitrary or unreasonable. *See* *United States v. Green*, 22 M.J. 711, 718 (C.M.A. 1986) (holding that the Fort Stewart regulatory proscription prohibiting soldiers from "[h]aving any alcohol in their system or on their breath during duty hours," as invalid, unenforceable, and essentially standardless, arbitrary, unreasonable, and "serving no corresponding military need not better satisfied by statutes and regulations of greater legal dignity") *See also* *United States v. Cowan*, 47 C.M.R. 519 (ACMR 1973); *United States v. Garcia*, 21 M.J. 127 (CMA 1985).

235. The Fourth Amendment to the United States Constitution provides:

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

U.S. CONST. amend. IV. Courts, however, have consistently upheld health and welfare inspections as valid and constitutionally permissible. There are few limitations in this area as long as the inspection relates to military mission. *See* *Unger v. Ziemniak*, 27 M.J. 349 (C.M.A. 1989). A Navy lieutenant challenged the Navy directive that called for "direct observation" of the private parts of a person giving a urine sample. The lieutenant claimed that she had a constitutional right to privacy and to be free from unreasonable searches and seizures. She argued that because she had to urinate in front of an enlisted soldier, the direct observation demeaned her in status as an officer. The court found that although it was unpleasant and disagreeable to urinate while being directly observed by someone, there are cavities in the body where urine may be hidden for the purposes of substitution in the event of a drug test. Thus, the "direct observation" method was necessary to achieve the overall objective of ensuring that such a tactic would not be used. "Because the impact of drug abuse on the performance of military mission, we believe mandatory drug testing in the military community is not subject to the same limitations that would be applicable in the civilian society." *Id.* *See also* *Chappell v. Wallace*, 462 U.S. 296 (1983); *Goldman v. Weinberger*, 475 U.S. 503 (1986); *Solorio v. United States*, 483 U.S. 435 (1987).

236. *See* *Kash Interview*, *supra* note 36.

IV. How to Improve the Current Army Policy

The Army has taken on a great challenge in its attempt to regulate body art. Keeping track of what a soldier does to his body is no easy task. No policy will please everyone. The best approach to the body art concern is to fairly, reasonably, and logically balance the needs of the Army against the personal rights of soldiers. This balancing approach will reveal the legitimate purposes for prohibiting some forms of body art while allowing other forms.

The Air Force policy is arguably the better model balancing personal freedoms and rights and the need for a regulated military appearance.²³⁷ The Air Force policy can be summarized in one concept: if the body art is not visible in uniform and does not in some way affect duty performance, then it will be allowed.²³⁸

To make the Army policy less open to criticism, the Army should allow for some exceptions to the current prohibitions. For example, at a minimum, an exception for small inconspicuous cosmetic facial tattoos

237. See AF/JAG Memorandum for all Staff Judge Advocates, Harlan G. Wilder, Chief, General Law Division, OTJAG, HQ USAF/JAG, subject: Air Force Policy on Tattoos and Body Piercing, (undated). This memorandum states:

Based upon the personal nature of tattoos and body ornaments, we anticipate the new policy may generate some controversy and media attention. However, we believe the policy strikes a reasonable balance between individual rights and the need for public confidence in the Air Force based upon a member's personal appearance. Although the specific rules on tattoos and body piercing are new, they are in line with other dress and personal appearance standards that have existed since our Armed Forces were first established.

Id. The memorandum also emphasized that commanders may also "impose more restrictive standards for tattoos and body piercing in situations where the Air Force-wide standards may be inadequate because of host country sensibilities or unique circumstances surrounding the mission." *Id.* In those circumstances, commanders should be able to "articulate a rational basis for more restrictive rules." *Id.*

238. See *Air Force Writes the Book On Body Art*, AIR FORCE NEWS, June 10, 1998. The Air Force "has recognized the increasing popularity of body art and have adjusted personal appearance policy to set appropriate guideline for such practices." *Id.*

should be included in the policy. The Army should also consider allowing possible religious exception, which the current policy does not provide.

The Army should more clearly articulate what constitutes "excessive" tattooing, and consider why such restrictions are even necessary if tattoos are located in inconspicuous locations. The Air Force policy applies "excessive" tattooing to exposed body parts.²³⁹ The Army defines "excessive" tattooing to body parts—including exposed and unexposed. The Air Force's more restrictive approach seems more reasonable.

The Army should also consider appropriate occasions when body art removal is necessary and proper.²⁴⁰ Along the same lines, commanders need clearer guidance on what steps commanders should take to process a soldier for inappropriate body art.

V. Conclusion

Freedom of choice is the bedrock of the United States. Soldiers, the keepers of America's freedoms, should be mindful that Army policies are not unnecessarily restrictive based merely on the personal preferences or distastes of those charged with making the rules.

In large part, the body art policy is necessary. The Army, however, could lose good soldiers and potential recruits through an overly-restrictive body art policy.²⁴¹ During a difficult period for recruiting and a worse period for soldier retention, the Army need not give soldiers one more reason to avoid military service.²⁴²

A careful analysis of the new body art policy reveals that, in part, the Army has gone too far. The goals of controlling soldier appearance,

239. AIR FORCE DRESS CHANGE, *supra* note 62.

240. *See, e.g.*, AIR FORCE DRESS CHANGE, *supra* note 62. The Air Force allows large tattoos that can be covered with clothes. Air Force members are not forced to remove tattoos in such cases.

241. The Chief of Plans, Policy, Programs and Waivers Division, Headquarters, U.S. Army Recruiting Command, Fort Knox, Kentucky, indicated that out of every one hundred tattoos reviewed by recruiters, seven or eight prospective recruits are denied entrance into the service based on the new tattoo policy. *See* Gerry J. Gilmore, *A Piercing Issue* (visited Mar. 15, 1999) <<http://fludzone.net/wwwboard/messages/145.html>> (indicating that the same criteria is used by the Army recruiting command).

health, morale and welfare, and public perception are worthy and necessary—but only when legitimate military interests are at stake.

242. Recent reports indicate that the military is having a difficult time both recruiting new members and retaining current members. *See Statement by Congressman Steve Buyer Before the House Armed Services Committee Military Personnel Subcommittee*, FEDERAL NEWS SERVICE (Mar. 18, 1999). There is no question that the services face an incredibly difficult recruiting environment. Congressman Buyer indicated that the Army and the Air Force both project failed recruiting years in fiscal year 1999 and are expecting to violate the law by coming in under the end strength floors set by Congress. In the same vein, after a disastrous recruiting year in fiscal year 1998, the Navy is recovering but still not confident that the recruiting mission will be achieved. *See also Army Putting Fresh-Faced Soldiers In Recruiting Offices*, BUSINESS NEWS (Feb. 11, 1999).

In the first fiscal quarter for the year, the Army fell behind its goal by about 2400 recruits. At that rate, the Army could fall far short of its goal of 74,5000 recruits. The Army also is working harder to keep new recruits. The rate at which soldiers in their first enlistment quit the service rose to 40% last year.

Id.