NAVAL LAW REVIEW

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The Emerging Norm of Humanitarian Intervention And Presidential Decision Directive 25

Glenn T. Ware[*]

The West . . . has a high capacity to kill but a low capacity to die.
Charles William Maynes

I. INTRODUCTION.

The New World Order brought an end to neither war, ethnic and regional conflict, nor genocide, but rather set loose conflict as the world began to come to grips with democracy. Eastern Europe is raging in conflict as a result of the disintegration of the former Soviet Union. Third World countries once firmly controlled by Cold War politics, have had their hands untied and have likewise struggled with their newfound freedom. Calls for intervention, humanitarian assistance, peacekeeping, peacemaking and preventive diplomacy can be heard daily. These multifaceted international dilemmas are the types of challenges that the leadership of the United States and the United Nations must all too frequently come to terms with in this changing era of world politics. Actual or potential conflicts loom on the horizon, particularly in the Middle East, Africa, new independent states and other areas in the Third World.[1] The causes vary from the end of the Cold War to the rapid pace of decolonization, ethnic feuds and natural disasters. The political, legal and military questions raised by these threats to international peace and security, often times referred to as complex

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[*] *The positions and opinions stated in this article are those of the author and do not represent the views of the United States government, the Department of Defense, or the United States Navy. The author is an active duty Naval Officer presently serving as the Staff Judge Advocate to COMMANDER, CARRIER GROUP FIVE, located in Yokosuka, Japan. This article was completed as part of the author's study for his L.L.M. from Harvard University, Cambridge, Massachusetts. The author would like to thank Prof. Abe Chayes for his thoughtful comments and guidance. Additionally, the review by L.A. Benton was most insightful. This article has been edited by Captain Kevin J. Conway, USMC.*

[1] *See generally* Thomas G. Weiss & Kurt M. Campbell, *Military Humanitarianism*, SURVIVAL, Vol. 35, No. 5., at 451-465 (1991). Weiss & Campbell discuss the issues that are confronted with the emerging notion of "military humanitarianism" as a result of the unprecedented increase in military humanitarian operations since the end of the Cold War.

humanitarian emergencies, are staggering.[2] How do states justify intervening in these humanitarian disasters in contravention of the norm of nonintervention? What legal and political mechanisms have been established for operating in a complex humanitarian environment? How has the leadership in the United States reacted to previous crises and how have these reactions and experiences shaped the course of future U.S. participation and support of actions to resolve international crises that are yet to come?

The purpose of this Article is to address these questions. It will discuss generally the changing world order as it relates to intervention by states before and after the Cold War. It will explore the "tools" for peace available to the UN and to the United States. It will review the legal, political and military requirements that must be considered by the national leadership prior to participating in any operation designed to address a complex humanitarian emergency. Specifically, this Article will explore how events in Somalia have significantly shaped U.S. decision making and have caused the U.S. to draw back from its early 1990 posture of involvement and support in restoring peace in the world's trouble spots. This retreat in policy is articulated in Presidential Decision Directive (PDD) 25, which relates to U.S. involvement in international crises. The Article will discuss the elements of this new policy and its probable effect on U.S. involvement in future humanitarian emergencies.

The policy enunciated in PDD 25 makes threats to vital U.S. interests the trigger for U.S. action or support in resolving complex humanitarian emergencies. This strict "vital national interests" test is a shift from the early 1990s interventionist "multilateralistic" attitude brought about as a result of several factors: emerging international norms of justifiable intervention, a post-Cold War reinvigorated UN, post-Gulf War euphoria and a new Democratic administration willing or even feeling compelled to seek UN authority to conduct unilateral intervention operations, among other things.[3] A retreat to a strict

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[2] For a summary of operational/political issues involved in complex humanitarian emergencies, *see* David J. Zvijac & Katherine A. W. McGrady, *Operation Restore Hope: Summary Report*, Center For Naval Analysis (Mar. 1994) (on file at the Center For Naval Analysis and with the author); Jennifer Morrison Taw & John E. Peters, *Operations Other Than War, Implications for the U.S. Army*, Arroyo Center, RAND Corp. (1995); *See also* JOHN L. HIRSCH & ROBERT B. OAKLEY, SOMALIA AND OPERATION RESTORE HOPE (1995). This book details the political, legal and military operation in Somalia, including UNISOM I, UNITAF and UNISOM II. UNITAF was the U.S. led humanitarian mission into Somalia.

[3] Peter W. Rodman, *Declarations of Dependence*, NATIONAL REVIEW, June 13, 1994, Vol. 46, No. 11, at 32. The recognition that unilateral action, outside of self-defense under UN Chart. Art. 51, must be conditioned on UN authority is a signification change from previous administrations. Certainly President Reagan would not have sought UN authority to invade Grenada.

"vital national interests" test and away from an expanded "just causes" test for intervention (*e.g.*, massive human rights abuses, has prevented and will continue to prevent the U.S. from acting in areas of the world where it does not have a vital national interest, yet massive and systematic genocidal atrocities are, have been, or will be committed. The 1993 massacre of the Tutsis in Rwanda is a perfect example.

This national policy shift by the U.S. embodied in PDD 25 has numerous potential ramifications. It may signal a "hands off" attitude by the U.S. which will free the temptations of rogue nations or groups (or as National Security Advisor Anthony Lake termed "thug of the month", interested in "ethnic cleansing" or racial purity. It may restrain the U.S. from intervening until an emergency becomes exceedingly volatile and the calls for intervention can no longer go unheard. This delay could put those individuals (military, relief workers, etc.), who are tasked with intervening in a complex humanitarian emergency at greater risk. Additionally, it could increase costs because the cost of involvement increases as the volatile nature of a situation increases.

To avoid such results, the criteria that the U.S. uses in determining when it will support an intervention action must be reassessed. We must re-imagine our "vital" national interests when determining whether the United States will support or participate in international intervention operations. The United States should take the lead in seeking international consensus to expand the reasons justifying intervention to account for cases like Rwanda. However, this expansion of the "just causes" test for intervention should be balanced against a strict "means" test to accomplish the objectives as well as account for the practicality of intervention.

The move towards an expanded notion of "just causes" for intervention would likely have several effects. First, it would mean earlier U.S. engagement in complex humanitarian emergencies. This early engagement would curtail atrocities the likes of which the world has not seen since World War II. Also, early engagement would lessen the overall costs of an intervention, in terms of both financial and personnel resources. Early engagement, utilizing one of the various "tools" for peace, can be an effective and useful mechanism for achieving a variety of positive results as mentioned above. The task remains, however, to articulate the balance between the "just cause" for intervention and the means and practicality of intervention. While it remains to be seen what PDD 25's long term effect on U.S. interventionist posture will be, it is problematic that with the emergence of global democracy, the United States has

in place a policy that causes the U.S. to shy away from multilateral intervention in threatened democracies. As it stands now, current U.S. policy embodied in PDD 25 leaves open the possibility for future Rwanda scenarios and, in fact, may encourage their onset.

II. NONINTERVENTION AND ITS CHANGING NORMATIVE CONTENT.

With the peace of Westphalia in 1648 and the end of the "interventionist cycle of religious war," nonintervention principles prohibiting state intervention in the affairs of other states were established by statesman to "preserve the peace in a world of states divided by nationality, religion and ideology."[4] After three centuries, this Westphalian understanding of world order structured the relationship between states whereby "[b]oth sovereignty and nonintervention acquired an absolute status as ideas."[5] Although these ideas were often "betrayed in the daily dynamic of world politics," they nevertheless remained the ideal. [6]

Intervention takes many forms but does not include normal international activities, which result from the relationships among states. This is true even if the relationship tends, in the perception of one state or another, to unjustly benefit a particular state. Rather, interventionist acts are those acts that are so extraordinary as to be "subject to elimination from the repertoire of state

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[4] J. Bryan Hehir, *Intervention: From Theories to Cases*, 9 ETHICS AND INTERNATIONAL AFFAIRS 1, 4 (1995).

[5] *Id.* at 2-3.

[6] *Id.* at 3. *See also* Marc Trachtenberg, *Intervention in Historical Perspective*, in EMERGING NORMS OF JUSTIFIED INTERVENTION 15 (Laura W. Reed & Carl Kaysen eds., 1993). Although the norm of nonintervention developed over the period of three centuries, there were significant events in its development which tended to indicate a double standard such as "gun boat diplomacy" by the British which led to the war with China. By the end of the 19th century it was assumed that the "civilized' nations of Europe had the right to control their own destiny, free of foreign intrusion, but the "backward" and "less civilized" Asian and Latin American states could be targets of intervention. *Id.* at 23. The U. S. also took for granted the double standard which applied to civilized v. uncivilized countries. "Woodrow Wilson. . . the great champion of self-determination for the European nationalities, sent American forces into Santo Domingo and Haiti and into Mexico twice." *Id.* at 24.

behavior if shown to be unjustified."[7] This article focuses primarily on intervention through the use of military force in the realm of an internal conflict. Military force in internal conflict tests the normative limits of nonintervention. In addition to military force, which is recognized as "classical" intervention, authors have specified other "acts" which test the norm of nonintervention. The following acts could be considered interventionist:

a. *Retaliatory economic sanctions*. Included under this heading are acts such as withholding trade preferences, tariff surcharges, importation bans or limits, boycotts, etc. Such sanctions are usually intended to accomplish economic objectives. Sanctions can also be used for political or military purposes, such as obtaining the release of certain prisoners.

b. *Economic aid-conditionally*. These are the types of acts which are done by a donor state with the condition that money be spent in a specific way for a specific purpose.

c. *Intelligence gathering*. A host of activities have been condemned by countries as interventionist such as: remote sensing, political and military intelligence gathering, etc. Weaker countries claim that intelligence gathering whether it be for political, military or economic purpose can be used by the stronger country against the weaker and thus offend their sovereignty.

d. *Destabilization of foreign governments*. These acts usually are the clandestine acts of certain intelligence agencies and include arming insurgents, supporting political opposition, providing bases and asylum for insurgents, bribing, and terrorist practices.

e. *Counterterrorism*. Included in this category are those activities in which countries engage to thwart terrorism such as kidnapping, killing, assassination, etc. Compelling extradition also has been discussed as a form of intervention.

f. *Democratization*. While not normally thought of as interventionist, it could be put in the interventionist category if "democratization" is done against the wishes of the host government. Included acts are giving technical assistance in training election officials, judges, etc.

g. *Aid in ending civil wars*. This is the area where this Article focuses and includes activities such as peace operations. Providing training in human rights often times falls within the scope of "aid in ending civil wars."

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[7] Ernest B. Haas, *Beware the Slippery Slope: Notes Toward the Definition of Justifiable Intervention*, *in* EMERGING NORMS OF JUSTIFIED INTERVENTION 66 (Laura W. Reed & Carl Kaysen eds., 1993).

h. *Humanitarian intervention.* Feeding the hungry and caring for the sick could be considered interventionist if the organization or state does not receive cooperation from the host government. [8]

This Article will not consider economic forms of intervention or acts of aggression such as Iraq's incursion into Kuwait. These activities fall outside the debate regarding justifiable intervention - which for the most part is grounded in humanitarian concerns.[9] Fielding indicates that humanitarian assistance to restore democracy "consists largely of the support of democracy by measures not involving use of force such as condemnation, withdrawal of aid, and suspension of diplomatic relations or perhaps, if the exigency of the circumstances demand, harsher measures such as economic sanctions." Intervention by force to restore democracy would only be advocated when there is a virtual humanitarian crisis such as massive killings.[10]

Rationales justifying intervention during the development of the norm of nonintervention included preserving economic interests, maintaining a balance of power, reducing or deterring the outbreak of warfare and attending to humanitarian concerns. During the Cold War, intervention for economic purposes was replaced by the primary reason justifying intervention, which was, in the words of Dean Acheson, to "prevent them from going commie."[11]

Today, there are a number of international legal customs, rules, treaties and cases which "impose a duty on States to refrain from intervention in the internal affairs of other States."[12] Article 2 of the UN Charter specifically states:

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[8] *Id.* at 66-68.

[9] *See also* Lois E. Fielding, *Taking the Next Step in the Development of New Human Rights: The Emerging Right of Humanitarian Assistance to Restore Democracy*, 5 DUKE J. COMP. & INT'L L. 329 (1995).

[10] *Id.*

[11] Trachtenberg, *supra* note 6, at 26. *See also* George T. Raach & Ilana Kass, *National Power and the Interagency Process*, JOINT FORCES Q., Summer 1995, at 8, 9.

[12] Ruth Gordon, *United Nations Intervention in Internal Conflicts*, 15 MICH. J. INT'L L. 519, 520 (1994); *See* John Norton Moore, *Legal Standards for Intervention in Internal Conflict*, 13 GA. J. INT'L & COMP. L. 91 (1983); *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty*, F. A. Res 2131, U.N. GAOR 1st Comm., 20th. Sess. Annex 3, Agenda Item 107, at 10, U.N. Doc. A/6220 (1965); Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27).

> 1. The Organization is based on the principle of the sovereign equality of all its Members. . . .
>
> 4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations. . . .[13]

The prohibition on intervention also extends to international organizations such as the UN itself:

> 7. Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state. . . .[14]

The Helsinki Accords signaled a movement away from nonintervention even before the end of the Cold War when the former Soviet Union acknowledged that human rights were an international issue.[15] The end of the Cold War, however, put intervention for human rights purposes firmly on the table.

Since the end of the Cold War, the "line between permissible and unacceptable uses of force" in an internal conflict of a state has been redrawn.[16] The notion that there now exists a "right to intervene" in the

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[13] U.N. CHARTER art. 2.

[14] U.N. CHARTER art 2. Regardless of the historical norm and presumption of nonintervention, there has been emerging recognition of the notion that states are not free to "massacre their own citizens or allow their territory to serve as a base for piracy or terrorism." Trachtenberg, *supra* note 6, at 30. This notion is converse to the long held position that a state's violation of the human rights of its own citizens is an internal matter and not subject to international scrutiny. Weiss & Campbell, *supra* note 1, at 454. Additionally, Cold War restraint prevented the international community from enforcing and encouraging human rights standards for fear of sparking a superpower conflict. Trachtenberg, *supra* note 6, at 30. Human rights abuses were subordinated to superpower interests and were thereby neatly tucked away under the guise of "matters within the internal affairs" of a country.

[15] A. BLOED & P. VAN DIJK, ESSAYS ON HUMAN RIGHTS IN THE HELSINKI PROCESS (1987). The Carter Human Rights program also signaled the emergence of human rights violations as an exception to the rule against nonintervention.

[16] Trachtenberg, *supra* note 6, at 15. *See* Kelly A. Childers, *United Nations Peacekeeping Forces in the Balkan Wars and the Changing Role of Peacekeeping in the Post-Cold War World*, 8 TEMPLE INT'L & COMP. L.J. 117 (1994).

domestic or internal affairs of a state is increasingly accepted in the international community.[17] French Foreign Minister Roland Dumas stated the "international community has the 'right to intervene' in humanitarian cases, and should be prepared to violate national boundaries to alleviate human suffering resulting from repression, civil disorder, interstate conflict or natural disasters."[18]

Although the presumption of nonintervention still applies, the emerging view is that intervention is legitimate in cases when the "line has been crossed and the norms of civilized behavior have been so egregiously violated that the rest of the world can no longer remain passive." It has even been suggested that at least on a multilateral basis, nations have a duty to intervene to stop a rogue country like Iraq from developing a nuclear capacity, when "ethnic or religious minorities are being massacred" or when a state is really nothing more than a terrorist outpost.[19] The action to protect the Kurds in northern Iraq pursuant to UN Security Council resolution 688 [20] is a recent demonstration of the principle of the emerging norm of justified intervention wherein sovereignty and nonintervention will take a back door to human rights abuses.[21]

Additionally, it is historically recognized that states are free to request [thereby consenting] and receive support from outside governments in assistance in dealing with internal conflicts.[22] However, this principle is not so clear if

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[17] Trachtenberg, *supra* note 6, at 15. *See* Mark R. Hutchinson, *Restoring Hope: UN Security Council Resolutions for Somalia and an Expanded Doctrine of Humanitarian Intervention*, 34 HARV. INT'L L. J. 624 (1993); Steven G. Simon, *The Contemporary Legality of Unilateral Humanitarian Intervention*, 24 CAL. W. INT'L L.J. 117 (1993).

[18] Weiss & Campbell, *supra* note 1, at 452.

[19] Trachtenberg, *supra* note 6, at 30-31. A number of non-governmental organizations NGOs have also engaged in "cross border operations" without receiving consent of the host country. The NGOs have justified their action based on the "rights of the suffering"- which appear to supersede the principles of sovereignty and non-interference. Weiss & Campbell, *supra* note 1, at 454.

[20] The UN has taken an increasingly significant role in the emerging norm of intervention as a result of the end of the Cold War. It is cloaked with authority under various circumstances to intervene in the affairs of another state. This authority is seen as more legitimate than the unilateral intervention which occurred during the Cold War era, which was essentially power politics operating out of concern for a national interest. Gordon, *supra* note 12, at 520-522. Trachtenberg, *supra* note 6, at 31.

[21] Weiss & Campbell, *supra* note 1, at 455.

[22] Gordon, *supra* note 12, at 531.

intervention would violate the right of self-determination when it is not possible to discern if there is a "legitimate" government within the country subject to the intervention.[23] Professor Schacter, a leading international law scholar states:

> No state today would deny the basic principle that the people of a nation have the right under international law to decide for themselves what kind of government they want, and that this includes the right to revolt and to armed conflict among competing groups. For a foreign State to support with "force" one side or the other in an internal conflict is to deprive the people in some measure of their right to decide the issue by themselves.[24]

In any case, with increasing frequency the UN is called upon to intervene or authorize intervention in areas that have traditionally been within the purview of the domestic affairs of another country such as human rights issues.[25] This proactive stance reflects an international perception that the prohibition against interference by international organizations in the domestic affairs of another country as proscribed by the UN Charter is not as extensive as it once was.[26] Given the recent events in Haiti, Somalia and Iraq, it now appears internal civil strife "of any significance may no longer be essentially within the domestic jurisdiction of Member States."[27] Legal scholars have criticized this position as they seek normative limits on the increased participation by the UN in all world affairs.[28]

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[23] *Id.*

[24] Gordon, *supra* note 12, at 531, *quoting* Oscar Schactter, *International Law in Theory and Practice: General Course in International Law*, 178 R.C.A.D.I. 160 (1982).

[25] Gordon, *supra* note 12, at 522.

[26] *Id.*

[27] *Id.* at 524.

[28] Martti Koskenniemi, *The Police in the Temple, Order, Justice and the UN: A Dialectical View*, 6 EUR. J. INT'L L. 525, 326-327 (1995). Koskenniemi points out that the "secrecy of the Council's procedures, the lack of clearly delimited competence and the absence of what might be called a legal culture within the Council" has caused international lawyers to respond by trying to rein in and spell out more clearly the competence of the Council through interpretation of Articles 1, 2, 24(1) and 39. *Id.*

In order to justify intervention by the use of force in an internal conflict, Chapter VII of the UN Charter authorizes the UN Security Council to determine the existence of a threat to international peace and security.[29] While the UN Charter does not specify under what conditions an internal conflict will constitute a threat to international peace and security, a number of factors will be considered: size of the conflict, likelihood of cross border spillover, classification as a colonial conflict, likelihood of outside assistance to one or more parties to the conflict or intolerable human rights abuses.[30] More recently, the UN Security Council extended its view of what constitutes threats to international peace and security by suggesting that "[t]he non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to international peace and security."[31] Some authors have suggested abolishing the distinction between matters that are in the domestic (internal) jurisdiction of a state, and those matters that are international - thus rendering the UN capable of intervening in any country with the goal of strengthening democracy.[32] Still others have suggested a more "realistic" approach when determining what constitutes a legitimate threat to international peace and security that justifies intervention. Martti Koskenniemi points out the following when discussing when intervention is justified:

> [M]any have taken the 'realist' position that the relevant issue is conclusively settled through an analysis of the politically possible: if the Council-or the permanent five-can agree, then there is little more to say. . . . [33]

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[29] U.N. CHARTER art. 37, para 2:

> If the Security Council deems that the continuance of the dispute is in fact likely to endanger the maintenance of *international peace and security*, it shall decide whether to take action under Article 36 or to recommend such terms of settlement as it may consider appropriate.

(Emphasis added.)

[30] Gordon, *supra* note 12, at 524; Trachtenberg, *supra* note 6, at 30.

[31] U.N. Doc S/23500 (Jan 31, 1992). Taken from the first Security Council Summit in 1992.

[32] Ann-Marie Slaughter, 4:2 J. OF TRANS. L. & COM. PROB. 377, 404 (1994). In her article, Professor Slaughter suggests democracies rarely go to war with each other, therefore, the best mechanism to ensure international peace and security is through world-wide democracy. *Id.*

[33] Koskenniemi, *supra* note 28, at 327.

While it is difficult to define the parameters of the emerging norm of intervention, there is little doubt as to it existence, specifically when justified by the UN on a multilateral basis.

A conflict has developed, however, particularly in the United States, between the emerging norm of justified intervention based on humanitarian factors and intervention based on vital national interests. This conflict has caused the United States to vacillate between recognition and repudiation of the justified norm of intervention. This vacillation by the United States has directly influenced the UN, which as a practical matter cannot conduct or authorize an intervention operation without the active participation of the United States. No country other than the United States has the capacity to project power for multilateral intervention operations. The essential nature of United States involvement in intervention operations further complicates the definition of the emerging norm of justified intervention as "vital national interests" of the United States will always be linked with a multilateral UN intervention operation. The following sections of this Article will explore the current factors that the United States considers important in determining when to support multilateral UN intervention or act unilaterally.

III. OPTIONS AVAILABLE TO THE UNITED NATIONS.

During the Cold War, the efficacy of the UN was considered marginal when dealing with international conflict. During the first 40 years of its existence, only 13 peace operations were conducted. [34] Between 1945 and 1990, there were 279 vetoes on matters involving international security at the UN Security Council.[35] Since the end of the Cold War, the UN has been reinvigorated and looked upon as the primary tool for resolving complex humanitarian emergencies (or threats to international peace and security).[36]

In 1992, the UN Secretary General Boutros-Boutros Ghali submitted a report to the Security Council as a result of the first ever Head of State Security Council Summit. This report, entitled: *Agenda for Peace: Preventive*

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[34] U.S. Army Field Manual, *Peace Operations*, FM 100-23, v. (Dec. 1994) [hereinafter FM 100-23].

[35] VICTORIA K. HOLT, BRIEFING BOOK ON PEACEKEEPING, THE U.S. ROLE IN UNITED NATIONS PEACE OPERATIONS 1 (2nd ed. 1995).

[36] *Id.* at 2. Between 1988 and 1993 the UN authorized 20 peacekeeping missions. By the end of 1994, the UN had approved 35 peace operations. *Id.*

Diplomacy, Peacemaking, and Peacekeeping (hereinafter *Agenda*), was an optimistic perspective on the role of the UN in the post-Cold War era.[37] The following are five mechanisms available to the UN when there is a recognized or potential threat to international peace and security as outlined by the Secretary General:

1. Preventive Diplomacy;
2. Peacemaking;
3. Peacekeeping;
4. Peace-enforcement; and,
5. Peace-building.[38]

While these terms themselves are arbitrary, they have developed a common definition within the United States and particularly the United States military. I will attempt to define these categories as they have become known within the United States in order to provide a context in which to understand the available UN options. It should be noted that the concepts all play into the emerging norm of intervention, either extending or expanding the norm, or remaining within the presumption of nonintervention. Collectively, these tools are known as "peace operations" and shall be referred to as such throughout the remainder of this article. Peace operations have become the primary tool for dealing with complex humanitarian emergencies. It should be clear that in implementing these tools, the presumption of non-intervention and territorial integrity govern the relationship between the UN and sovereign states. Accordingly, the range of options available to the UN covers those acts which clearly recognize the norm of nonintervention or push the emerging norm of justified intervention.

A. Preventive Diplomacy.

Preventive diplomacy, "the watchword of the 1990s," [39] is defined in *Agenda* as "action to prevent disputes from arising between parties, to prevent existing disputes from escalating into conflicts and to limit the spread of the

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[37] Boutros-Boutros Ghali, *Agenda for Peace, Preventive Diplomacy, Peacemaking and Peacekeeping*, United Nations, New York (1992).

[38] *Id.*

[39] DIANA CHIGAS ET AL., PREVENTIVE DIPLOMACY AND THE ORGANIZATION FOR SECURITY AND COOPERATION IN EUROPE IN CREATING INCENTIVES FOR DIALOGUE AND COOPERATION (Abram and Antonia Handler Chayes ed., 1996).

latter when they occur"[40] (The term "parties" should be understood to be those intrastate players involved in a particular internal conflict). The goal of preventive diplomacy is to "create confidence" in the parties to a potential conflict and thereby lessen the probability of conflict.[41] Preventive diplomacy does not necessarily involve action by the UN Security Council and thus can take many forms.[42] The Secretary General himself may "shuttle" between the potential belligerents in an attempt to curtail the onset of hostilities. A special envoy may be dispatched by the Secretary General or a regional organization may be utilized.[43] Other types of "technical" methods of preventing conflict involve the "creation of hotlines," "risk reduction centers," methods to monitor troop movements[44] and the Organization for Security and Cooperation in Europe (OSCE).[45] Preventive diplomacy may involve some sort of "preventative deployment" of military forces or the establishment of a "demilitarized zone."[46] The U.S. Army Field Manual describes preventive diplomacy:

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[40] Ghali, *supra* note 37, at 12.

[41] *Id.* at 13.

[42] *Id.*

[43] Article 52 of the U.N. Charter specifically recognizes the role of the regional organization. Article 52 states in part:

> Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.
>
> . . . .
>
> 3. The Security Council shall encourage the development of pacific settlement of local disputes through such regional arrangements or by such regional agencies either on the initiative of the states concerned or by reference from the Security Council.

UN CHARTER art. 52, para 1,3.

[44] Boutros Boutros-Ghali, *An Agenda for Peace: One Year Later*, ORBIS, Summer 1993, at 324.

[45] *See infra* footnote 54.

[46] Ghali, *supra* note 37, at 13.

> Preventive diplomacy involves diplomatic actions taken in advance of a predictable crisis to prevent or limit violence. In more tense situations, military activities may support preventive diplomacy. Such support may include preventive deployments. . . . The objective is to demonstrate resolve and commitment to a peaceful resolution while underlying the readiness and ability . . . to use force if required.[47]

The deployment to the former Yugoslav Republic of Macedonia by UNPROFOR following Security Council resolution 842 in 1993 was the first preventive deployment in the history of the UN.[48]

John Hirsch and Robert Oakley, describe preventive diplomacy this way:

> Effective preventive diplomacy is hardly a matter of happenstance, it requires a delicate mix of timing, negotiating strategies, and the right personalities for effective mediation, as well as encouragement and properly applied pressure and persuasion from outside parties.[49]

Oftentimes the state facing the crisis will be reluctant to accept or consent to outside intervention in the form of preventive diplomacy as this may appear to be a sign of weakness. This weakness could then erode further the authority of the leadership in the threatened country.[50] States will rely heavily on the norm of nonintervention to keep other states from intervening in their internal affairs. Potential intervening states often willingly accede to this presumption as they may lack the political will to intervene in a *potential* crisis (or a crisis "not yet ripe" for resolution).[51] It is only after the conflict occurs or ripens

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[47] FM 100-23, *supra* note 34, at pg. 2-3. Preventive deployments theoretically can be used in a variety of situations. According to the FM 100-23, the following options are listed:

- International or national crisis, at the request of the government or parties concerned.
- Interstate disputes, at the request of one or more of the parties concerned.

Id.

[48] THE UNITED NATIONS AND THE SITUATION IN THE FORMER YUGOSLAVIA, U.N. Dept. of Public Information, Ref. Rev. 4, 11 (1995).

[49] JOHN L. HIRSCH & ROBERT B. OAKLEY, SOMALIA AND OPERATION RESTORE HOPE 170 (1995).

[50] Chigas, *supra* note 39, at 30.

[51] *Id.* at 29.

that countries will seek to rely on the emerging norm of justified intervention and engage in action to stop it. This course of conduct is the more costly and burdensome, as restoring order in an ongoing crisis usually entails more risk, resources and effort. It is as if countries simply turn a blind eye and rely on the norm of nonintervention when it comes to a brewing dispute, hoping that it will not rise into a full-fledged conflict. Countries are also at a loss to define an acceptable plan of action for a potential crisis and thus are further deterred from taking preliminary action. Oakley attributes a lack of preventive diplomacy in Somalia as well as Bosnia and Rwanda for perhaps heightening the amount of suffering and death.[52] Whatever form preventive diplomacy takes, it requires fact-finding to determine the existence of a threat and to provide early warning to take action if the international will exists.[53] All too often, early warning is provided but countries ignore the warning by stating that the matter is an internal problem or, more realistically not enough political support in the UN can be generated to do anything other than watch.[54]

B. Peacemaking.

The second mechanism listed in *Agenda* is peacemaking. Peacemaking is the "traditional role the UN has played over the years."[55] Peacemaking involves

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[52] HIRSCH & OAKLEY, *supra* note 49, at 170.

[53] Ghali, *supra* note 37, at 14-16.

[54] In addition to the UN's preventive diplomacy mission, regional organizations also play a significant role in preventive diplomacy. The Organization for Security and Cooperation in Europe (OSCE) is an example of such an organization. The OSCE began as a result of the Helsinki Final Act of 1975. Thirty five European (including the former Warsaw Pact countries) and North American states signed the act which established the Conference on Security and Cooperation in Europe (later changed to the Organization for Security and Cooperation in Europe). OSCE adopted several *unique* features that enabled it to meet the challenges inherent in preventing conflict in the post Cold War era. Chigas, *supra* note 39, at 32. First, it included a "comprehensive concept of security that included not only military and interstate political relations, but also economic cooperation and human rights." *Id.* Second, the "OSCE was established as a political agreement, not a legal treaty, and as a process rather than an organization." *Id.* Essentially OSCE was established as a cooperative regime, not a collective security pact, designed "to promote security through ongoing dialogue and persuasion, not coercion." *Id.* at 33. Finally, OSCE "established a decision making process based on consensus." *Id.* The consensus model ensures that the major powers will not be subject to the will of the majority states, but also that the smaller states will have a voice in those areas in which they have an interest.

[55] DONALD M. SNOW, PEACEKEEPING, PEACEMAKING, AND PEACE ENFORCEMENT: THE U.S. ROLE IN THE NEW INTERNATIONAL ORDER, STRATEGIC STUDIES INSTITUTE, U.S. ARMY WAR COLLEGE (Feb. 1993).

action taken under Chapter VI of the UN Charter.[56] Specifically, Article 33 provides:

> 1. The parties to any dispute, the continuation of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.
>
> 2. The Security Council shall, when it deems necessary, call upon the parties to settle their disputes by such means.[57]

The goal of peacemaking is to get the parties to the negotiating table to resolve their disputes without resort to the use of force.[58] Various approaches have been taken under the guise of peacemaking. The Secretary General or his representative may undertake to conduct mediation or negotiation with support of the Security Council or the General Assembly of the UN.[59] The World Court is another mechanism that is available to parties to a conflict. [60] However, the World Court has not enjoyed the success envisioned by its creation because the jurisdiction of the court is voluntary.[61] The Secretary

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[56] Ghali, *supra* note 37, at 12.

[57] U.N. CHARTER art. 33.

[58] Donald Snow from the Strategic Studies Institute of the U.S. Army War College believes that the definition of Peacemaking offered by Boutros Boutros-Ghali is too restrictive. He states that it "deals only with the lowest end of possible actions that can be taken to deal with warring combatants and to create peace." SNOW, *supra* note 55, at 16. Snow attempts to distinguish between "diplomatic peacemaking" and "military peacemaking" the former being of the type contemplated by Boutros Boutros-Ghali, while the latter is more akin to Peace Enforcement as the Americans have come to understand it. *Id.* Peacemaking as understood by Snow will be discussed in this paper under the heading of Peace Enforcement.

[59] Ghali, *supra* note 37, at 21-22. The efforts of Cyrus Vance and David Owen in the former Yugoslavia is an example of Peacemaking. Boutros Boutros-Ghali, *Agenda for Peace: One Year Later*, ORBIS, Summer 1993, at 327; Snow, *supra* note 55, at 16.

[60] Ghali, *supra* note 37, at 22-23.

[61] *Id.* The Statute of the International Court of Justice provides in Article 36 (2) that: "[S]tates. . . may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes. . . ." The United States originally accepted this jurisdiction in 1946 but later withdrew its consent on Oct. 7, 1985, after the decision of the World Court brought by Nicaragua

General in *Agenda* encourages a revitalization of the World Court by recommending that member states, without reservation, accept its jurisdiction.[62] Additionally, he also urges member states to support the trust fund established to assist those countries that cannot afford the cost of litigation before the World Court.[63]

Additional types of peacemaking involve the establishment of interim UN offices. Interim UN offices have been set up in countries such as Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Ukraine and Uzbekistan to provide a vehicle for pacific settlements of disputes.[64] Again, peacemaking rests on the side of presumption of nonintervention and thus requires the consent of parties to the conflict.

C. Peacekeeping.

The third mechanism mentioned in *Agenda* is peacekeeping.[65] At the onset of 1995, there were 17 peacekeeping operations being conducted throughout the

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against the United States regarding the mining of the harbors in Nicaragua. LOUIS HENKIN ET AL, INTERNATIONAL LAW: CASES AND MATERIALS 810-815 (3rd ed. 1993).

[62] Ghali, *supra* note 37, at 22-23.

[63] *Id.*

[64] Boutros Boutros-Ghali, *An Agenda for Peace: One Year Later*, ORBIS, Summer 1993, at 326.

[65] A number of conditions identified by Boutros-Boutros Ghali as critical to successful Peacekeeping Operations are:

a. Clear and practicable mandate;

b. cooperation of the parties in implementing that mandate;

c. the continuing support of the Security Council;

d. the readiness of the member states to contribute the military, police and civilian personnel, including specialists;

e. United Nations command at headquarters and in the field; and

f. adequate financial and logistics support.

Ghali, *supra* note 37, at 29.

world.[66] The cost of peacekeeping is estimated at over 3.6 billion dollars annually.[67] The traditional definition of a peacekeeping force is a "lightly armed, defensively oriented observer force that physically separate former combatants and observe their adherence to the cease fire while negotiations occur."[68] Peacekeeping requires "consent of all parties concerned and is normally considered actions taken under Chapter VI of the UN Charter."[69] Peacekeeping entails "monitoring and enforcing a cease-fire" and "it proceeds in an atmosphere where peace exists and where the former combatants minimally prefer peace to continued war."[70]

One can further distinguish peacekeeping operations as either "observer missions" or "peacekeeping missions."[71] Observer missions such as the United Nations Observer Mission in El Salvador[72] usually involve reporting and monitoring. The observers do not "interpose themselves between belligerent parties,"[73] whereas in the more traditional peacekeeping mission, such as the United Nations Force in Cyprus, the peacekeeping force may "occupy a

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[66] General Assembly/Security Council, *Supplement to an Agenda for Peace: Position paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations*, A/50/60 s/1995/1, Jan. 3, 1995 [hereinafter *Supplement*].

[67] *Id.* at 4. *See also Peace Operations - Information on U.S. and U.N Activities*, GAO Reports, Feb. 14, 1995, *available in* LEXIS, Nexis library, CURNWS file.

[68] SNOW, *supra* note 55, at 19.

[69] Ghali, *supra* note 37, at 12. *See also* JOINT TASK FORCE COMMANDER'S HANDBOOK FOR PEACE OPERATIONS, JOINT WARFIGHTING CENTER, Feb. 28, 1995[hereinafter JTF HANDBOOK]. This U.S. military publication attempts to define peacekeeping from other forms of UN action so as to better inform the military commander what the role and mission of the force will be under a specific type of action. The handbook lists Peacekeeping as a Chapter VI activity. *Id* at 2.

[70] SNOW, *supra* note 55, at 4.

[71] HOLT, *supra*, note 35. JTF HANDBOOK, *supra* note 69, at 2.

[72] For a listing of all on-going peace observer missions and peacekeeping missions through the end of 1994 as well as countries cost and participation breakdown, *see* PAMELA L. REED ET AL., THE HANDBOOK ON UNITED NATIONS PEACEKEEPING, HENRY L. STIMSON CENTER, Handbook No. 3, (1995).

[73] FM 100-23, *supra* note 34, at 4-5.

disengagement line or buffer zone at the interface between the belligerent parties."[74]

From 1992 until March 1995, twelve additional peacekeeping operations were added[75] which generated or caused a unique (and quick) learning cycle to occur within the UN regarding the conduct of peacekeeping operations in general. The most notable are Bosnia, Somalia and Haiti. These operations and their perceived shortcomings were a dose of reality that, to a great extent, extinguished the post-Cold War and post-DESERT STORM euphoria that existed in the UN. These operations, particularly Somalia, resulted in a retreat for the emerging norm of justified intervention and again firmly grounded the presumption of non-intervention. [76]

Consent from the host country distinguishes peacekeeping from peace enforcement. Charles Dobbie argues that "the conduct of peacekeeping depends on the presence of a workable modicum of in-theater consent and that such consent should determine the manner in which peacekeeping operations are planned, directed and conducted at all levels."[77] If consent is not present, then something "other" than peacekeeping is taking place. Dobbie believes that

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[74] *Id.* at 5-6.

[75] HOLT, *supra* note 35, at 4. For information regarding previous peace operations, *see generally*, THE BLUE HELMETS: A REVIEW OF UNITED NATIONS PEACE-KEEPING (2nd. ed. 1990); PEACE-KEEPING OPERATIONS PAST AND PRESENT, UNITED NATIONS (1994); UNITED NATIONS, RESTORING HOPE: THE REAL LESSONS OF SOMALIA FOR THE FUTURE OF INTERVENTION (1994).

[76] The "reality check" is evident in the 1995 *Supplement* to the *Agenda*. In the *Supplement*, the Secretary General re-emphasized three historical or classical factors in addition to those listed *infra*, which have been always considered the most "important" for the success or failure of the Peacekeeping activities. These classical factors are:

a. Consent of the parties;

b. Impartiality; and,

c. Non-use of force except in self defense.

Supplement, *supra* note 66, at 9.

[77] Charles Dobbie, *A Concept of Post-Cold War Peacekeeping*, SURVIVAL, ILSS Quarterly, Vol. 36, No. 3, at 121 (1994).

consent is the dividing line that creates "mutually exclusive" categories between peacekeeping and peace enforcement.[78]

The U.S. Army field manual, however, does not define peacekeeping and peace enforcement with bright line definitions. The manual specifically discusses a "dynamic environment" in which consent, levels of force and impartiality are "not constant and may individually or collectively shift during the course of an operation."[79] Understanding the distinction between consent oriented forces and some "other" type of force is critical to military planners. If military forces are given a mission wherein they believe that consent exists for their activities, then the type of force will be different than if the mission requires going into a hostile area where consent is not likely or unworkable. As Donald Snow observes:

> The danger is in thinking that peacekeeping forces can be inserted into peace-enforcement situations; that somehow the situations represent a lineal extension of one another. Peace-enforcement requires, as argued, very different forces qualitatively and quantitatively than does peacekeeping. The result of confusing roles and forces has been most evident in the placing of the UNPROFOR peacekeepers in a war zone in Sarajevo, where the peacekeepers were placed in a peace enforcement situation and have proven - unsurprisingly -not to be up to a task for which they are unprepared.[80]

General John A. MacInnis, RCAF, Deputy Commander of UNPROFOR from 1993 to 1994 echoed Snow's remarks when expressing his concern regarding the transition from peacekeeping to peace-enforcement where consent breaks down or does not exist and the level of force necessary to conduct the operation increases:

> The closer a peacekeeping mission approaches peace enforcement, the more likely the mission is entering not a gray zone, as some would have it, but a zone of paralysis where any mandate component, be it delivery

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[78] *Id.*

[79] FM 100-23, *supra* note 34, at 12.

[80] SNOW, *supra* note 55, at 19.

of humanitarian aid, the monitoring of weapons or simply mission self-support, becomes difficult, if not impossible, to carry out.[81]

General MacInnis asserts that a force can only carry out the tasks for which it is trained and equipped. Anytime that mission "creeps" away from the original intent, then the effect will bring the mission to a standstill. He argues that forces must remain clearly on the stated side of the consent continuum for which they are mandated. Movement toward the nonconsent end of the continuum is the dooming factor in peacekeeping missions today.[82] Again, the conflict between the emerging norm of justified intervention and the presumption of nonintervention is viewed as critical to any operation mounted to avert humanitarian crisis. Pushing too far towards the intervention/nonconsent side of the continuum will necessarily lead to friction and potential mission failure - specifically if the original peacekeeping force was not prepared to operate in that environment.

Recent activities conducted by peacekeepers that have led to a loss of consent of the parties were identified in the *Supplement*. These three conditions are:

a. Protecting humanitarian operations during continuing warfare;

b. Protecting civilian populations in designated safe areas; and,

c. Pressing the parties to achieve national reconciliation at a pace faster than they were ready to accept.[83]

In these cases, the peacemakers were given additional missions by the UN. This increase in responsibility put the peacekeepers in a more proactive role (and required more aggressive "use of force" rules) during their operation and thus created the danger that Donald Snow and General MacInnis addressed above.[84] An example of this problem is when, in Somalia, the UNISOM II force, was

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[81] John A. MacInnis, *Peacekeeping and Postmodern Conflict: A Soldiers View*, MEDITERRANEAN Q., Spring 1995, at 36. General MacInnis previously served as UN chief of mission in Cyprus and supervised Canadian participation in the UN activities in Namibia, Iran-Iraq and Afghanistan.

[82] *Id.* at 35-36.

[83] *Supplement supra* note 66, at 9.

[84] *Id.*

given the "arrest" order for General Aideed.[85] Stated differently, it would seem that the conflict between the presumption of nonintervention and the norm of justified intervention is what creates the conflict in real terms between the interveners and the government being subject to intervention.

D. Peace Enforcement.

The fourth mechanism identified in *Agenda* is peace enforcement. Peace enforcement has been the subject of a wide variety of definitions and is conceptually the most confusing to recognize. Boutros-Boutros Ghali discussed "Peace Enforcement Units" under the heading of Peacemaking in *Agenda*. He describes it as follows:

> The mission of forces under Article 43 would be to respond to outright aggression, imminent or actual. Such forces are not likely to be available for some time to come. Cease-fires have often been agreed to but not complied with, and the United Nations has sometimes been called upon to send forces to restore and maintain the cease-fire.[86]

The former Secretary General envisions the use of Peace Enforcement Units *after* agreement to a cease-fire has been reached. Others do not accept this definition. For instance, Oakley notes, "[o]nce a crisis has gone beyond preventive diplomacy or small scale conventional peacekeeping, the distinction between peacekeeping and peace enforcement cannot easily be maintained."[87] The United States Joint Staff defines peace enforcement as "the physical interposition of armed forces to separate ongoing combatants to create a cease-fire that *does not exist*."[88] Additionally, the *Handbook on United Nations Peace Operations* defines peace enforcement as the use of "coercive force to suppress conflict in an area, *creating a de facto* cease-fire to protect non-combatant populations and facilitates the opening of negotiations among local factions."[89]

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[85] HIRSCH & OAKLEY, *supra* note 49.

[86] Ghali, *supra* note 37, at 26.

[87] HIRSCH & OAKLEY, *supra* note 49, at 162.

[88] SNOW, *supra* note 55, at 4 (emphasis added).

[89] REED ET AL., *supra* note 72.

This Article considers peace enforcement operations consistent with the definition of the Joint Staff; that is, when the UN Security Council orders the use of force *without consent* of the sovereign[s] involved to separate parties pursuant to Chapter VII of the United Nations Charter. In Somalia, the UN Security Council adopted resolution 814, which called for the establishment of UNISOM II in Somalia. This was the first time since the Korean War that a UN commanded force was given a Chapter VII mandate.[90] The UNITAF mission in Somalia and OPERATION DESERT STORM were authorized under Chapter VII resolutions, but were not UN commanded force. Rather, they were U.S. led initiatives with a Chapter VII mandate permitting member states to act on their initiative.

E. Peace Building.

The last mechanism mentioned by *Agenda* is peace building. The idea behind post-conflict peace building is to "form cooperative projects that link two or more countries in a mutually beneficial undertaking that can not only contribute to economic and social development but also enhance the confidence that is so fundamental to peace."[91] Specifically mentioned as peace building initiatives were projects such as agricultural, transportation and utilities.[92]

One mechanism not specifically listed as a "peace operation" but mentioned throughout *Agenda* and elsewhere is the humanitarian operation. It is difficult to categorize humanitarian operations as either peacekeeping, peacemaking or peace enforcement without examining the particular mandate given by the Security Council. Humanitarian operations usually occur where there is no cease-fire in place and it is necessary to relieve human suffering in the "midst of a conflict or a situation of anarchy."[93] These operations usually occur *within* the emerging norm of justified intervention. In most cases, humanitarian missions are conducted by the military in conjunction with a humanitarian agency. These agencies, such as the UN High Commission on Refugees, the

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[90] HIRSCH & OAKLEY, *supra* note 49, at 111.

[91] Ghali, *supra* note 37, at 32.

[92] *Id.*

[93] REED ET AL., *supra* note 72, at 4.

International Committee for the Red Cross and other "feeding" programs are key to the success of a humanitarian mission.[94]

The Somali situation was one such humanitarian operation. UNITAF was a U.S.-led force designed to provide humanitarian relief to famine stricken Somalia. In Somalia, the UN Security Council found a "threat to international peace and security" and used its Chapter VII authority to authorize intervention *without the consent* of the Somali government (although the Addis Ababa accords in January 1993 did provide a consensual structure for the follow-on UNISOM II forces which took the place after UNITAF).[95] UNPROFOR in Bosnia was given a humanitarian mandate by UN Security Council Resolution 776. Resolution 776 called for UNPROFOR to provide support to the UN High Commission on Refugees in the delivery of humanitarian supplies.[96] As in peacekeeping, critical to any humanitarian mission is the concept of impartiality - both on the part of the non-governmental agencies and military that are participating. General MacInnis described this notion with relation to humanitarian operations as follows:

> To be successful in the execution of the humanitarian operation, the entire UN has to be seen as impartial. The responsibility for this impartiality is twofold. First, and I think it goes without saying, the humanitarian agency must be impartial if aid is not to become a weapon in the conflict, and secondly, the escorting agency, in this case, UNPROFOR, must be equally nondiscriminatory. In essence, there must be a military-humanitarian ***bond,*** in which the armed force is seen to be but a protective extension of the assistance operation.[97]

The above mentioned mechanisms are the generally accepted "tools" available to the UN for Peace Operations. In addition to these government run operations, there are a host of non-governmental organizations that play a significant role in the peace process. These NGOs often work in close coordination with the UN or other military force to supplement the available tools. NGO involvement creates a host of issues that must be resolved if

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[94] MacInnis, *supra* note 81, at 37-38.

[95] REED ET AL., *supra* note 72, at 3. HIRSCH & OAKLEY, *supra* note 49, at 49-54, 94-96.

[96] MacInnis, *supra* note 81, at 37.

[97] MacInnis, *supra* note 81, at 37-38 (emphasis added).

humanitarian operations are to be successful, however, they are beyond the scope of this article.[98]

These "tools" for peace are those that are now commonly being used in the international community when engaging in complex humanitarian emergencies. It is apparent that the tools seek to strike a balance between the presumption of nonintervention and the emerging norm of justified intervention. It is the conflict between these two doctrines which creates most of the problems during the course of peace operations. Without belaboring the obvious, the United States plays a significant, if not the most significant, role in determining the criteria and normative content underlying the use of these tools. As a permanent member of the UN Security Council, the U.S. position on when to support or participate in these operations can be the critical factor in determining if the "world" will respond. Accordingly, in continuing to outline the structure and process of U.S. military intervention, I will briefly outline how the U.S. decides whether to intervene internationally.

IV. CRITERIA UTILIZED BY THE UNITED STATES FOR U.S. MILITARY INTERVENTION.

During the Cold War, the norm of nonintervention gave way, in the eyes of the United States, when there was a threat to a "vital" national interest and/or there was a need to contain the Soviet threat.[99] However, since the end of the Cold War and the expansion of peace operations world wide, there has been significant internal debate regarding under what circumstances the U.S. should intervene. Intervention in DESERT STORM, which was the high point for multilateral operations, could still be clearly based on customary international rules of self-defense, deterring a blatant act of aggression and on our vital national interests.[100] The success of DESERT STORM is well documented and

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[98] For a discussion of NGO activity in conflict management, *see generally* ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY; COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS (1996).

[99] The National Security Strategy of Engagement and Enlargement, The White House, Feb. 1 1995 [hereinafter NSSEE] (what constitutes a "vital" national interest is discussed *infra*, note 119); U.S. State Dept. Dispatch, Vol. 5. No 46 at 766 Nov. 14 1994, statement of National Security Advisor, Anthony Lake.

[100] Colonel James P. Terry, USMC, *A Legal Review of U.S. Military Involvement in Peacekeeping and Peace Enforcement Operations*, 42 NAV. L. REV. 79 81-82 (1995) (Colonel Terry was Legal Counsel for the Chairman of the Joint Chief of Staff from 1992-1995); Mark Hutchinson, *Restoring Hope: U.N Security Council Resolutions for Somalia and an Expanded Doctrine of Humanitarian Intervention*, 34 HARV. INT'L L.J. 624, 625 (1993).

does not have to be re-evaluated here, but it was clearly a summit of credibility for the UN which perhaps hastened its involvement in activities not traditionally within customary rules of self-defense (e.g., humanitarian intervention). [101]

The Clinton Administration, continuing to wave the "UN banner" after the success in the Gulf War, came into office with the notion that the United States would be a "team player" with the UN in the New World Order. As late as 1993, some writers even suggested that the Clinton administration had "ambitious plans to expand the role of the UN as a global police force and to subordinate U.S. policy to UN mandate." [102] While this was clearly an overstatement, there was movement in that direction. In what became known as the "Tarnoff Doctrine" (named after Under Secretary of State Peter Tarnoff), the United States "would act multilaterally in the future . . . because we allegedly no longer had the leverage, the influence, the inclination, or the resources to act by ourselves."[103] Morton Halperin, a senior National Security Council staff member wrote:

> The United States should explicitly surrender the right to intervene unilaterally in the internal affairs of other countries by overt military means or by covert operations. Such self-restraint would bar interventions like those in Grenada and Panama, unless the United States first gained the explicit consent of the international community acting through the UN Security Council or a regional organization.[104]

This discourse indicated that the United States was in essence acknowledging that the international community, namely the UN Security Council, would decide whether an act was a threat to international peace and security. The justification for intervention, in the eyes of the United States, shifted from a "national

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[101] For thorough review of DESERT STORM from both the military and political perspective; *see* JOHN NORTON MOORE, CRISIS IN THE GULF: ENFORCING THE RULE OF LAW (1993)(the purpose of this book was to examine in detail the complex legal problems that arose from the invasion of Kuwait by Iraq). For a critical analysis of the Gulf War, *see* Roger Normand & Chris Jochnick, *The Legitimization of the Violence: A Critical Analysis of the Gulf War*, 35 HARV. INT'L L.J. 387 (1994). *See also* Jane Gilliland Dalton, *The Influence of Law on Seapower in Desert Storm*, 41 NAVAL L. REV. 27 (1993) (discusses the U.S. Naval perspective of the Gulf War).

[102] Rodman, *Declarations of Dependence*, 46 NATIONAL REVIEW 32, Vol. 11 (1994).

[103] *Id.*

[104] *Id.* (citing Morton Halperin, Comments FOREIGN AFFAIRS, Summer 1993).

interest" Cold War view, to one consistent with the emerging norm of intervention as discussed in Section II of this Article. The United States was willing to play along with those global emerging human rights norms and interventionist notions, which define sovereignty in much more relativistic terms.

The entire discourse regarding intervention made a remarkable shift since our involvement in Somalia, where no "vital" U.S. interests were at stake. Somalia caused the Clinton administration to back off of its stance of multilateralism and intervention based on the emerging norm of justified intervention.[105]

The deterioration of the UN/U.S. efforts in Somalia began after the United States turned control of the operation over to the UN on May 4, 1993. It was widely believed that the UN forces would be weaker than the U.S.-led forces that established the initial relief effort. General Aideed, the warlord and dominant political figure controlling much of the Somali resistance, was determined to test this hypothesis and stepped up his aggressive posture against the UN forces. The UN took action to control General Aideed by indicating that it wanted to inspect and inventory his weapon compound. Fighting broke out on June 5, 1993, after Pakistani peacekeepers began to fulfill the inspection and inventory requirement. General Aideed's troops (SNA) caught the Pakistani soldiers by surprise and, as a result, 24 Pakistani peacekeepers were killed. The UN responded with a resolution that essentially declared the SNA as the "enemy" of the UN force in Somalia. Over the ensuing months, the tensions between General Aideed's troops and the UN forces continued to escalate. On August 6, 1993 a land mine exploded in Mogadishu wounding 6 Americans. This apparently was the "final straw' for President Clinton. He ordered special operations forces to "snatch" General Aideed. The plan was to capture General Aideed and have him tried for murder in a third country. Seven weeks after the order came down to capture Aideed, a bloody firefight ensued in which 18 American soldiers died, 77 were wounded, and approximately 300 Somalis were killed with another 700 wounded. Bodie's of dead Rangers being dragged through the streets of Mogadishu were broadcast to the American people. As the body of one bloodied corpse was dragged through the streets of Mogadishu - the surrounding crowd was yelling "victory" and telling reporters "come look

[105] Terry, *supra* note 100, at 81. Tom Ashbrook, *UN Efforts Everywhere Turn to Dust; Downed Helicopter in Somalia Doomed a 'New World Order'; Who Will Keep the Peace*, BOSTON GLOBE, April 30, 1995, at 1. The Clinton Administration reversed itself after Somalia and blamed the Republican administration for allowing peacekeeping to be "all out of control" when the Clinton administration came into office. *Id.* For a discussion of the definition of "vital" national interests, *see infra,* note 119.

at the white man." In the aftermath of this debacle, Congress and the American people began calling for the withdrawal of the U.S. from Somalia and the U.S. eventually did just that.[106]

These tragic events were a defining moment for the United States in determining the course it would take in future intervention operations and led to the review of U.S. criteria regarding intervention. The review of the criteria for U.S. military intervention, as stated by the legal counsel to the Chairman of the Joint Chiefs of Staff, "reflects the Government's soul searching in the aftermath of our experience in Somalia."[107] One writer has even tabbed the word "Somalia Syndrome" to describe the change in policy that occurred as a result of events in Mogadishu.[108] Additionally, after the 18 Army Rangers were ambushed and killed, many Americans questioned the need for U.S. involvement in countries where there was little or no national interest. Members of Congress were also concerned with the ever-expanding number of peace operations. Congress was particularly concerned with the financing of these operations as well as the bloated nature of the UN bureaucracy.[109]

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[106] Terry, *supra* note 100. *See also* Colonel James P. Terry, *The Evolving U.S. Policy for Peace Operations*, 19 S. ILLINOIS LAW J. 119 (Fall 1994); Patrick J. Sloyan, *Somalia Mission Control; Clinton Called the Shots in Failed Policy Targeting Aidid*, NEWSDAY (Long Island, New York), Dec. 5, 1993, at 7; Keith B. Richburb, *Somalia Battle Killed 12 Americans, Wounded 78*, WASH. POST, Oct. 5, 1993, at A1. A comprehensive background of the Somalia operation can be found in JOHN L. HIRSCH & ROBERT B. OAKLEY, SOMALIA AND OPERATION RESTORE HOPE (1995). *See also* KENNETH ALLARD, SOMALIA OPERATIONS: LESSONS LEARNED (1995).

[107] Terry, *supra* note 100, at 82.

[108] Tom Ashbrook, *UN Efforts Everywhere Turn to Dust; Downed Helicopter in Somalia Doomed a 'New World Order'; Who Will Keep the Peace*, BOSTON GLOBE, Apr. 30, 1995, at 1.

[109] Regarding Congress' disdain for the UN and its need for reform *see*, Josh Friedman, *Candles, Carping for UN Its 50th Birthday is Greeted with Praise, Criticism*, NEWSDAY (Long Island, New York), Oct. 20, 1995, at A07, *available in* LEXIS, Nexis library, CURNWS file. *See also Background Briefing on UN Events by Senior Administration Official*, M2 Presswire, June 28, 1995, *available in* LEXIS, Nexis Library, CURNWS File; Thomas W. Lippman, *U.N. Debt Payoff Plan Proposed: Congress Could Expand Voice in Peacekeeping*, WASH. POST, Oct. 31, 1995, at A9 *available in* LEXIS, Nexis Library, CURNWS file. Colonel Harry G. Summers, Jr. USA (Ret.), Distinguished Fellow, U.S. Army War College, Syndicated Columnist for the Los Angles Times, put it best in a briefing to the Senate Armed Services Committee. Colonel Summers stated that in the "wake of the Mogadishu Debacle . . . the American people still take a 'jealous and proprietary interest' in their military's commitment. The Army still cannot be committed lightly." Regarding the Bosnian conflict, Colonel Summers stated: "With no vital U.S. interests involved, we should declare a pox on all their houses and let them have at it." *Hearings of Senate Armed Service Committee on Situation in Bosnia*, June 15, 1995, available in LEXIS, Nexis Library, CURNWS file. A Heritage Foundation study stated that : "Americans overwhelming support the use of

The review was completed with the signing of PDD 25 in May 1994. Entitled *The Clinton Administration's Policy on Reforming Multilateral Peace Operations*, PDD 25 is a classified document.[110] However, in May 1994, an unclassified press statement was released which outlines the relevant portions of the current U.S. policy.[111]

Specifically, PDD 25 addresses six categories regarding reform and improvement for U.S. military involvement in peace operations:

a. Choosing which Peace Operations to support;

b. Reducing U.S. costs for UN Peacekeeping;

c. Defining U.S. policy regarding Command and Control of American Military Forces in UN Operations;

d. Reforming/improving the UN's ability to manage peace operations;

e. Improving the way the U.S. manages and funds peace operations; and,

f. Creating better cooperation between the Executive and Legislative branches.[112]

This Article reviews the first category, *Choosing Which Peace Operations to Support,* in detail as it is this category that the National Security Council

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military force to protect vital U.S. military and economic interests. Americans also support the use of military force for humanitarian missions, such as the prevention of mass starvation. This support falls off quickly, however, when no vital U.S. interest is involved." Michael G. Franc, *Foreign Defense Policy: What American Think About Foreign and Defense Policy*, THE HERITAGE FOUNDATION Issue 94 -The Candidates Briefing Book, 298 (1994).

[110] Colonel James P. Terry, USMC, *A Legal Review of U.S. Military Involvement in Peacekeeping and Peace Enforcement Operations*, 42 NAVAL L. REV. 79, 81-82 (1995).

[111] White House Press Release, *The Clinton Administrations Policy on Reforming Multilateral Peace Operations*, Undated [hereinafter PDD-25]. At no time did this author ever consult, view or discuss classified information in the preparation of this Article. This was intentionally avoided so as to never call into question the classification of the material presented.

[112] PDD-25, *supra* note 111.

developed for evaluating what level and extent of support[113] the United States will give to a proposal for a peace operation.[114] PDD 25 and subsequent statements by administration officials clearly shift the United States back to a " vital national interest" priority and away from an emerging norm of justified intervention when determining whether the U.S. will intervene in the affairs of another country.

A. Choosing which peace operations to support. [115]

In voting to *support* UN sponsored Peace Operations, PDD 25 requires the U.S. to consider the cumulative weight of the following key factors:

a. The extent to which any U.S. interest will be advanced and whether there is an international community interest for dealing with the problem on a multilateral basis. Although the directive does not state what U.S. interests are, it does state that "preserving and restoring peace" is a U.S. interest.[116] Vital U.S. interests have been identified elsewhere however.[117] The President's National Security Strategy outlines three levels of interest. These interests are

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[113] Support does not always mean participation. Rather, support can simply mean voting for a proposed operation in the UN and paying assessed costs. Commonly, however, support entails some type of U.S. military personnel involvement.

[114] The legality of the PDD-25 criteria has recently been called into question as a result of the court-martial of Army Specialist Michael New. Specialist New was ordered to be part of the UN commanded force in Macedonia. Specialist New refused to wear the blue beret and arm patch of the UN and to place himself under the command of a UN commander. Specialist New stated: "I am not a United Nations citizen or a UN Soldier. I am an American and an American soldier." New's attorney sought release of PDD-25 as the basis for the order to send New to Macedonia. The defense wanted to examine PDD-25 and subject it to judicial scrutiny. Specialist New was eventually convicted at trial and now awaits appeal through the military system. Several members of Congress have supported New's case and his request for a hearing on PDD-25 is in the works. *G.I.s Trial May Test UN Troop Setup*, CHI. TRIB. Nov. 19, 1995, at C12. Rowan Scarborough, *Peacekeeping Policy Arouses Curiosity: Clinton's PDD-25 Begs Clarification*, WASH. TIMES, Feb. 1, 1996, at A12.

[115] When outlining this new policy, "U.S. National Security Advisor Anthony Lake made clear that while the Administration would like to 'end every conflict' and 'save every child' neither America nor the international community 'have either the mandate or the resources, or the possibility of resolving every conflict. . .'" VICTORIA K. HOLT, BRIEFING BOOK ON PEACEKEEPING: THE U.S. ROLE IN UNITED NATIONS PEACE OPERATIONS 17 (2nd ed. 1995).

[116] PDD-25 *supra* note 111, at 4.

[117] NSSEE, *supra* note 99, at 12.

classified as "vital," "important," and "humanitarian."[118] Vital national interests have been defined as "interests that are of a broad overriding importance to the survival, security and vitality of our national entity. . . ." [119] These interests include, "defense of U.S. territory, citizens, allies and economic well being."[120] The second category of "important" interests include those interests that "do not affect our national survival, but do affect importantly our national well-being, and the character of the world in which we live."[121] The third category of interests includes "primarily humanitarian interests."[122] It is the category of "vital" national interests which is the decisive factor for United States military involvement:[123]

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[118] *Id.*

[119] *Id.* In further defining those interests that are "vital" the NSS does expand on those collective groups of interests that go to the core of our national survival. They are:

(1) Combating the Spread and Use of Weapons of Mass Destruction and Missiles;
(2) Enhancing American Competitiveness;
(3) Enhancing Access to Foreign Markets;
(4) Strengthening Macroeconomics Development;
(5) Providing for Energy Security;
(6) Promoting Sustainable Development Abroad; and,
(7) Promoting Democracy.

[120] *Id.*

[121] *Id.*

[122] *Id.*

[123] The NSSEE specifically emphasizes the importance of "vital" national interests as the most important and decisive consideration for the use of force. Specifically, the NSSEE states:

> The decision on whether and when to use force is therefore dictated first and foremost by our national interests. In those specific areas where our *vital* or survival interests are at stake, our use of force will be decisive and, if necessary, unilateral. In other situations posing a less immediate threat, our military engagement must be targeted selectively on *those that most affect our national interests* - for instance, areas where we have a sizable economic stake or commitments to allies, and areas where there is a potential to general substantial refugee flows into our nation or our allies.

Id at 12-13.

b. Whether there is an actual threat to international peace and security;[124]

c. Are there clear objectives and an understanding of where the mission fits on the spectrum between traditional peacekeeping and peace enforcement;

d. Is there is a cease-fire in place if traditional Chapter VI operations are contemplated;

e. If Chapter VII peace enforcement operations are contemplated, is the threat to international peace and security considered significant;

f. Are the means to accomplish the mission available;

g. What are the political, economic and humanitarian consequences of inaction; and,

h. What is the anticipated duration of the operation?[125]

In voting to participate in a UN peacekeeping operation (Chapter VI), the U.S. will apply a more stringent analysis. The factors stated in the White House press release include:

a. Whether U.S. participation advances specific U.S. interests and the unique and general risk to U.S. personnel have been weighed and are considered acceptable;

b. Whether personnel, funds and resources are considered available;

c. Whether U.S. participation is considered necessary for the success of the operation;

d. Whether the role of U.S. forces is tied to clear objectives and an endpoint for U.S. participation is identified;

e. Whether domestic and Congressional support exists or can be marshaled; and,

f. Whether command and control are acceptable.[126]

If the Peace Operation is considered a combat type UN Chapter VII operation, then even more stringent requirements will be considered. They are:

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[124] (1) International Aggression.

(2) Urgent Humanitarian disaster coupled with violence.

(3) Sudden interruption of established democracy or gross violation of human rights coupled with violence, or threat of violence. PDD 25, *supra* note 111, at 3-4.

[125] *Id.*

[126] *Id.* at 4-5.

a. Whether there exists a determination to commit sufficient forces to achieve clearly defined objectives;

b. Whether there exists a plan to achieve those objectives decisively; and,

c. Whether there exists a commitment to reassess and adjust, as necessary the size, composition and disposition of our forces to achieve our objective.[127]

What PDD 25 has done is unmistakable. Support or participation will not be forthcoming from the United States if the peace operation does not advance vital U.S. interests. Although there is *dicta* in the policy statement that humanitarian concerns are within the spectrum of U.S. interests, those concerns alone, no matter how compelling, will not trigger U.S. action unless tied to a vital U.S. interest.

In addition to the policy restrictions on U.S. involvement in UN peace operations, there are a number of legal restrictions that Congress has placed on the President. There are two significant pieces of legislation that impact on U.S. support of UN Peacekeeping Operations. That legislation must be considered when deciding whether or not to support Peace Operations. Additionally, if an operation has been approved by the U.S. and adopted by the UN there are additional legal issues that must be resolved.

The two pieces of U.S. legislation relevant to this inquiry are the United Nations Participation Act[128] (UNPA) and the Foreign Assistance Act of 1961, as amended (FAA).[129] Both acts address the limits of the President's authority in the type of support he may provide to the UN.

Section 287d-1 of the UNPA authorizes the President to assign U.S. military troops to Chapter VI Peace Operations to serve in a variety of roles, including that of observers and guards, and in other noncombatant capacities. However, his authority is limited to committing no more than 1,000 personnel at any one time.[130] Sections 2388 and 2390 of the FAA authorizes the head of an agency, subject to presidential authorization, to assign personnel to an international organization to serve on the agency's international staff. No limit

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[127] *Id.* at 5.

[128] 22 U.S.C. § 287 et seq. (1995).

[129] 22 U.S.C. § 2151 et seq. (1995).

[130] 22 U.S.C. § 287d-1(a).

on the number of personnel has been stated in this legislation. [131] This authority was used in UNISOM II to provide U.S. logistical support to the UN commanded force.[132] Section 287d-1 of the UNPA authorizes the President to furnish facilities, services and other assistance and the loan of equipment by the Department of Defense in support of UN activities directed to peaceful settlement of disputes, such as Chapter VI operations. This section specifically precludes use of this authority to support Chapter VII Peace Enforcement Operations. Reimbursement is required for use of this authority although the President may waive it.[133] Section 2357 of the FAA authorizes, upon determination of the President that it is consistent with and in furtherance of the purposes of the FAA, any agency to furnish commodities and services to international organization for peacekeeping and disaster relief efforts. Reimbursement is required under this statute and cannot be waived.[134]

These legal restrictions as well as others such as the War Powers Act are obstacles to participation in any proposed Peace Operation. Additionally, the Senate has proposed the Peace Powers Act and the House has proposed the National Security Revitalization Act as mechanisms to rein in U.S. involvement in future Peace Operations.[135] Both of these acts attempt to restrict the President's activities as the Commander-in-Chief -- further evidence that Congress is continually sensitive to the sending of U.S. troops into harm's way when vital U.S. interests are not at stake.

Regardless of the foregoing legal restrictions placed on the President, it was PDD 25's more stringent criteria that led to the lack of U.S. support for the proposed peacekeeping mission in Rwanda and threatened to create a climate where similar scenarios could repeat themselves.[136] I will explore in greater detail PDD 25's impact on Rwanda in Section VI below. However, prior to discussing Rwanda, PDD 25 addresses another area that was supposedly dead under the current administration's quest for robust multilateralism - that is, unilateral U.S. military intervention.

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[131] 22 U.S.C. §§ 2388 & 2390.

[132] HIRSCH & OAKLEY, *supra* note 49, at 109.

[133] 22 U.S.C. § 287d-1 (1995).

[134] 22 U.S.C. § 2357 (1995).

[135] Terry, *supra* note 100, at 86-87.

[136] HIRSCH & OAKLEY, *supra* note 49, at 171, footnote 23.

V. UNILATERAL ACTION BY THE UNITED STATES.

Not only did PDD 25 reset the clock on military intervention, it also scrubbed the "Tarnoff Doctrine" which sought to put an end to unilateral action by the United States. The possibility of unilateral intervention and the conditions under which it would be used was firmly reestablished in both PDD 25 and the follow-on National Security Strategy of the United States. The National Security Strategy indicates the primary mission of the United States military is to unilaterally "be prepared to fight and win two simultaneous regional conflicts"[137] otherwise referred to as "major regional contingencies" (MRC).[138] PDD 25 specifically states:

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[137] PDD-25 *supra* note 111, at 1.

[138] NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 8 (1995) [hereinafter NSS] NATIONAL MILITARY STRATEGY OF THE UNITED STATES OF AMERICA 5 (1995), [hereinafter NMS]; John H. Dalton, J.M. Boorda, Carl E. Mundy, *Forward...From the Sea*, Dept. of Navy, White Paper, undated. Combating two Major Regional Contingencies (MRC's) remains the centerpiece of strategic thought. In order to ensure this ability, the two strategic concepts which define this objective are stated in the NMS: Overseas Presence and Power Projection.

> *Overseas Presence*: Overseas forces, including some tailored for specific missions,*p826Xperfvariety of activities that promote stability and prevent conflict. Additionally, through overseas presence we maintain mobile, combat-ready forces capable of responding to a wide range of threats throughout the world. US forces overseas provide visible proof of our commitment to defend American interests with our allies and friends worldwide. Overseas presence is not a crutch for friends who refuse to bear their share of the burden; rather, it is an essential mechanism to support our fundamental interests in forward regions where the support of these interests can be developed.
>
> *Power Projection*: With fewer US forces permanently stationed overseas we must increase our capability to project power abroad. Credible power projection capability complements our overseas presence by acting as a deterrent to potential adversaries. Effective power projection capabilities also provide greater flexibility in employing military force. Coupled with overseas forces, the ability to project tailored forces through rapid, strategic mobility gives national leaders additional time for consultation and increased options in response to potential crises and conflicts.

Id. at 6-7.

However, this is not intended to lessen the significance of peace operations. Clearly, "peacekeeping can be one useful tool to help prevent the resolve such conflicts before they pose direct threats to our national security." PDD-25, *supra* note 111, at 1.

> When our interests dictate, the U.S. must be willing and able to fight and win wars, unilaterally, whenever necessary. To do so, we must create the required capabilities and maintain them ready to use. UN peace operations cannot substitute for this requirement. Circumstances will arise, however, when multilateral action best serves U.S. interests in preserving or restoring peace. In such cases, the UN can be an important instrument for collective action. [139]

President Clinton's National Security Advisor, Anthony Lake, identified seven categories in which the United States would use force, unilaterally if necessary, in furtherance of its national interests:

a. To defend against direct attacks on the United States, its citizens at home and abroad, and its allies. (Classic self defense under Article 51, UN Charter);

b. To counter aggression, which is central to preserving a peaceful world;

c. To defend our most important economic interests, because it is here that Americans see their most immediate personal stake in our international engagement;

d. To preserve, promote, and defend democracy, which, in turn, enhances our security and the spread of our values;

e. To prevent the dangerous proliferation of nuclear weapons and other weapons of mass destruction, to prevent acts of terrorism, and to combat the deadly flow of drugs;

f. To maintain our reliability. When the US makes commitments to other nations, we must keep our promises; and,

g. For humanitarian purposes, such as combating famine and other natural disasters and in cases of overwhelming violations of human rights.[140]

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[139] PDD-25, *supra* note 111, at 1 (emphasis added).

[140] U.S. Dept. of State Dispatch, Vol. 5, No. 46, at 766 (Nov. 14 1995) (Statement by National Security Advisor, Anthony Lake.) In his statement, Anthony Lake indicated that with the exception of attacks on our nation or allies, not one interest as stated will necessarily involve the unilateral use of our military.

According to Mr. Lake, the U.S. will act alone when its national interests are deeply threatened. There is, however, no definition of what "deeply threatened" means.

The United States' willingness to intervene unilaterally was made clear when U.S. Ambassador to the United Nations, Madeleine K. Albright, stated to Congress:

> UN Peacekeeping is not, in our view, a substitute for vigorous alliance and a strong national defense. When threats arise to us or to others, we will choose the course of action that best serves our interests. We may act through the UN, we may act through NATO, we may act through a coalition, we may sometimes mix these tools or we may act alone. But we will do what ever is necessary to defend the vital interests of the United States.[141]

Secretary of State Warren Christopher stated:

> Let us be clear: multilateralism is a means, not an end. It is one of the many foreign-policy tools at our disposal. And it is warranted only when it serves the central purpose of American foreign policy: to protect American interests. [142]

Following in the analysis for multilateral intervention, unilateral U.S. action firmly rests within a framework of vital national interests. If interests to the United States are vital and the UN is not capable of ensuring those interests, then the United States will look to another means to ensure protection of its interests. If the interests are vital and the United States can gather international support, it will seek to do so. PDD 25 can be viewed as a general "use of force" checklist as it covers basic requirements to any military operation, whether it is a UN sponsored operation or unilateral action by the United States. The operational impact of PDD 25 was tested very early. In spite of the *dicta* in policy statements that humanitarian suffering and human rights abuse are

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[141] US Dept. of State Dispatch, Vol. 5, No. 20, at 315 (May 16, 1994), *available in* LEXIS, Nexis library, Exec File.

[142] *Four Characters in Search of a Doctrine*, THE ECONOMIST, Oct 2. 1993, at 26, *available in* LEXIS, Nexis library, CURNWS file.

interests which the United States will defend, they simply were not "vital" to the United States.[143]

VI. RWANDA MEETS NEW U.S. CRITERIA FOR INTERVENTION.

The administration's new policy on multilateral peace operations met its first test on the eve of its enactment.[144] On April 6, 1994, the presidents of Rwanda and Burundi were killed in a plane crash that was considered to have occurred under suspicious circumstances.[145] The two leaders were returning from a peace conference in Tanzania where African leaders were meeting to end years of ethnic violence.[146] The killings shattered a delicate peace that existed between Rwanda's majority Hutus and minority Tutsis.[147] The Hutus blamed

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[143] *See supra* note 140. National Security Advisor Anthony Lake indicated that the prevention of widespread human rights abuses was in the category of interests where the U.S. would use force.

[144] *The UN Crawls to the Rescue; Living with a Recalcitrant U.S.; Rwandan Massacre,* World Press Review, Sept. 1994, Vol. 41, No.9, at 12; John-Thor Dahlburg, *Haunting Questions Linger After Slaughter in Rwanda*, HOUS. CHRON. Sept. 11, 1994, at A28. Much of the delay in doing anything regarding Rwanda was an outgrowth of PDD-25. *Id.*

[145] Elaine Sciolino, *West Determined to Avoid Rwanda*, HOUS. CHRON. Apr. 16, 1994, at A22. Rwanda President Juvenal Habyarimana and Burundi President Cyprian Ntaryamira were both aboard the French built airplane which was apparently hit by a rocket fired from Tutsi rebels. Both Presidents were from the majority Hutu tribe. *Id.*

[146] William E. Schmidt, *Troops Rampage in Rwanda; Dead said to Include Premier,* N.Y. TIMES, Apr. 8, 1994, at A1.

[147] Rwanda gained its independence from Belgium in 1962. Since independence constant tension has existed between the two predominant ethnic groups, the minority Tutsi and the larger Hutu. The Hutu president, prior to his death, had been in power for the preceding 21 years. During that period there were constant challenges from rebel Tutsi groups. In 1990, a civil war was started as the Tutsi minority battled the government. The Tutsis received considerable support from Uganda in that civil war. The two sides signed a cease-fire during the summer of 1993. Pursuant to that cease-fire, a UN peacekeeping force of approximately 2,600 was sent in to monitor the cease-fire which was in constant jeopardy. When the President was killed, the Hutu dominated presidential guard blamed the Tutsi rebels for the attack. This seemed to be the straw the broke that camel's back of the deeply rooted hatred between the two factions. Massacres occurred between these ethnic groups in 1963 when an estimated 20,000 were killed. In 1972, 100,000 Hutu were massacred in neighboring Burundi. William E. Schmidt, *Troops Rampage in Rwanda: Dead Said to Include Premier*, N.Y. TIMES, Apr. 8, 1994, at A1. It is however, too simplistic to state that the massacre that occurred was divided along ethnic lines -- political issues also lay at the heart of the massacre. The Hutu presidential guard were attempting to stop other Hutu leaders in the government from taking power and maintaining an integrated Hutu/ Tutsi government-thus the motivation behind the assassinations of the Prime Minister, Cabinet Members, members of the national assembly and constitutional court. *Id.* Hearing of the African Subcommittee of the House Foreign Affairs

the Tutsis for the destruction of the President's plane.[148] The killing started on the same night when the Hutu majority put up street barricades, herded the Tutsis and other Hutu government officials into holding areas, and then clubbed, hacked and machetted at least 200,000, and perhaps up to 500,000, people to death.[149]

The killing was brutal and savage and continued for days after the plane crash. A small UN contingent operating as "peace monitors" was already in Rwanda to monitor the fragile pre-existing cease-fire.[150] At the onset of the massacre, ten Belgian UN soldiers were caught up in the frenzy and slain along with the Tutsis. Major General Romeo Dallaire, head of the UN contingent in Rwanda, and who has been described as a "tough Canadian artilleryman," wanted to take immediate action to protect the civilians. He telephoned the UN from a satellite link and requested permission to begin a protection operation. His request was denied.[151] General Dallaire himself recognized that the new post-Somalia policy was a leading factor for this decision when he stated: "The big boys got a bloody nose in Somalia and ran, and everybody else got a little gun-shy."[152] General Dallaire himself felt that "[w]e could have saved hundreds of thousands of lives, without a doubt" had the UN acted immediately-with as little as 5,000 troops. Instead, a hands off approach was adopted that some have called "Yellowstoning" (a reference to the "let it burn" policy of US Forestry officials regarding how to combat forest fires).[153]

Committee, May 4, 1994; Donatella Lorch, *The Massacres in Rwanda, Hope is Also a Victim,* N.Y. TIMES, Apr. 21, 1994, at A3.

[148] Dahlburg, *supra* note 144.

[149] Charles J. Hanley, *U.N. Test for Intervention, If Not in Rwanda, Then Where,* HOUS. CHRON., July 17, 1994, at A16.

[150] *Id.*

[151] *Id.*

[152] Tom Ashbrook, *UN Efforts Everywhere Turn to Dust; Downed Helicopter in Somalia Doomed a 'New World Order'; Who Will Keep the Peace,* BOSTON GLOBE, Apr. 30, 1995, at 1.

[153] *Id.* Others have also indicated that the slaughter could have been stopped. Holly Burkhalter, Director of the Washington Human Rights Watch indicated the following three failures in US Policy during the Rwanda crisis:

> The first, and most important, came on April 21, when at US insistence, the UN Security Council voted to reduce its 2,500 man Rwandan peacekeeping force, known as UNAMIR, to a skeleton crew of just a few hundred. The decision came at the height of the massacres of the

The UN Security Council finally acted on April 21, 1994. There was essentially a choice between two options: Reinforce the small UN contingent in country or withdraw. The Security Council fashioned a "middle of the road" answer. It approved a resolution to reduce General Dallaire's force to 270 troops.[154] Numerous groups condemned the action in the face of such genocidal atrocities. Many non-governmental organizations were appalled by the UN lack of conviction to intervene in what looked like a genocidal massacre that was not abating.[155]

Tutsi minority and opposition Hutu political figures by the Rwandan Army and affiliated militias, sending unmistakable signals that the world would stand aside while they completed their extermination campaign. . . .

A second failing was the Clinton Administration's refusal to publicly condemn by name those Rwandan civilian and military officials who were well known to have planned and implemented the genocide. Putting those individuals on notice that they could face an international tribunal for their monstrous crimes might have discouraged others from joining them. Yet the Clinton administration, although prohibiting representatives of extremist political parties from visiting Washington, demurred from denouncing those responsible for mass crimes by name and refused to characterize the situation as 'genocide' for many weeks. . . .

A third missed opportunity was the US refusal to take action to jam Rwandan radio broadcasts, which played a key role in fomenting ethnic hatred and inciting mass killings. Rwandan Radio des Mille Collines on a daily basis exhorted Hutus to kill all Tutsis, including children. The messages gave extremist machete-wielding militias orders to ethnically cleanse Rwanda of Tutsi minority. . . .

Holly Burkhalter, *US Might Have Avoided Rwanda Tragedy*, THE CHRISTIAN SCIENCE MONITOR, Aug. 9, 1994, at 19.

[154] Hanley, *supra*, note 149; Dahlburg, supra note 144, at A28. On April 9, 1994 approximately 330 U.S. Marines from Marine Expeditionary Unit 11 embarked on USS PELELIU, were deployed to neighboring Burundi to help evacuate Americans in Rwanda. There were approximately 255 Americans in Rwanda at the time, most of whom were aid workers from various non-governmental organizations and U.S. Embassy personnel. Additionally, Belgium sent approximately 1,500 military personnel and France sent another 600--all assisting in evacuating their citizens. Pauline Jelinek, *Violence Rages in Rwanda as Evacuation Begins*, THE RECORD (Bergen County, New Jersey), Apr. 10, 1994, at A18; Adam B. Seigal, *A Chronology of U.S. Marine Corps Humanitarian Assistance and Peace Operations*, Center for Naval Analysis (1994).

[155] Hanley, *supra* note 149. Thomas W. Lippman, *U.S. Troop Withdrawal Ends Frustrating Mission to Save Rwandan Lives*, WASH. POST, Oct. 3, 1994, at A11. The Clinton administration did not use the word "genocide" to describe the acts committed in Rwanda until June 1994. Apparently the administration wanted to ensure that the same language that was being used in Bosnia was also being used in Rwanda. *Id.*

Apparently, even the Secretary General "was having second thoughts" regarding the April 21 decision. On April 29, he asked the Security Council to reverse its decision and examine the option of reinforcing General Dallaire's troops.[156] On April 30, Boutros-Ghali requested that the Organization for African Unity (OAU) prepare and plan for an intervention operation. Boutros-Ghali was desperate in trying to put an all-African force in Rwanda immediately to attempt to stall the slaughter. The plan never materialized as the OAU simply did not have the capacity to engage in such a large-scale operation.[157]

Separate initiatives were also being studied for an all-African contingent. On May 10, 1994, the Vice President of the United States was in South Africa to attend Nelson Mandela's inauguration. During that visit, Vice President Gore met with Security Council President Ibrahim Gambari, Nigeria's UN Ambassador, and Boutros-Ghali. Following that meeting, the Secretary General announced plans to put an all-African force from Nigeria, Ghana and Tanzania into Rwanda. This plan however was not adopted. Instead the Security Council adopted, on May 17, 1994, a resolution calling for a small first deployment and requested Boutros-Ghali to report back on a potential cease-fire before the main force would be sent in. In a speech made in Baltimore, Boutros-Ghali expressed his regret for this decision when he stated: "If we do not intervene in a situation where over a quarter of a million people are reported to have been killed in a few weeks, where will we intervene." [158]

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[156] Hanley, *supra* note 149.

[157] *Id.* Even if an OAU force could have been developed, a regional organization would not be empowered to act under UN authority unless authorized to do so by the Security Council. Articles 52 and 53 of the U.N. Charter state:

> 1. Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.
>
> 2. The Members of the United Nations entering into such arrangements or constituting such agencies shall make every effort to achieve pacific settlement of local disputes through such regional arrangements or by such regional agencies before referring them to the Security Council. . . .

U.N. CHARTER art. 52, 53.

[158] Hanley, *supra* note 149.

In mid-June as the killing reignited, France sent in a contingent of troops under a UN security council resolution to protect refugees in west Rwanda.[159] This operation, named "Turquoise" sent over 2,500 French and African troops into west Rwanda and into the Zaire refugee camps.[160] In July 1994, the government of Rwanda fell to the Tutsi rebels (Rwandan Patriotic Front (RPF)) who counterattacked after the initial Hutu slaughter.[161] The new government that was established was made up of those individuals, both Tutsi and Hutu, who were the targets of the initial Hutu attack.[162]

Eventually, the United States acted on July 29, 1994, after news spread of "a million people being hacked to death," and the public outcry simply became too great to ignore.[163] Approximately 2,350 troops were dispatched, not as part of the UN mission, but acting in conjunction with the UN.[164] This force functioned in a humanitarian capacity only to assist the million plus refugees who fled the onslaught of the Hutus and who were now facing disease, starvation and dehydration in the refugee camps.[165] This U.S. mission was

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[159] *Id.*

[160] *Events in Rwanda Following Death of President Habyarimana*, AGENCE FRANCE PRESSE, Apr. 23, 1995, International News Section. The operation conducted by French, while considered highly controversial, was considered a success as it was widely believed to have curbed the amount of death in the western parts of the country. Scott Kraft, *France's Big Gamble Pays Off in Rwanda; Africa; Skeptics Had Felt Peace Mission Could Have Been Another Somalia*, L.A. TIMES, July 16, 1994, at A1.

[161] Presidential Letter to Congressional Leaders on Rwanda, PRES. DOC. 1602, *available in* LEXIS, Nexis library, ASAPII File.

[162] *Updates on Developments in Rwanda and Burundi*, Dept. of State Dispatch, Vol. 6, No 16. (Apr. 17, 1995), *available in* LEXIS, Nexis Library, ASAPII File.

[163] Dahlburg, *supra* note 144; Lippman, *supra*, note 155; Presidential Letter, *supra* note 161.

[164] Steven Kull, *Misreading the Public Mood; Peacekeeping Efforts of the United Nations*, BULLETIN OF THE ATOMIC SCIENTISTS (1995). This force sent in by the United States was supported by a large majority of Americans at the time of its deployment largely due to the desire to curb the atrocities being committed. *Id.*

[165] Presidential Letter, *supra* note 161. At the time of the United States deployment it was estimated by the United Nations High Commissioner for Refugees (UNHCR), that 2.1 million Rwandan refugees have fled to Zaire, Burundi, Uganda, and Tanzania, and that another 2.6 million people are internally displaced. *Id.*

termed "Operation Support Hope."[166] It never intervened between the warring parties, but rather was strictly a humanitarian operation. The operation terminated at the end of September 1994.[167]

Why did neither the United States nor the UN intervene to stop the massacre even though the on-scene UN commander (General Dallaire) believed that the massacre could have been prevented with as little as 5,000 troops? Why, when the United States finally acted was it on the periphery of the events? Rwanda was unfortunate to have occurred when it did - while the tears of Somalia were still fresh on the cheeks of America. [168] Even with a mounting death toll that was simply appalling, Rwanda did not meet the criteria required for direct military involvement under PDD 25. Everyone, including President Clinton, the National Security Advisor, State Department and Pentagon officials, were uniform in their statement that the new tougher requirements of PDD-25 simply could not justify intervention.[169] It simply came down to a strict national interests test, as summed up by a senior White House official: "The fact is that in terms of classic American national interests, we have less in Rwanda than in Bosnia, Haiti or Korea . . . [t]hat is simply a fact."[170] This remarkable statement is a post-Cold War retreat which indicates that the U.S. will not intervene or support intervention absent a threat to those traditional strict national interests (i.e., aggression against the U.S. or its allies, threat to U.S. economic interests, etc.). This post-Cold War retreat can do nothing more than escalate the potential for further violence, genocide, human rights violations and

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[166] *Id.*

[167] Lippman, *supra* note 155. It was clear from what resulted in Rwanda, that the new policy did in fact put a strict vital national interest test back into the forefront of American priorities when considering when to support a peace operation or any intervention at all for that matter. In fact, this vital national interest test appears contrary to language in PDD 25 and statements made by the National Security Advisor, both of which state that humanitarian disasters, coupled with violence, mass starvation, genocide and the failure of a state will be justification for the United States to act. The lack of activity by the United States to curb this almost unprecedented humanitarian disaster clearly indicates that "vital" United States interests does not include as one of it is elements, massive human rights violations and genocide-particularly if it occurs in a place where the United States has essentially no other interest. If the United States did not have a normative duty to act in Rwanda, then clearly, the emerging norm of intervention as discussed in Section II has come to an abrupt halt.

[168] Hanley, *supra* note 149; *Stand Firm; President is Right to Keep U.S. Clear of Rwanda*, HOUS. CHRON., Sept. 20, 1994; Ashbrook, *supra* note 152.

[169] Lippman, *supra* note 155.

[170] *Id.* Hanley, *supra* note 149; Dahlburg, *supra* note 144.

other atrocities in those areas of the world in which the United States does not have a classic national interest. Therefore, the United States must review PDD 25 and its application in order to strike a balance which accounts for U.S. interests but does not leave the back door open in the Third World for atrocities to go unchecked. In looking at this policy shift, discussed *infra,* it goes without saying that if the United States were to take a more proactive role in potential trouble spots, one thing that will be essential will be a reconceptualized force package to give the United States leverage in dealing with rogue countries. What this force will look like is beyond the scope of this article, but it can be posited that the United States must have a short notice, highly mobile, diverse, humanitarian oriented (but with a sizable weapons package), "fly away" force capable of bringing credibility to any threat and/or intercede in any trouble spot. This force availability and the willingness to use it could provide a deterrence in potential trouble spots, convert wrongful behavior to correct behavior and assist humanitarian organizations with disasters. Even with such a force package, a policy must exist which would utilize its effectiveness. This is the question that this Article will now turn to.

VII. MOVEMENT TOWARDS A "JUST CAUSE" POLICY FOR INTERVENTION.

J. Bryan Hehir argues that the justification for intervention must be expanded on a "systematic basis" to ensure international order.[171] If intervention did not occur in Rwanda because the criteria for intervention was not met, then it must follow that if the United States is to take the lead in preventing further Rwandas it must seek to expand the justification for international intervention on a different basis than the one provided by PDD 25. The "dire situation in many African countries" alone "highlights . . .the need to play a more forceful role" or we will be reliving the atrocities of Rwanda over and over.[172] The alternative is merely to "let Africa burn!"[173]

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[171] Hehir, *supra* note 4, at 8.

[172] Weiss & Campbell, *supra* note 1, at 459. Weiss and Campbell note that "[i]n case after case, the international community has been prevented from assisting helpless civilians." *Id.* Clearly the situation will not improve under the current implementation of PDD-25.

[173] A CIA sponsored task force, using sophisticated analytical techniques, responded to a tasking by Vice-President Al Gore to determine why countries fall apart and to come up with factors to alert policy makers of impending disasters like Rwanda, Somalia, Liberia, etc. The study identified 16 countries that could be facing Somalia/Rwanda like crisis within two years. Tim Zimmerman, *Why Do Countries Fall Apart?*, U.S. NEWS AND WORLD REPORTS, Feb. 12, 1996, at 46. The study found Armenia, Bangladesh, Benin, Bolivia, Brazil, Central African Republic, Haiti, India, Kirgizstan, Madagascar, Malawi, Mali, Niger, Pakistan, Turkey, and Zambia had key variables

This argument, however, will draw strong criticism from countries who will say that the United States will hide under the banner of "humanitarian intervention" in order to advance its own economic interests on a world wide basis. Cries of neo-colonialism can be heard even as I write these words. Hehir likewise recognizes this concern when he states:

> [B]roadening of the reasons for intervention involves the risk that states will invoke humanitarian reasons while pursuing other objectives through military intervention. Disparities in size, power and status among states and the historical memory of how states rationalize their policies under the guise of moral humanitarian motivation illustrates the need to use the proper authority criterion as an instrument of restraint in the politics of intervention. [174]

In seeking to address this concern he advocates the following criteria for intervention. First, as previously stated, Hehir believes that we must systematically and on a non *ad hoc* basis expand the notion of intervention to account for humanitarian concerns while still maintaining the sacrosanct norm of nonintervention as discussed in section II, *supra*. [175] This expansion of justifiable causes for intervention was expressed by then Secretary-General Javier Perez de Cuellar, has having wide ranging support:

> We are clearly witnessing what is probably an irresistible shift in public attitudes towards the belief that the defense of the oppressed in the name of morality should prevail over frontiers *and legal documents*. [176]

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present that explain why a country disintegrates. The model utilized by the CIA had accuracy rates approaching 70%. *Id. See also* Peter Beinart, *The Domino Theory,* THE NEW REPUBLIC, Feb. 26, 1996, at 6. Beinart notes that "Burundi is next" to implode. He denounces the United States for not doing enough now to deter aggression in Burundi. Beinart argues that the least costly way to prevent the Burundi disaster is to take a tough stand on the perpetrators of the Rwandan massacre through support of the international tribunal. This support would include placing tremendous political pressure on both Kenya and France to assist in the judicial process. Specifically, the United States could prevent IMF loans to Kenya. With regard to France, Chirac should be persuaded to not "take the rap" for Mitterand's government and go along with a more zealous effort at supporting the war crimes tribunal. *Id.*

[174] Hehir, *supra* note 4, at 8.

[175] *Id.* at 7-9.

[176] Weiss & Campbell, *supra* note 1, at 455 (emphasis added).

The systematic expansion of the basis for intervention must seek to address massive humanitarian disasters such as occurred in Rwanda and Somalia, both of which lacked the "vital U.S. interest" now necessary for U.S. led intervention.[177] A standard must specifically be stated which gains international consensus, but is flexible enough to cover a broad range of scenarios. This endeavor is a *Herculean* task when considering efforts at drafting universal standards for other international activity such as the Law of the Sea Convention, which took 12 years to complete once work began. While this is no place to start writing the convention, the work must begin to set concrete standards which will more fully articulate the norm of justified intervention. Now, more than ever, with the Cold War over, it appears to be the time to strike out on this project while international consensus is at least theoretically possible.

To account for the concerns raised by states that expansion of the "just causes" for intervention will be used for illegitimate purposes, the second criteria of the Hehir proposal calls for a "prohibition on the right of individual states to intervene."[178] Hehir states that "multilateral authorization should be the norm." [179] This multilateral criteria, while not ensuring legality, "does draw on the wisdom and experience of constitutional governance within states."[180] Additionally, as a practical matter, if the United States wanted to intervene in a humanitarian mission and could not engender international support with her allies and in the UN, then the United States would not intervene. However, Hehir does not propose an absolute prohibition on the right of unilateral intervention. Specifically, Hehir recognizes that there may be a need for unilateral intervention to thwart aggression, self defense or defense of alliance commitments. [181] These types of interventions have long been recognized under international law and were the justification used in the Gulf War. [182] Accordingly, what is being proposed is a modified "Tarnoff

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[177] Hehir, *supra* note 4, at 7-9; Hutchinson, *supra* note 100.

[178] Hehir, *supra* note 4, at 9.

[179] *Id.* at 9.

[180] *Id.* at 9.

[181] *Id.* at 11.

[182] U.N. CHARTER art. 51. Article 51 specifically recognizes a states inherent right to individual or collective self defense against acts of aggression.

Doctrine,"[183] in which the United States should only intervene in a complex humanitarian emergency with the sanction of the international community. In no way, however, would the unilateral right of action to thwart aggression, self-defense or defense of alliance commitments, either on a covert or overt level, be surrendered so long as the right is asserted consistent with international law.

The final prong in Hehir's criteria is a "means test."[184] By means test, Hehir proffers an analysis between the "ends pursued and the destruction caused" by the intervention.[185] The central thesis of the means test is "noncombatant immunity and proportionality."[186] Any intervention must provide "systematic *a priori* assessment" of the likelihood of mission accomplishment while maintaining noncombatant immunity and proportionality.[187] Even the Gulf War raised serious questions regarding the proportionality of force and called into the question this prong of the means test.[188]

One further criterion implied by Hehir as part of the means test but not discussed in detail would be an analysis on the practicality of the intervention itself. In other words, even if there is a clear case for intervention such as in Rwanda, the question asked must be "is it worth it" in the sense of a resource commitment? The world community may call out for intervention in a small nation where atrocities are being committed. Even if the operation meets the means test in the sense that the technology exists to ensure proportionality and noncombatant immunity, but it will cost 100 billion dollars--at what point is it considered "not worth it?" How do you measure it? For instance, in Somalia, the question was asked, "was the death of 18 Army Rangers worth the benefits received by intervention?" As stated by the National Security Advisor, Anthony

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[183] *See supra* note 103.

[184] Hehir, *supra* note 4, at 10.

[185] *Id.* at 10.

[186] *Id.* at 11.

[187] *Id.* at 11.

[188] Normand & Jochnick, *supra* note 101. Normand and Jochnick argued that the destruction of the power grid in Iraq was disproportionate to the advantage achieved. The argument was premised on the fact that because Iraq had redundant means of communication, an attack on the power grid really had no military advantage and the only real result was massive suffering wherein 500,000 may have died. *Id.*

Lake, the United States would like to "end every conflict" and "save every child," but neither America nor the international community has "the resources, nor the possibility of resolving every conflict . . . ."[189] The United States cannot be the world police force. Nor can the UN intervene multilaterally in every event. Boutros-Boutros Ghali in *Agenda*, in which he called for a "clear and practicable mandate" for peace operations, stated this concern. [190] Currently under PDD 25, the practicality of the mission does not come into the analysis unless the United States will "participate" directly in the operation. This practicality question is not asked if the United States is voting to "support" a proposed peace operation. [191] In Rwanda, concern was raised that the United States, by diverting resources to Rwanda, would weaken its response to the Multiple Regional Contingency (MRC) scenario. This however, simply was not apparent according to the on scene military commander, General Dallaire, who stated that as few as 5,000 troops could have stopped the bloodshed in Rwanda.[192] There is a question as to what would have been the best tactic in Rwanda given the primitive nature of the battle. The establishment a safe zone in an area and then protecting those civilians with automatic weapons and light artillery would certainly seem to make sense against machete wielding Hutus on a blood thirst.[193] While not a long-term fix, it could provide the necessary pause in the frenzy for international efforts to reach out and seek a long-term solution. Accordingly, it certainly could be argued that practicality in the sense of it "being worth it" is based on a lack of understanding of what the capacities are of the military.

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[189] HOLT, *supra* note 115.

[190] *See* Ghali, *supra* note 37.

[191] *See supra* note 113.

[192] *See supra* note 153.

[193] *See generally* Barry R. Posen, *Military Responses to Refugee Disasters*, INTERNATIONAL SECURITY, Summer 1996, at 72. Posen doubts the efficacy of establishing a safe zone in Rwanda as suggested by General Dallaire. Posen feels that the populations are too intermixed for safe zones or safe havens to be a reasonable solution. Posen also does not believe that mere enforcement of a pause in the killings is constructive when the killings are a result of political passions. Posen argues that without destroying the capacity of the combatant the protecting force may have to stay a long time. *Id.* at 98-104. Posen discounts the apparent effectiveness of the French by implying that the French had other motives during OPERATION TURQUOISE than merely protecting refugees through the declaration of a safe zone. *Id.* at 97. However, what other motive they may have had and why the safe zone was not effective, is not discussed by Posen.

Barry Posen, in his article regarding the application of military power to conflicts where there has been massive internal or international displacement of persons, suggests that there is tremendous lack of understanding regarding the practicality and efficacy of military action in conflicts. Posen discusses various military measures such as aerial bombing, safe zones, safe havens, peace enforcement and outright war against the belligerent. His article carefully works through each of these alternatives and specifies why a particular method of intervention may or may not be practical or simply "not worth it."

With regard to aerial bombing, Posen notes that "[w]hen trouble arises anywhere in the world, the first instinct of many is to bomb the miscreants."[194] He observes however that "punitive" bombing is very problematic. Posen states that bombing has focused on population centers, economic infrastructure, vital centers or national leaders. Bombing population centers has historically not worked for the simple reason that killing civilians strengthens the will of the people being bombed. It convinces them that their enemy is evil and does not induce surrender. [195] Bombing the economic infrastructure rests on the idea that it is meant to destroy the country's war making power. Posen notes that this may have little efficacy in today's conflicts. For example, blowing up an industrial base does not destroy troops already in the field, the leaders of a country may value war more then their industrial base and finally, and most importantly, many of these countries do not have industrial centers in the first place.[196] Clearly, industrial or population center bombing would not have been a practical alternative in Rwanda.

The third type of bombing Posen discusses is "vital center" bombing. Vital center bombing theory rests on the notion that societies are held together by certain "nodes" such as telephone communication, power generation, radio and television. Posen again avers that this type of bombing is rarely effective, as was noted during the Gulf War in which Iraq withstood tremendous "vital center" bombing intended, unsuccessfully, to topple the power of Saddam Hussein.[197] One commentator, however, has suggested that destroying the radio stations controlled by the Hutus in Rwanda who were fomenting "ethnic

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[194] *Id.* at 86.

[195] *Id.* at 87.

[196] *Id.* at 88.

[197] *Id.* at 88-89.

hatred and inciting mass killings" through radio broadcasts would probably have been effective.[198]

Posen's final bombing alternative would be the targeting of leaders. The problem is obvious from our experience in Iraq, Libya and Somalia. Leaders are very adept at hiding themselves and thus this tactic proves to be highly ineffective. Overriding all bombing issues, however, is the true capacity to conduct these types of operations. Outside of the United States, few countries have the capacity to deliver "smart weapons" or to conduct long range strategic bombing. Additionally, political forces make it highly unlikely that bombing will be a preferred alternative to regional or internal dispute resolution.

Establishing safe zones is another tactic which may be used by those intervening in an attempt to protect those who are too weak to defend themselves by establishing a large zone in a distinct area where a population can be safe from outsiders.[199] Although rarely tried, the closest example Posen discusses is the operation to protect the Kurds in Northern Iraq.[200] Posen argues that the strongest opposition to this type of tactic is the norm of nonintervention.[201] This argument is rather facile when considering that the real issue is whether a country with the capacity (e.g., United States), has the will and determination in which to seek multilateral efforts to establish a safe zone. Accordingly, while Posen correctly identifies the fact that safe zones are difficult to establish, he does little to undercut their efficacy once in place. He does however, identify factors such as demographics, weather, topography and vegetation, which would provide logistic obstacles to military planners. However, these issues again do not degrade safe zone efficacy but may limit their availability.

Establishing safe havens is similar to establishing safe zones. Establishment of a safe haven involves carving out shelter areas *within* an area of conflict.[202] The most recent attempt to conduct this activity was in Bosnia. Six towns were established as safe havens. It was not until NATO started large scale bombing

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[198] Holly Burkhalter, *US Might Have Avoided Rwanda Tragedy*, THE CHRISTIAN SCIENCE MONITOR, Aug. 9, 1994, at 19.

[199] Posen, *supra* note 193, at 77.

[200] *Id.*

[201] *Id.*

[202] *Id.*

to protect these areas from outside intrusion that the Bosnian Serbs backed off from their threats to "take out" the safe havens. Accordingly, safe havens must be established with enough capacity in order to make them an effective alternative. Safe havens can be very attractive according to Posen because conflicts that produce refugees will constantly arise. Additionally, safe zones require much more capacity than carving out a small area to provide sanctuary as in a safe haven.[203] However, safe havens are not guaranteed to be problem-free. If the conflict is unsophisticated, like in Rwanda, it will be difficult if not impossible to use air power to protect the safe haven because the combatants and noncombatants are too intermingled. This would then lead to the requirement of troop deployment, which comes with all the unfavorable logistic and political baggage. Additionally, the practicality of the safe haven will depend on whether it can be sustained as a place where people can live. This requires food, medicine, shelter, etc. Again the establishment of the safe haven requires the capacity to suport it.[204] These requirements alone, based on our experience in Bosnia require capacity to project power- a capacity which only a few countries have. The larger the capacity required, the more we must ask "is it worth it," because the United States will have to take the lead.

The final alternative discussed by Posen is the "enforced truce." This scenario is the "failed state" operation where military interveners are not so much acting as combatants, but rather focus on control of the country. Somalia and IFOR in Bosnia are the most recent examples.[205] The central problem in this type of operation is when to leave and how to make a state out of a failed state. The practical aspects of this type of operation will vary depending on a variety of factors from political to logistical.

Posen concludes that when balancing all the practicalities of a proposed operation the assailant is favored. The assailant who knows and understands these restraints will then likewise be undeterred. Accordingly, in order to move towards an actual "just cause" for intervention, states have to bring a great deal of military force to any "generic remedy." In many cases, such as genocide and politicide, only "complete invasion and occupation is likely to stop the crime."[206]

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[203] *Id.*

[204] *Id.* at 98-99.

[205] *Id.* at 105.

[206] *Id.* at 109.

Understanding the practicality limitations described by Posen is most problematic within the existing security structure of the United States. Many individuals who are part of the interagency process lack experience and understanding of crisis management and *knowledge of military capacity*.[207] Can the United States install a practicality test in this new test for intervention that really works? Raach and Kass, when discussing the interagency process, believe that uniformed personnel more aggressively engaging the interagency process can resolve the practicality failure. The current lack of understanding of the capacities and practicalities of any operation can be resolved through closer cooperation between the military and civilian nonmilitary players currently making the decisions.[208] The military can more fully develop the costs in terms of human life, personnel and equipment that are required for mission accomplishment. The civilian political leadership can assess politically what the costs and benefits are of a given mission in the sense of non-material value. For instance, if going into Rwanda would cost 2.5 billion dollars (or 1% of the U.S. defense budget) then the answer would most likely be that it is not worth it. However, when considering the deterrent effect that this activity will have in the eyes of the world community - in the sense that other countries will be deterred from falling into the Rwanda scenario - it may tip the scale toward its efficacy.

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[207] Raach & Kass, *supra* note 11, at 11-13.

[208] *Id.* Raach and Kass proffer four recommendations to cure the present defect of lack of understanding of the practicalities and capacities to handle a particular crisis:

> a. Military officers assigned to the confusing and frustrating interagency process must not withdraw from the interagency process, as has been the case. Rather, military officers must engage the interagency process and bring the unique military understanding and develop the trust and confidence of those unique personalities who are currently making the decisions.
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> b. Officers must work within the system to educate nonmilitary players regarding current capacities and practicalities of the military. This goes beyond a list of force options available, but also must "touch on relevant theory about how force is applied, how the military assists other departments and agencies in accomplishing common goals."
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> c. The frequency of interagency work groups must be increased. "Working in isolation until the proverbial balloon goes up does not improve the process." Military officers should look for chances at all levels to form informal groups who are likely to be members of formal interagency groups. This will increase the payoffs under a. and b. above
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> d. Finally, military officers must question more vigorously during the interagency process. Queries about alternative courses of action will ensure that options are not being overlooked and that risks involved are fully understood.

Id. Burkhalter states three options that could have been utilized by the U.S. to thwart the atrocities in Rwanda. All the actions stated by Burkhalter would have cost little in terms of personnel and resource commitment - further demonstrating the lack of understanding of the practicalities and capacities of the military. Burkhalter, *supra* note 198.

Additionally, the civilian leadership must also measure the "prestige" value in the eyes of the community.[209] While it would be foolish to spell out a specific framework wherein there are threshold body counts, equipment costs, and money expenditure, a consideration of whether it is worth it must always be considered in the global context of the overall return and not simply the cost of a mission. Consideration must be given not only to mission costs in terms of personnel and other material costs, but also in terms of such non-material gains as "prestige" and deterrence.

By changing the current policy, the United States can account for many of the concerns which underlie PDD 25 but also avoid PDD 25's current pitfalls. First, PDD 25 seeks to limit the United States from being the world's policeman. The modified policy would address this underlying concern by requiring only multilateral action. Additionally, the means test and a rigorous practicality standard would also restrict the frequency of involvement. The changed policy would also mean earlier engagement. In Rwanda for example, early engagement with a small number of troops might have prevented the mass killings and exodus of people to refugee camps. After the killings and exodus, the world community was called upon to support and feed the more than 1.7 million refugees in Zaire and other areas around Rwanda. Earlier engagement under this scenario would have addressed the concerns about wasted resources, lack of clear objectives, exit strategy, and cost in terms of human lives which PDD 25 also seeks to address by preventing a protracted refugee problem.[210] Moreover, while prohibiting unilateral action for intervention, the new policy does not prejudice a state's right to act unilaterally to thwart acts of aggression. The new policy would likewise preserve a unilateral right to act when an act of aggression requires an immediate response. This is an altogether different analysis when discussing intervention in complex humanitarian emergencies, which allow time for consideration of the means contemplated, and the destruction envisioned by a resort to force.

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[209] The UN is currently paying 300 million dollars a year to support the estimated 1.7 million refugees in refugee camps in Tanzania, Zaire and Burundi a year and half after the bloodshed began. James C. McKinley, Jr., *Some Rwandan Exiles Can't Go Home Again,* N.Y. TIMES, Feb. 7, 1996, at A8.

[210] For an assessment of the continuing costs associated with disaster assistance, both internal conflict and natural disaster, *see* Louis McHugh, *International Disaster Assistance: Cost to the United States of Six Recent Incidents*, CRS Report for Congress, July 18, 1995. In this CRS report, McHugh notes that the Rwanda disaster cost the United States $504.9 million up to April 4, 1995.

VIII. CONCLUSION.

This Article has discussed the process, structure and policy used by the United States and UN for conducting Peace Operations. Central to this process is an understanding of PDD 25 and its relationship to the narrow definition of the United States' vital national interests. PDD 25 disengages the United States from places in the world that are allegedly not "vital" interests of the United States. Because the United States' ability to project power is central to successful Peace Operations, the U.S. disengagement as a matter of practical consequence also disengages the UN. This policy and its practical implementation, based largely on events in Somalia, have and will continue to have ruinous consequences if applied as it was in Rwanda. The disengagement built into PDD 25 signals a "hands off" attitude or lack of interest on the part of the U.S. to countries struggling with democracy. This signal is not the one that the United States, a country interested in the proliferation of democracy, wants to send. With disengagement, the United States reduces its ability to assert its influence, capitalize on foreign markets and encourage U.S. American values. By demonstrating an international disinterest, a significant international restraint is lifted that could have helped ensure the observance of international standards of human rights, deter atrocities and keep in check those groups interested in disrupting democratization. If the United States is truly committed to global democracy, global security, expanding markets and U.S. American values, disengagement, disinterest and "hands off" cannot be the answer. Accordingly, if PDD 25 is to be modified in practice to account for the Rwanda scenario and to expand the emerging norm of humanitarian intervention, the modification must first come in the way that the United States defines its vital national interests.

A. Redefining Vital National interests.

As noted in this thesis, vital national interests remain the trigger for U.S. action under PDD 25. If we define vital national interests to include preventing gross human rights abuses, genocide, atrocities, failed states and other humanitarian disasters, particularly in those countries, which have previously been defined as non-vital like Rwanda, then the current PDD 25 criteria ostensibly would work. Brian Atwood, Director of U.S. Agency for International Development, argued in a speech at the New Direction in U.S.

Foreign Policy Conference for a broader definition of vital national interests and national security. Paraphrasing, Atwood stated, in part, the following: [211]

> Traditional threats, such as a war in the Persian Gulf are now and will continue to be, under any objective analysis, a threat to our vital national interests. However, threats to global stability, loss of markets, loss of influence and American values will arise elsewhere. During the Cold War, the United States would venture into a place like Vietnam or Korea for fear of communist expansion. That was our fear and thus our biggest threat. The communist threat would endanger our freedom, our markets, our influence and signal the defeat of the American value system, our morals, and human spirit. Today, with communism no longer around, what is the threat? If nations self-destruct because of the warlords of the world, doesn't this threaten regional stability just as much as if a communist regime were in place? If communism steals our markets, doesn't civil war cause the same result? If a million people are machetted to death, doesn't this defeat the American value system and human spirit as much as the communist regime did in Afghanistan? If ethnic cleansing takes the place of the gulag, are international standards less violated? Communist hordes, what about hordes of refugees? Today the international community is spending $4 billion a year on 42 million refugees (which is double what we spent in 1980). We spent $5.4 billion in 1993 on peace operations (more than the previous 45 years combined). Twenty years from now we will have billions more people on this earth to manage. Should the United States disengage now and wait for twenty years no one will debate if the current situation was vital or strategic.[212]

Atwood wants the United States to stop thinking in Cold War terms of threat, and encourages us to look at the overall structure of the New World Order to see how these new threats seriously infringe on the interests of the United States.

One could argue that Atwood's speech does not represent the true nature of the communist threat as the U.S. saw it during the Cold War. In other words, the real fear from communist expansion was not the fall of democracy in a foreign country, but rather that one day a red flag would be flying over the

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[211] J. Brian Atwood, Address at the *University of Maryland,* New Directions in Foreign Policy Conference (Nov. 2, 1995).

[212] *Id.*

White House. Nevertheless, the significance of Atwood's argument cannot be diminished. Failed states, human rights abuses, genocide, ethnic cleansing, and hordes of refugees do represent a threat to the interests of the United States and must be accounted for as vital national interests. Our national interests cannot be defined by who has missiles pointed at us, but must be looked at on a far broader scale. In broadening our conception of what the United States considers its vital national interests, we would expand or "nudge" the emerging norm of humanitarian intervention in the direction advocated by J. Bryan Heir. This norm must be firmly established as part of the international legal order to compel states to act multilaterally to intervene in a failing state or a state that is committing massive human rights abuses, genocide or other atrocities. The expansion of the emerging norm of intervention can only occur if the United States takes the lead. No other single country has the ability to project power like the United States. Because the United States has the all important veto power at the UN, there cannot be multilateral intervention that is detrimental to U.S. interests. Additionally, this expansion would in no way limit a state from acting unilaterally in self-defense. Quite simply, the United States stands to define, when, where, and how a multilateral intervention will occur in a humanitarian crises. If, however, the United States continues under PDD 25 as currently implemented, Rwanda could be an all too often repeated scenario.

B. Rewriting PDD 25.

While it is beyond the scope of this paper to comprehensively rework the criteria, PDD 25 should start off with a policy statement that provides that the United States seeks to expand and solidify the emerging norm of intervention based on humanitarian grounds. Then, it should affirmatively provide that preventing gross human rights abuses, massive refugee flows, genocide and other humanitarian disaster are "vital national interests" of the United States. This language should be at the forefront of the policy and not merely buried in the text without any real force or meaning. Furthermore, we should affirmatively and positively state that when this humanitarian group of vital national interests are at stake, the United States will seek multilateral intervention, *subject to the means test*, if other measures of preventive action, short of actual intervention, have failed. The United States must firmly commit to this notion, not as a preference, but as a normative obligation, again subject to the means test. It is only the United States that can take the lead in moving the international community towards a real substantive norm of justified intervention.

While some critics of a reworked PDD 25 will say that the United States will become the world's policeman by affirmatively burdening itself to intervene in all humanitarian crises, that simply is not the case. Under this new humanitarian "vital national interest" grouping, the United States will only act if it can get international sanction *subject to a rigorous means test.* Since the United States holds a UN veto power, multilateral commitments which do not meet a rigorous means test could not be imposed on it. To thwart critics, who claim that the United States would be prevented from acting unilaterally, the reworked policy must specifically reserve the right of unilateral action under the traditional norm of self-defense embodied in Article 51 of the UN Charter. By making these changes the United States will remain in the driver's seat with regard to the establishment of the emerging norm of intervention.

Even if PDD 25 is reworked to include the humanitarian concerns as vital national interests, it will not be effective nor offer any deterrence unless a reconceptualized military force package is available on short notice to deal with the trouble spots which become the subject of the norm of intervention. The emerging norm of justified intervention would be empty if there is no capacity to execute its mandate.

This reconceptualized force package must be highly mobile, diverse and oriented toward humanitarian concerns. Where this force package would be located and under what authority is not a subject for this paper. However, many ideas have been offered regarding how this force package could be organized. We could empower Article 47 of the UN Charter and place troops at the disposal of the UN. It could be a "double volunteer" force which means that personnel would commit themselves for military duty with a particular country and also commit themselves for duty with the UN. The force could be a designated U.S. force that is specially trained and equipped for only these types of missions and act under UN mandate, but not under UN control. However conceptualized, unless we move into the realm of the emerging norm of justified intervention with a sound policy and force package to back it up that is not "ad hoc," we will be not be taking the lead in an area where only the United States can.

This policy change will have other implications as well, such as strengthening preventive diplomacy and other methods of dispute resolution. Since the United States is the driving force at the UN, the United States must be ready to encourage, support and vote for Peace Enforcement Operations under Chapter VII of the UN Charter. This "tool for peace" is the mechanism to conduct a multilateral intervention operation. If robust preventive diplomacy, either by the UN or other organization such as the OSCE, fails, the United

States must not hesitate to seek an interventionist Peace Enforcement Operation. The world community would then be on notice that failing to cooperate at the negotiating table, maintain a dialogue, seek mediation or arbitration or settle their dispute at the International Court of Justice will cause the world to react in a decisive way. Decisive action, led by the United States, would hopefully reduce the amount of intervention operations needed overall, lessen the costs of intervention worldwide and ensure international stability as countries realize that failing to resolve dispute through negotiations and preventive diplomacy will lead to intervention. If rogue groups with the potential for atrocities were seriously faced with an affirmative norm, international determination, and the real-time capacity to intervene, the likelihood of violence will decrease. However, until that time, we are moving away from this norm, away from engagement, and away from an international legal community that ensures an effective normative order.

THE UCMJ AND THE NEW JOINTNESS: A PROPOSAL TO STRENGTHEN THE MILITARY JUSTICE AUTHORITY OF JOINT TASK FORCE COMMANDERS

Major Michael J. Berrigan, USA[*]

> *Regard your soldiers as your children, and they will follow you wherever you may lead. Look upon them as your own beloved sons, and they will stand by you even unto death. If, however, you are indulgent, but unable to make your authority felt; kind-hearted, but unable to enforce your commands; and incapable, moreover, of quelling disorder, then your soldiers must be likened to spoilt children. They are useless for any practical purpose.*[1]
>
> Sun-Tzu

> *If you can't get them to salute when they should salute and wear the clothes you tell them to wear, how are you going to get them to die for their country?*[2]
>
> General George S. Patton, Jr.

> *Gentlemen, we are the South Pacific Fighting Force. I don't want anybody even to be thinking in terms of Army, Navy, or Marines. Every man must understand this, and every man will understand it, if I have to take off his uniform and issue*

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[*] *The positions and opinions stated in this article are those of the author and do not represent the views of the United States government, the Department of Defense, or the United States Navy. The author is an active duty Army Officer presently assigned duties as the Area Senior Defense Counsel, I Corps, Fort Lewis, Washington. This article was edited by LT Gregory P. Noone, JAGC, USN.*

[1] SUN TZU, THE ART OF WAR 80 (L. Giles trans. 1944).

[2] General George S. Patton, Jr., quoted in ROBERT A. FITTON, LEADERSHIP: QUOTATIONS FROM THE MILITARY TRADITION 83 (1990).

coveralls with 'South Pacific Fighting Force' printed on the seat of his pants.[3]

Admiral William F. ("Bull") Halsey

I. INTRODUCTION.

Today, the armed forces of the United States operate as a team.[4] When the National Command Authority (NCA)[5] orders a particular Commander-in-

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[3] ELMER B. POTTER, BULL HALSEY 186 (1985).

[4] In his introduction to the inaugural issue of *Joint Force Quarterly* (JFQ), General Colin L. Powell, then Chairman of the Joint Chiefs of Staff, wrote:

> There is another major factor that contributes to the high quality of our Armed Force--less tangible than training or weaponry but nonetheless crucial. We call it *jointness*, a goal that we have been seeking since America took up arms in December 1941 at a time when warfare was clearly undergoing a dramatic change. Today we have achieved that goal; today all men and women in uniform, each service, and every one of our great civilian employees understand that we must fight as a team.

Colin L. Powell, *A Word from the Chairman*, JFQ, Summer 1993, at 5.

The concept of "team" is at the heart of the United States' joint military doctrine. "Joint warfare is team warfare" was the slogan on the cover of the November 11, 1991 edition of JOINT CHIEFS OF STAFF, PUBLICATION 1, JOINT WARFARE OF THE ARMED FORCES OF THE UNITED STATES (Nov. 11, 1991) [hereinafter Joint Pub 1]. It was the theme of General Powell's message accompanying that edition of Joint Pub 1. Finally, as General Shalikashvili recently wrote in his introductory remarks to the January 10, 1995 edition of Joint Pub 1, "[t]he enduring theme--**joint warfare is team warfare**--remains at the heart of this capstone publication; that will not change."

United States Army doctrine could not be more explicit in this area:

> The Army will not operate alone. The Army contributes a full range of unique capabilities for combat, CS, and CSS functions for sustained land combat operations as part of a joint, combined, or interagency team.

DEP'T OF ARMY, FIELD MANUAL 100-5, Operations 2-2 (June 14, 1993) [hereinafter FM 100-5 Operations].

[5] The National Command Authorities (NCA) are the President and Secretary of Defense together with their duly deputized alternates or successors. The term NCA is used to signify constitutional authority to direct the Armed Forces in their execution of military action. Both movement of troops and execution of military action must be directed by the NCA; by law, no one else in the chain of command has the authority to take such action.

Chief (CINC) of a combatant command[6] to perform a real-world mission, it is extremely likely that the force structure the CINC chooses to employ will be a "joint" force. It will be joint in the sense that it will be comprised of elements from at least two armed services. These joint forces, most often organized as Joint Task Forces (JTFs), present their commanders with some particularly vexing problems involving interservice command and control.[7]

DEP'T OF DEFENSE, ARMED FORCES STAFF COLLEGE PUBLICATION 1, THE JOINT STAFF OFFICER'S GUIDE, 2-2 (1993) [hereinafter AFSC Pub. 1].

6 "A combatant command" is defined as:

> [A] unified or specified command with a broad continuing mission under a single commander established and so designated by the President, through the Secretary of Defense and with the advice and assistance of the Chairman of the Joint Chiefs of Staff. Combatant commands typically have geographic or functional responsibilities.

JOINT CHIEFS OF STAFF PUBLICATION 0-2, UNIFIED ACTION ARMED FORCES (UNAAF)(Feb. 24, 1995) [hereinafter JOINT PUB 0-2].

> The unified commands are the fighting commands of the U.S. Collectively, their job is to conduct military operations wherever U.S. national interests require. Unified commands have broad continuing missions, and employ the forces of two or more services. Specified commands (when created) also have broad, continuing missions, but only employ one service component to fulfill that mission. . . . U.S. forces are assigned to 9 unified commands under the authority of the SECDEF. . . . [these are the] 9 combatant commands. The Commanders-in-Chief (CINCs) are assigned either regional or functional responsibilities. Five of the 9 unified commands (USACOM, USEUCOM, USPACOM, USSOUTHCOM, USCENTCOM) have regional responsibilities; the other four have functional responsibilities (USTRANSCOM, USSOCCOM, USSPACECOM, and USSTRATCOM).

INTERNATIONAL AND OPERATIONAL LAW DIVISION, THE JUDGE ADVOCATE GENERAL'S SCHOOL, UNITED STATES ARMY, THE OPERATIONAL LAW HANDBOOK (JA 422) 2-3 (1995) [hereinafter Op. Law Handbook].

7 One prominent student of military command structures has recently written:

> Precisely because service command structures exert first claim on the loyalties of their members, command relationships *between* the services have been a persistent problem. In fact, it was largely because of the perception that there were such difficulties in the interservice, or joint, relationships, that the Ninety-ninth Congress eventually passed the Goldwater-Nichols Department of Defense Reorganization Act of 1986.

C. KENNETH ALLARD, COMMAND, CONTROL, AND THE COMMON DEFENSE 3 (1990).

These problems of interservice command and control are not new.[8] Historically, the autonomous nature of the various armed services has been discussed and debated. This semi-independence has led to the development of different service traditions and cultures. These distinct service cultures have in turn fostered rivalries among the armed services. It is against this background that the last two Chairmen of the Joint Chiefs of Staff (JCS), Generals Powell and Shalikashvili, have stressed that "joint warfare is team warfare."[9]

The use of the "team" metaphor is particularly appropriate. From the often quoted remarks of General Omar Bradley,[10] to the famous press conferences of General Schwarzkopf during OPERATION DESERT STORM, the motif of the team has often been central to the analysis of military operations.

Military operations, particularly contemporary ones, by their nature bring people and units of diverse backgrounds together in an attempt to accomplish some mission or set of missions. But as the quotation from Sun-Tzu at the beginning of this thesis suggests, the ability to enforce order and discipline in a given unit is absolutely essential if it is to be an effective force. King Archidamus of Sparta also knew this fact well. He exhorted the Spartans and their allies at the start of the Peloponnesian War that "nothing contributes so much to the credit and safety of an army as the union of large bodies by a single

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[8] In 1813 Commodore Isaac Chauncey of the United States Navy wrote to Major General Brown, United States Army, on Lake Ontario: "We are intended to seek and fight the enemy's fleet, and I shall not be diverted from my efforts by any sinister attempt to render us subordinate to, or an appendage of, the Army." R. HEINL, JR., DICTIONARY OF MILITARY AND NAVAL QUOTATIONS 333 (1985); *quoted in* LIEUTENANT COLONEL DENNIS W. TIGHE, UNIFICATION OF FORCES: THE ROAD TO JOINTNESS? 1 (May 1991) (on file with the Pentagon Library and the Combined Arms Research Library, Ft. Leavenworth, Kansas).

[9] *See supra* note 4.

[10] General Bradley testified:

> But it [Pearl Harbor], and the subsequent lessons we learned, day by day, until September 1945, should have taught all military men that our military forces are one team--in the game to win regardless of who carries the ball. This is no time for "fancy dans" who won't hit the line with all they have on every play, unless they can call the signals. Each player on this team--whether he shines in the spotlight of the backfield or eats dirt in the line--must be an All-American.

Testimony before the House Armed Services Committee, October 19, 1949, *quoted in* JOHN BARTLETT, FAMILIAR QUOTATIONS 1025 (14th ed. 1968).

discipline."[11] There is continuing validity to the perceptions of Sun-Tzu and King Archidamus. Their insights concerning what it takes to mold an effective fighting team remain as true today as they were centuries ago when they were first uttered.

Joint Task Forces, by their nature, are *ad hoc* creations brought into being for a limited purpose and usually for a limited period of time.[12] They are created by hand-picking units, detachments or individuals from the various armed services and placing them under a selected JTF commander. Usually, the JTF is organized around a JTF headquarters and staff taken from the same armed service and unit as the JTF commander.[13] For these reasons, there is no standing unit discipline or set of orders, backed by competent authority, that can serve to unite JTFs as soon as they are created. Although the UCMJ was designed, in part, to provide such a standing set of uniform rules, in practice it does not fully serve this function. After the creation of a JTF, current law limits the authority of the JTF commander to enforce his/her general orders directly against members from other services assigned to his/her command.

It is imperative that to strengthen the military justice authority of JTF commanders, they must have the legal authority to convene interservice general courts-martial (GCMs). This GCM authority is needed to ensure JTF commanders can enforce their orders by appropriate legal action should it be necessary to do so.

This analysis begins with a statement of the problem. The problem statement is in two sections. The first places the problem of joint or reciprocal military justice in proper context--concrete operational settings. This section looks at how problems regarding joint military justice jurisdiction can operate to hinder the operational effectiveness of JTFs. The second section looks at some of the more theoretical questions that must be addressed when thinking about the optimal manner by which to administer military justice in a joint environment. These questions must be examined in order to develop a solution that is appropriate and flexible enough for the unique characteristics of operational JTFs.

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[11] FITTON, *supra* note 2, at 78, *quoting* Thucydides.

[12] Thomas C.Linn, *The Cutting Edge of Unified Actions,* JOINT FORCE QUARTERLY, Winter 1993-94, at 34-39.

[13] JOINT PUB 0-2, *supra* note 6, at IV-9-IV-13.

Part III of this article, lays out one half of the background of the problem of joint UCMJ jurisdiction--the history of service autonomy. This part of the paper is composed of two sections. The first traces the origin and nature of the autonomy of the armed services. The second section addresses the contemporary validity and utility of continued service autonomy. Almost any discussion of "jointness" raises a host of issues concerning the historic traditions and rivalries of the various armed services. This is particularly true when an issue is as central to service authority as the ability to convene general courts-martial. For this reason, it is important to acknowledge and address contentious issues at the beginning so as to avoid the quagmire of debate over service roles and missions and larger issues of service unification.

Part IV lays out the other half of the background of the problem--the fact that success in military operations seems to require a single commander who possesses all the powers he needs to command effectively. This part lays the theoretical framework for analyzing the problem. It examines military theory and bodies of doctrine developed by the services and by the Joint Chiefs of Staff (JCS) regarding command, particularly focusing on the principle of unity of command. The distinction between unity of command and unity of effort is of critical importance and receives special attention. Part IV is divided into three sections. The first examines the historical origins of the principle of unity of command. I concentrate on the record of "joint" operations over the last 50 years of the military history of the United States--particularly on the watershed formative experiences of World War II. The second section addresses the concept of "unity of effort" and links this concept to the long-standing autonomy of the different armed services. The final section takes the conclusions of the first two sections and ties them together by analyzing what is really at stake in the current debate over the proper definition of "jointness."

Part V examines the history of the legal framework which underlies the problem of interservice military justice jurisdiction. This historical analysis is divided into three sections. The first looks at the history of the organization of the Department of Defense and the Joint Chiefs of Staff, with a particular emphasis on the Goldwater-Nichols reform legislation of 1986.[14] The second section traces the history of reciprocal military justice in the United States, with a focus on the development and legislative history of Article 17 of the Uniform Code of Military Justice (UCMJ).[15] The third section analyzes the changes to

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[14] 1986 DOD Reorganization Act, Pub. L. No. 99-433, 100 Stat. 1013 (codified as amended at 10 U.S.C. 164 *et seq.* (1988) [hereinafter Goldwater-Nichols].

[15] 10 U.S.C. §§ 801-946 (1988).

UCMJ article 22 and Rule for Courts-Martial (RCM) 201 that resulted from the enactment of Goldwater-Nichols.

Part VI examines the current legal context of the problem of joint military justice authority. This part looks at problems raised by current provisions, and omissions, in the UCMJ and the Manual for Courts-Martial (MCM)[16] that address issues of military justice administration in the joint arena.

Part VII lays out my proposed solution to the problem. I suggest two main remedies. The first is to amend RCM 201[17] to provide commanders of operational JTFs with GCM authority over all military personnel, whatever their service, assigned to their organization. The second proposed solution is a natural outgrowth of the first. It is a joint regulation that would be the equivalent of Army Regulation (AR) 27-10.[18] It would be applicable in operational JTFs and would facilitate the administration of joint military justice in those environments. Because the content of such a joint regulation would provide more than enough material for several theses, this proposal will not be discussed at any length. I will simply identify the requirement.

II. THE PROBLEM: LACK OF UCMJ AUTHORITY FOR JTF COMMANDERS.

The problem is reconciling the needs of JTF commanders with the legal authority required to ensure good order and discipline, while, at the same time, recognizing (and providing for) the legitimate interests of the various armed services in administering their personnel. *The bottom line is that under existing law, the only joint force commanders who possess the ultimate disciplinary tool, the ability to convene general courts-martial, are the CINCs.*[19] Any other joint

[16] MANUAL FOR COURTS-MARTIAL, United States, (1995 edition) [hereinafter MCM].

[17] MCM, *supra* note 16, RCM 201.

[18] DEP'T OF ARMY, REG. 27-10, LEGAL SERVICES: MILITARY JUSTICE (August 8, 1994) [hereinafter AR 27-10].

[19] UCMJ art. 22(a)(3) (1988); MCM, *supra* note 16, RCM 201(e)(2)(A).

force commander must be specifically authorized by the Secretary of Defense to convene GCMs before he/she can legally do so.[20]

The inability of a commander to convene a general court-martial is a clear indication of the fact that he has less than full command authority. Current joint doctrine lends support to this view. The authoritative Joint Pub 0-2, *Unified Action Armed Forces*, defines "command" as:

> [T]he authority that a commander in the Military Service lawfully exercises over subordinates by virtue of rank or assignment. Command includes the authority and responsibility for effectively using available resources and for planning the employment of, organizing, directing, coordinating, and controlling military forces for the accomplishment of assigned missions. It also includes responsibility for health, welfare, morale, and *discipline* of assigned personnel.[21]

Joint doctrine further provides:

> [C]ommand is central to all military action, and unity of command is central to unity of effort. Inherent in command [definition just quoted above] is the authority that a military commander *lawfully* exercises over subordinates and confers authority to assign missions *and to demand accountability for their attainment.* Although commanders may delegate authority to accomplish missions, they may not absolve themselves of the responsibility for the attainment of these missions. *Authority is never absolute; the extent of authority is specified by the establishing authority, directives, and law.*[22]

Joint doctrine also defines different levels and types of command authority:

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[20] UCMJ art. 22(a)(9) (1988); MCM *supra* note 16, RCM 201(c)(2)(B). I am referring here to authority which accrues to the commander by virtue of his joint command. As we shall see in Part VI, if a JTF commander brings with him GCM authority that flows from an independent service command, policy--not law--restricts his ability to convene interservice courts-martial.

[21] JOINT PUB 0-2, *supra* note 6, at GL-4 (emphasis added).

[22] *Id.* at III-1 (emphasis added).

> [T]he authority vested in a commander must be commensurate with the responsibility assigned. This document describes the various levels of authority used for U.S. military forces, four are command relationships--COCOM, operational control (OPCON), tactical control (TACON), and support.[23]

Of these levels of authority, only COCOM (combatant command authority) includes the power to convene courts-martial[24] and it "cannot be delegated or transferred."[25] It remains with the CINCs alone.

Experiences of United States forces in recent joint military operations suggests that this lack of "full" command authority on the part of JTF commanders (i.e., inability to convene a general court-martial to try a member of another service) provides an unnecessary obstacle in the path of command, and may hamper a joint force commander's ability to command effectively.

A. *Recent Operational Manifestations of the Problem.*

1. *JTFs in Haiti: 1994-95.*

Recently published accounts of United States military operations in Haiti in 1994-95 suggest there were some command problems that resulted from the lack of joint UCMJ authority.[26] Specifically, problems centered around the inability of the successive JTF commanders to enforce general orders over members from other services assigned, attached, or under the operational control of their respective JTFs.[27] This primarily occurred, and was always a danger of occurring, concerning enforcement of *General Order Number 1*.

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[23] *Id.* "The other authorities are coordinating authority, ADCON, and direct liaison authorized (DIRLAUTH)."

[24] *Id.* at xi. This authority is vested in CINCs by 10 U.S.C. § 164(c)(1)(F) and (c)(1)(G).

[25] *Id.*

[26] CENTER FOR LAW AND MILITARY OPERATIONS, THE JUDGE ADVOCATE GENERAL'S SCHOOL, UNITED STATES ARMY, LAW AND MILITARY OPERATIONS IN HAITI, 1994-95: LESSONS LEARNED FOR JUDGE ADVOCATES 109-12 (Dec. 11, 1995) [hereinafter CLAMO Haiti Report].

[27] *Id.* at 111.

General Order Number 1 was an attempt to create "a uniform set of rules pertaining to such things as alcohol consumption, sexual contact with the Haitian populace, and the taking of souvenirs."[28] Besides ensuring discipline in the substantive areas covered by the order, the general order served "the related but distinct interests of justice and troop morale, as soldiers situated equally are treated equally."[29] Unfortunately, these benefits did not always accrue to the Haiti JTFs because the successive commanders were not able to enforce their general orders against members of other armed services who were part of their JTFs.[30] This resulted in disparate treatment of members from different services.[31] The largest number of problems came from special forces personnel whose military justice authority lines ran directly back to Fort Bragg, not through the JTF commander.[32]

Major General Meade, the commander of the 10th Mountain Division (Light) and of JTF-190 in Haiti, and his Staff Judge Advocate, Lieutenant Colonel Karl Warner, both point to several problems that were traceable, to a large degree, to the lack of joint UCMJ jurisdiction in Haiti. Specifically, the problems included "unnecessarily disparate treatment, morale, welfare, discipline and loss of control."[33] There were instances where members of different services were riding in the same car and were caught engaging in the same misconduct, alcohol and curfew violations, and yet they received widely disparate treatment, because they were disciplined by their respective services. Knowledge of these facts naturally caused morale problems. This was particularly a problem regarding disparate treatment of two groups of Army personnel, the special forces on the one hand, and the "regular" Army soldiers on the other. Because the special forces personnel fell under a different unified command, USSOCOM, General Meade could not enforce his general orders against special forces soldiers in his area of operations unless the special forces

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[28] *Id.* at 110.

[29] *Id.*

[30] *Id.* at note 362.

[31] Telephone interviews with Major General David C. Meade USA (Ret.), former Commander 10th Mountain Division and of JTF-190 and LTC Karl Warner USA, SJA for 10th Mountain Division in Haiti and JTF-190 (Jan. 1996).

[32] *Id.*

[33] *Id.*

chain of command agreed. The resulting disparity between treatment of special forces soldiers and treatment of 10th Mountain soldiers contributed to an unhealthy command atmosphere that was reported in the press as our "two armies" in Haiti. [34]

Brigadier General John D. Altenburg, USA, was the SJA for XVIII Airborne Corps, commanded by Lieutenant General (LTG) Shelton, USA, and as such was the SJA for JTF-180, also commanded by LTG Shelton.[35] Joint Task Force 180 had been designed to execute a forcible entry into Haiti, if necessary, and the initial U.S. force that entered Haiti in September 1994 fell under this command. Joint Task Force 190, which was organized around the core of the 10th Mountain Division, was initially organized as a subordinate JTF to JTF-180 and was the unit ordered to execute the semi-permissive entry into Haiti after former President Carter had negotiated a deal with General Cedras.[36]

General Altenburg advocates that there are several aspects of JTF-180 that made seeking joint UCMJ jurisdiction inappropriate. First, JTF-180 was designed and prepared for combat operations. The operational tempo was very fast and considerations regarding potential courts-martial were far down on the command's list of concerns. In that type of fast-changing environment, soldiers are far less likely to get into trouble and commit offenses for which a court-martial might be appropriate. In addition, if a soldier were to commit offenses in that type of operational environment, the matter in all likelihood would be handled through normal service channels after the shooting had stopped. The suspected offender would either be segregated until after the fighting, or he would continue the mission and face the potential charges after the military operation was over.[37]

A second reason joint UCMJ jurisdiction would not have been appropriate for JTF-180 was the fact that the JTF itself was complex, fast moving and constantly changing. General Altenburg points out that various

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[34] Bob Schacochis, *Our Two Armies in Haiti: Green Berets and Infantry,* N.Y. TIMES, Jan. 8, 1995, § 4, at 19.

[35] Interview with Brigadier General John D. Altenburg, USA, Assistant Judge Advocate General For Military Law and Operations, at the Pentagon (Feb. 9, 1996).

[36] *Id.*

[37] *Id.*

detachments were constantly being added and subtracted from JTF-180 so that on any given hour it was difficult to tell exactly what units JTF-180 "owned" and the identity of the command relationships.[38]

A third problem JTF-180 posed for joint UCMJ jurisdiction was the difficulty in defining the theater of operations for that particular task force. There were two other JTFs operating in the areas around Haiti, JTF-160 which was dealing with the refugee problems in Guantanamo Bay, and JTF-120 which was performing an interdiction mission around Haiti. The different areas of responsibility for these three JTFs were not entirely clear. In addition, one unit or detachment might be part of a particular JTF one hour and part of another JTF the next hour.[39]

For the above reasons, Brigadier General Altenburg never recommended seeking joint UCMJ authority for LTG Shelton as commander of JTF-180. On the other hand, General Altenburg believes that JTF-190 was a situation where joint UCMJ authority would have been appropriate, for several reasons. First, JTF-190 operated in a relatively stable environment, with much less fluidity in terms of mission and force composition. In addition, troops began to have more time on their hands which allowed them to commit offenses. Furthermore, the command was more likely to find out about misconduct during this type of "stability operation" than during the combat-type scenarios JTF-180 was contemplating.

2. *JTFs in Somalia: 1992-94.*

United States military operations in Somalia provide a good contrast to the Haiti operations for several reasons. First, the JTF Somalia commander, Marine Lieutenant General (LtGen) Johnston, was the first, and perhaps only, JTF commander to be empowered by the Secretary of Defense (SECDEF) as a General Court-Martial Convening Authority.[40] The second reason Somalia is a good contrast with Haiti is that the history of the successive U.S. and U.N. JTFs in Somalia, with their convoluted organizational structures, is instructive on the need for, and importance of, unity of command.

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[38] *Id.*

[39] *Id.*

[40] Pursuant to UCMJ art. 22(a)(9) (1988) and MCM, *supra* note 16, RCM 201(e)(2)(B).

According to Brigadier General Walter B. Huffman, USA, who in December 1992 was serving as the Staff Judge Advocate for United States Central Command, both USCINCCENT, General Hoar, and Lieutenant General Johnston, who General Hoar had picked to be the JTF commander in Somalia, believed it was important for the JTF Somalia commander to have GCM jurisdiction over all members of the JTF, regardless of their branch of armed service.[41] To accomplish this, then-Colonel Huffman carried on discussions with, and wrote a memorandum to, the Legal Counsel for the Chairman of the Joint Chiefs of Staff (CJCS) requesting the required SECDEF delegation of GCM authority.[42] The GCM authority was eventually obtained, however, it was not simply a matter of routine.[43]

While this joint GCM authority was ultimately never used in Somalia, it was certainly available for use. It would have become a particularly useful command tool under various potential scenarios. In addition, it had some significant side benefits.[44] In particular, the ability to convene general courts-martial would have been needed if the United States had decided to court-martial civilians for crimes against humanity for atrocities against civilians that were being investigated. United States authorities were actually contemplating the use of general courts-martial for this purpose. For political reasons, these courts-martial would have had to have been convened by the highest ranking American in Somalia, the JTF commander.[45]

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[41] Interview with Brigadier General Walter B. Huffman, USA, Assistant Judge Advocate for Civil Law and Litigation, at the Pentagon (Jan. 31, 1996).

[42] *Id.* A copy of some of this correspondence, including the memorandum from Colonel Huffman to CJCS Legal on December 7, 1992, requesting the delegation is on file with the author. The SECDEF delegation was required by MCM, *supra* note 16, RCM 201(e)(2)(B).

[43] *Id.* Brigadier General Huffman told me that both he and Colonel Terry, USMC, then legal adviser to CJCS, believed this issue was a case of first impression--at least since the time of the enactment of Goldwater-Nichols.

[44] *Id.* General Huffman related that a week or so after GCM authority was delegated to LtGen Johnston, Colonel Terry called him to say that it was a good thing that they had gone ahead and done the novel delegation of GCM authority. This was so because some administrative matter had surfaced relating to LtGen Johnston's JTF that required a GCM authority to take action and LtGen Johnston could not have acted on it had he not received the delegation of authority. General Huffman could not recall the specifics of the subject matter that required GCM authority.

[45] *Id.*

B. *The Real and Potential Complexities of Joint Units.*

A cursory look at the actual operations in Somalia and Haiti suggest there are many different types of JTFs and joint organizations. Variables such as mission, composition, size, and duration account for the myriad of possibilities. These different variables must be examined if a true picture of the actual military justice authority *needs* of joint force commanders is to be developed.

1. *Mission.*

The missions of joint organizations are very diverse. They can range from the work of personnel assigned to standing staff units such as the Joint Chiefs of Staff (JCS) or the various unified commands, to the operational tasks of JTFs such as those involved in Somalia, Rwanda, and Haiti. This diversity has important implications in determining the appropriate legal authority a joint force commander should possess in order to enforce discipline within his command. Perhaps the most significant of these implications is the need for flexibility.

The legal framework that supports a joint force commander's justice authority must be sufficiently flexible to be responsive. The need for flexibility is also suggested by current joint doctrine on the organization of joint forces.[46] A legal regime which lays out a joint force commander's military justice authority must sufficiently consider the different situations in which a joint force will be employed.

2. *Composition.*

The composition of a joint force, in terms of manpower contributions from the various armed services, will of course vary with the mission requirements. The composition of a joint force is particularly significant for interservice political reasons. For example, the interest of the Air Force in how a joint organization administers military justice is arguably greater in a unit composed of eighty percent Air Force personnel than in a unit that receives less

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[46] JOINT PUB 0-2, *supra* note 6, at xiv:

> JFCs [Joint Force Commanders] have the authority to organize forces to best accomplish the assigned mission based on their concept of the operations. The organization should be sufficiently flexible to meet the planned phases of the contemplated operations and any development that may necessitate a change in plan.

than ten percent of its personnel from the Air Force. This is not to imply that a particular armed service would not have some interest in how justice is administered to even one of its personnel. It does reflect, however, the political reality of the persuasive force of numbers.

Current joint doctrine also recognizes the services' concerns over the composition of JTFs: "The composition of the JFC's [Joint Force Commander's] staff will reflect the composition of the joint force to ensure those responsible for employing joint forces have a thorough knowledge of total force capabilities."[47]

Another aspect of joint force composition, perhaps even more significant than personnel concerns, is the issue of the armed service to which the commander belongs. The role of the commander in our system of military justice is central, therefore, questions about a given commander's attitudes and disciplinary philosophy are often central in helping to establish the "tenor of command" for a given unit.[48] This fact, when coupled with historic and well-entrenched service traditions regarding discipline (that may amount to classic stereotypes), explains why the armed services become particularly concerned when the issue of reciprocal jurisdiction is raised. Service parochialism, born out of service prejudice is a historical *and* contemporary fact that must be confronted in the area of reciprocal court-martial jurisdiction.

3. ***Size.***

The size of a particular joint unit is an important variable for the same reasons it is critical in the traditional single service disciplinary scheme. Joint Task Forces can be extremely large, commanded by a three or four star flag officer, or they may be relatively small and commanded by a junior officer. The principle that as commanders grow in experience and responsibility they receive ever more legal authority and power is a cornerstone of our military justice system. A company commander does not need the same level of disciplinary authority as a division commander.[49]

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[47] *Id.*

[48] General Huffman attributed the phrase "tenor of command" to General Frederick Franks and used it in the context of discussing the principle of unity of command.

[49] *See supra* text accompanying notes 21 and 22, quoting JOINT PUB 0-2. This principle of the UCMJ is not universally viewed as the correct one for effective command in the modern military setting. Take, for example, the following passage from Colonel David Hackworth, USA (Ret.):

The considerations underlying the existence of the different levels of disciplinary and court-martial authority in each service (summary Article 15s, Article 15s, field grade Article 15s, summary courts-martial, special courts-martial and general courts-martial), apply with at least equal force in the joint arena. The basic policy of the military justice system that "[a]llegations of offenses should be disposed of in a timely manner at the lowest appropriate level of disposition"[50] is effectuated by the requirement that before the serious proceedings of a GCM can be invoked, a case must be processed through the chain of command. In addition, the administrative procedures involved in processing cases through the various disciplinary levels, which are tied to considerations of due process, virtually require that only commanders of relatively large units have GCM authority.[51]

> In the old days, a company commander had full authority to bring in his outposts. Now, in the modern, post-Korea centralized Army, the fate of my two hundred-odd men rested in the hands of a lieutenant general a hundred miles away. . . .
>
> "A systematic robbing of authority and prestige," Colonel Johns was later to write me, describing the lot of company commanders and NCOs during this period, indeed since the end of the Second World War. . . . Then there was the Uniform Code of Military Justice (UCMJ), adopted in 1951, which robbed a company commander of the authority to administer punishment on his own, and certainly tied the fists of an Old Army NCO: since the UCMJ's inception, the use and abuse of the court-martial had become widespread. . . .
>
> The particular irony of all this was found on the potential battlefield. While company COs could not take a piss without consulting higher HQ for the time, place, and manner in which to do it, in the field they were responsible for a staggeringly large defensive area.

DAVID HACKWORTH, ABOUT FACE: THE ODYSSEY OF AN AMERICAN WARRIOR 371-372 (1989). This line of argument from Colonel Hackworth essentially parallels the argument of my thesis. The differences are that I advocate strengthening the authority of a JTF commander, rather than a company commander, and I believe the UCMJ is a tool which, when properly used, helps commanders command rather than impairs their ability to command.

[50] MCM, *supra* note 16, RCM 306(b).

[51] The smallest units to which Article 22 of the UCMJ grants GCM authority are separate infantry brigades or their equivalents in the other services. UCMJ art. 22 (1988).

4. *Duration.*

The length of time that a joint unit is likely to be in existence is another important factor in assessing the military justice needs of the commander of that particular unit. Almost by definition, a JTF is of limited duration:

> A JTF may be established on a geographical area or functional basis when the mission has a specific limited objective and does not require overall centralized control of logistics. . . . A JTF is dissolved by the proper authority when the purpose for which it was created has been achieved or when it is no longer required.[52]

Some JTFs, like those created to conduct Noncombatant Evacuation Operations (NEOs), may last from a couple of days to a week.[53] Other JTFs, like those designed to provide relief or to deny flight, might last months or years.[54] A commander who is in charge of an operation for a relatively long period of time, arguably, has a greater interest in having GCM authority than a commander who in command for a shorter duration.

III. FACTUAL BACKGROUND: TRADITIONS OF SERVICE AUTONOMY.

A. *Origins and Nature of Service Autonomy.*

The topic of the differences between, and rivalries among, the armed services has been the subject of much analysis, most of it deprecating.[55] The bulk of this criticism will not be recited here. However, a brief review of the

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[52] JOINT PUB 0-2, *supra* note 6, at IV-9.

[53] For example: EASTERN EXIT, the evacuation of 281 noncombatants from the U.S. Embassy in Mogadishu, Somalia lasted from 2-11 January 1991; QUICK LIFT, the evacuation of Americans and others from Zaire lasted for a short time in September 1991. F. Doyle, K. Lewis & L. Williams, *Named Military Operations: From January 1989 to December 1993* (TRADOC Technical Library, April 1994); *See also* Linn, *supra* note 12, at 34-39.

[54] OPERATION PROVIDE COMFORT began in April 1991 and is ongoing; OPERATION SOUTHERN WATCH began in August 1992 and is ongoing. *See generally Id.*

[55] *See, e.g.*, ARTHUR HADLEY, THE STRAW GIANT (1986); A. KANTER, DEFENSE POLITICS: A BUDGETARY PERSPECTIVE (1979).

academic work that has been done in the area of service uniqueness and competition among the services is essential for the purposes of this article.

Colonel Kenneth Allard wrote an excellent book which provides a comprehensive history of the American military command structure. The book traces the origin and development of the autonomy of the armed services. Allard has noted that the services, in preparing their forces for war, can have very different perspectives on war itself, if not on the nature of such conflicts, then certainly on the fundamental questions of service roles, missions, and capabilities that would be brought to bear. Historically, these service viewpoints feature the respective applications of land power, sea power, or air power as a first priority, generally stopping well short of a joint perspective in which the different elements of warfare are combined in pursuit of the nation's strategic goals.[56]

These different perspectives rest upon three different, but related, foundations. First, they are based upon "a basic division of labor (separate land, sea, and air forces)."[57] Second, they are built upon "profound historical legac[ies]" and institutional experiences.[58] Third, they are grounded on different "strategic paradigms" which "represent the ideological component of service autonomy."[59] Together, these three bases contribute to distinct service personalities, styles, or cultures which are largely responsible for service differences. "Taken together, these intellectual and psychological differences represent a key source of conflict and competition within our armed services."[60]

Some scholars have looked to organizational theory for assistance in understanding the phenomenon of interservice rivalry. Organization culture has been described as the pattern of basic assumptions - invented, discovered, or developed by a given group as it learns to cope with its problems of external adaptation and internal integration - that has worked well enough to be

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[56] ALLARD, *supra* note 7, at 6-7.

[57] *Id.* at 8.

[58] *Id.*

[59] *Id.* at 244.

[60] *Id.* at 9, *quoting* Arthur T. Hadley, *The Split Military Psyche*, N.Y. TIMES, July 13, 1986 (Magazine), at 26.

considered valid, and therefore, to be taught to new members as the correct way to perceive, think, and feel in relation to those problems.[61]

These basic assumptions "elicit nearly automatic group responses to external and internal issues of survival."[62] Because these core assumptions operate at "the most fundamental level of human consciousness,"[63] some have suggested, "in the future we must ask more seriously than before to what extent they are dealing with learned responses which operate beneath the full level of human consciousness."[64] Because sub-consciousness is notoriously difficult to study and analyze, "most studies examine the product of these assumptions in the form of observable values and behavior."[65]

When the values and behavior of the services are studied by various authors, there is a surprising conformity among the conclusions reached. Whether the concept of "center of gravity" as suggested by Clausewitz is used,[66] or whether the focus is on the "unique combat environments" in which the services operate,[67] the results are remarkably similar.

For the Army, "the natural center of gravity focus . . . . appears to be the enemy's land combat forces. History has taught the Army that victory

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[61] EDGAR H. SCHEIN, ORGANIZATIONAL CULTURE AND LEADERSHIP 9 (1985), *quoted in* Craig S. Faller, The Navy and Jointness: No Longer Reluctant Partners? 6-7 (Dec. 1991) (unpublished thesis, Naval Postgraduate School, Monterey, California) (on file with the Pentagon Library and the Naval Postgraduate School, Monterey, California) [hereinafter Faller Thesis].

[62] Faller Thesis, *supra* note 61, at 8; *see also* Tighe, *supra* note 8, at *7.*

[63] *Id.*

[64] John Shy, *The American Military Experience: History and Learning*, J. INTERDISCIPLINARY HISTORY, vol. I, no. 2, Winter 1971, at 226; *quoted in* Faller Thesis, *supra* note 61, at 8.

[65] Faller Thesis, *supra* note 61, at 9.

[66] ROBERT R. BUCKLEY, SERVICE UNIQUENESS-STUMLDING BLOCKS TO JOINTNESS 15 (March 1989) (on file with the Pentagon Library and the U.S. Army War College, Carlisle Barracks, Pennsylvania).

[67] Raul Henri Alcala, *Guiding Principles for Revolution, Evolution, and Continuity in Military Affairs*, in WHITHER THE RMA: TWO PERSPECTIVES ON TOMORROW'S ARMY, 21-26, Strategic Studies Institute, U.S. Army War College (July 22, 1994).

comes with the defeat of the enemy's army and the occupation of his territory."[68] Regarding jointness, two aspects of the Army's view of warfighting are important. "First, the Army views victory as best achieved through successful land campaigns. Second, the Army needs jointness more than the other services in order to accomplish its missions,"[69] because it requires the Air Force and the Navy for transportation to the battle and for sustainment.[70]

With respect to the influence of the land combat environment:

> In contrast to the air crew combat environment, armies must place their combat soldiers continuously in harm's way, most often directly in contact or in imminent probability of contact with a lethal adversary. . . .
>
> Land combat forces engage in continuous operations to attack and destroy forces and facilities, to control territory, and to protect friendly areas and their populations; while ensuring their own survival and freedom of action. Continuous and often high risk from enemy action characterizes the daily existence of combat soldiers. Maintaining combat capability during operations, and the versatility to adapt it to the exigencies and opportunities of the situation without interruption, comprise the central operational process for which the ATO (air tasking order) is the equivalent for air combat crews.
>
> Once engaged, land combat units normally maintain contact to assure battlefield dominance through control of information and maneuver. They break contact only in extreme circumstances. Crew rest is organized in a staggered fashion to permit continuous operations, day and night, regardless of the weather. While risk is reduced during rest periods, it remains continuously high in contrast to the relatively risk free areas which air combat crews occupy between their periods of combat engagement.[71]

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[68] Buckley, *supra* note 66, at 16.

[69] *Id.* at 17.

[70] *Id.*

[71] Alcala, *supra* note 67, at 23-24.

As a result of their combat environment, the Army has different needs than other services' units. In the Army, noncommissioned officers (NCOs) must be leaders. They must be recognized, trained and legally protected as such, ready to step in and lead troops in combat should an officer fall. In the Air Force, NCOs are more technicians than leaders. Officers fly the planes. If a pilot is shot down, he must be replaced by some other pilot--not an NCO. The roles of NCOs are simply different.[72]

For the Marine Corps, their focus is on power projection through amphibious operations:[73] "[T]he immediate enemy center of gravity is any terrain that is vital to a naval campaign."[74] Because of the Marine Corps Air-Ground-Task-Force organization, the Marines are a relatively self-contained fighting force. Although reliant on the Navy for transportation to the battle area, once ashore the Marines have organic ground, air and combat service support elements. Thus, Marines are not as dependent on joint operations as the Army to accomplish their missions.[75]

The Marines' operational combat environment "is essentially identical to armies once the force is projected ashore."[76] Their need for strong NCOs, and a disciplinary system to support them, is identical to that of the Army.

The Navy's focus is on the sea. Its "perception of an enemy's center of gravity is defeat of his fleet in order to deny commerce and induce strangulation."[77] The Navy "has traditionally been the most independent of the

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[72] Interview with Lieutenant Colonel Frederic L. Borch, USA, Criminal Law Division, Office of the Judge Advocate General, Army representative to the Code Committee, at the Pentagon (Dec. 21, 1995).

[73] Buckley, *supra* note 66, at 18.

[74] *Id.*

[75] *Id.*

[76] Alcala, *supra* note 67, at 23.

[77] Buckley, *supra* note 66, at 20.

armed services."[78] "The fundamental assumption underlying the United States Navy's organizational culture is the belief in naval autonomy."[79] The Navy has traditionally operated alone on the high seas, has fought in isolated engagements, and has its own air force (naval aviation), army (Marine Corps) and warships, the Navy is the least dependent on jointness to accomplish its missions.[80] For this reason, the Navy has often been criticized for its "traditional reluctance to play on the team."[81]

> The Navy's combat operational environment lies between the operational environments of air and land combat forces. Sea combat units are, typically, in harm's way for relatively short periods of time. The naval force functions include destruction of targets at sea and on land, control of selected sea areas, and facilitating and protecting force deployments by sea and projection of those forces onto land for combat or other operations.
>
> Air combat units that operate from aircraft carriers experience essentially the same operating environments as do air combat crews. Submarine combat units, while more isolated for longer periods of time than many surface combat units, are now operating in an environment of low risk which is likely to continue well into the next century.[82]

The result of this operational environment is that "[s]ocially, the nature of command at sea and its relationship to a belief in decentralized control provides individual U.S. naval commanders power unequaled among Army and Air Force contemporaries."[83] The isolated nature of duty on board a ship also greatly reduces the opportunities for servicemembers to commit offenses. The Captain of the ship is king/queen; and the Navy's need is for a disciplinary

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[78] *Id.*, *quoting* William S. Lynn, *The Wars Within: The Joint Military Structure and its Critics*, *in* REORGANIZING AMERICA'S DEFENSE 198 (Robert J. Art, Vincent Davis & Samuel P. Huntington eds., 1986).

[79] Faller Thesis, *supra* note 61, at 20.

[80] *Id.* at 16; Buckley, *supra* note 66, at 20.

[81] *Id.* at 20.

[82] Alcala, *supra* note 67, at 24.

[83] Faller Thesis, *supra* note 61, at 15-16.

system that supports his/her authority. Noncommissioned officers have a secondary role compared to the Army and Marine Corps.

The Air Force views the enemy's center of gravity as "his industrial capacity to make war." If this capability is destroyed through deep air strikes, the enemy's ability to resist will collapse.[84] "Like the Navy, but to a lesser degree, the Air Force is a self-sufficient service."[85] The concept of "jointness" is not as central to its survival as it is to the Army.

The operational environment of the Air Force is primarily characterized by short periods of intense risk and then periods of relative comfort.[86]

> Combat aircraft and their crews are in harm's way for relatively short periods of time. Limitations of the aircraft themselves and the nature of air-to-air and air-to-ground combat define this environment and its short employment periods. Air combat units and their crews are launched from and recover to relatively protected and comfortable areas.[87]

The disciplinary needs of the Air Force, that tend to naturally flow from this type of environment, are understandably less than those of the Army and Marine Corps, and also less than those of the Navy.

These differences among the services shape their views on the nature of command, and shape their outlook on the characteristics of discipline deemed necessary for individuals and units. These differences are a primary cause of the distinct service policies on issues like fraternization, and enlisted/officer and senior/subordinate relations.

Competition among the services is particularly fierce in the area of roles and missions. Traditionally, "there has been little rivalry over the core missions:" armies walk, navies sail, and air forces fly.[88] In the area of

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[84] Buckley, *supra* note 66, at 22, *citing* Colonel Dennis Drew, USAF, *Joint Operations: The World Looks Different from 10,000 Feet*, AIRPOWER JOURNAL, Fall 1988, at 12.

[85] Buckley, *supra* note 66, at 23.

[86] Alcala, *supra* note 67, at 22.

[87] *Id.*

[88] Buckley, *supra* note 66, at 10.

secondary or peripheral missions, however, there has been fierce competition. For example, there was a bitter battle between the Army and the Air Force over the antiaircraft mission.[89] More recently, there has been the battle between the Army and Marines over the low-intensity conflict (LIC) mission.[90] Other controversies include the Air Force/Army dispute over the Army Tactical Missile System (ATACMS) deep strike missile program and disputes among all the services over ballistic missile defense systems.

Another area of conflict arises when missions of one service directly affect another service. One example of this type of conflict is the concerns the Army and Marines have over the Navy's sealift mission. Traditionally, the Navy has placed lower priority on this mission than on aircraft carriers, surface combatants, and submarines. As a result, there has been a shortage of sealift capability which greatly concerns the Army and Marine Corps.[91] Another example is the often times emotional debate between the Army and the Air Force over close air support.[92]

The stakes in these bureaucratic battles are high for the individual services. And while these battles are no doubt fought by well intentioned professionals, they can have significant side effects. As one author has noted, "the scars from these turf battles can remain on the institutions and their personnel to breed mistrust and lack of cooperation in the future."[93] These scars can strengthen the "unconscious" organizational assumptions that are brought to the table whenever issues like joint UCMJ jurisdiction are debated.

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[89] *Id.*, *citing*, HADLEY, *supra* note 60, at 91.

[90] Buckley, *supra* note 66, at 11.

[91] *Id.*

[92] *Id.*

[93] *Id.* at 12.

B. ***Contemporary Validity and Utility of Service Autonomy.***

> *Both for present and future planners the task is to recognize the unquantifiable value that service culture plays in warfighting. It is a characteristic to be exploited, not suppressed.*[94]
>
> *Lieutenant General Bernard E. Trainor, USMC (Ret.)*

As the preceding section demonstrated, the tradition of autonomy among the armed services has deep roots and is likely to be with us for the foreseeable future. While there are some drawbacks to this autonomy, principally having to do with considerations of efficiency, there are also some significant benefits.

Former Secretary of Defense Harold Brown cited several such benefits:

> Any organization as large as the [DOD] must be divided into major operational units, with appropriate authority delegated to them. . . . Each service has definable functions, and the land, sea, and air environments differ sufficiently to call for differing skills, experience, and sometimes even equipment. . . . Recruiting, training, and personnel functions up to a certain level are clearly best carried out in such a structure. Attempts to substitute for service identification some general professional military identification that would go with the activities of particular unified or specified commands, are unlikely to work as well.[95]

Colonel Allard points out additional benefits of service autonomy:

> If nothing else, these traditions embody a warrior ethos that serves not only as a repository for the hard-won lessons of combat but also as a generational link between past and present. Continuity and military expertise are therefore two of the better reasons why separate services exist and why they will continue to do so. A third reason exists as well: a deeply and profoundly pluralistic democracy has little enthusiasm for monoliths, especially military monoliths. The American experience

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[94] Bernard E. Trainor, *Jointness, Service Culture, and the Gulf War*, JOINT FORCE Q., Winter 1993-94, at 74.

[95] Secretary Brown, *quoted in* Tighe, *supra* note 8, at 41.

consequently seems well suited to its heritage of diverse service cultures.[96]

Finally, the existence and interplay of different services brings with it the benefits of healthy competition and alternative, and even opposing, ideas. There is a solid argument, that "jointness" is essential at the operational level, but may be counterproductive at the national level. "Unified effort in the field has real meaning, and there is no serious argument against this. But outside the realms of the unified commanders, the notion becomes unclear or encourages intellectual torpor."[97] Admonitions that "there is no place for rivalry" on the joint team, that the military should "exploit the diversity of approaches that a joint force provides," help establish a standard of political correctness in the Armed Forces that chokes off consideration of ideas which, while troublesome to the interests of an individual service or a particular weapons system, might be important to the Nation.[98]

IV. THEORETICAL BACKGROUND: UNITY OF COMMAND AND UNITY OF EFFORT.

An army should have but one chief; a greater number is detrimental.

Niccolo Machiavelli, Discorsi, xv, 1531[99]

Military men have long recognized that . . . the best chance to win proceeds from giving one man the command together with the tools placed at his disposal, and full responsibility for the results.[100]

Air War College Publication, 1952

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[96] ALLARD, *supra* note 7, at 247.

[97] Seth Cropsey, *The Limits of Jointness*, JOINT FORCE Q., Summer 1993, at 78-79.

[98] *Id.* at 78.

[99] *Quoted in*, JOINT PUB 0-2, *supra* note 6, at IV-1.

[100] *USAF Extension Course Institute, Vol. II, Part C, Command and Employment of Military Forces*, (Maxwell AFB, AL, Air War College, 1952), p. 5; *quoted in* T. CARDWELL, COMMAND STRUCTURE FOR THEATER WARFARE: THE QUEST FOR UNITY OF COMMAND 7 (1984).

A. *Unity of Command.*

The Army's principles of war have been around since the publication of an Army training regulation in 1921.[101] These principles were based to a great degree on the work of British Major General J.F.C. Fuller, who had developed them during World War I to serve as guides for his own army.[102] The phase "principle of war" refers to:

> Modern warfare requires the application of both science and the art of war. The science of war is in a constant state of change, driven by new technological developments which can radically change the nature of the battlefield. The art of war, on the other hand, involves the critical historical analysis of warfare. The military professional derives from this analysis the fundamental principles--their combinations and applications--which have produced success on the battlefields of history. The principles of war, thus derived, are therefore a part of the art rather than the science of war. They are neither immutable nor casual, and they do not provide a precise mathematical formula for success in battle. Their value lies in their utility as a frame of reference for analysis of strategic and tactical issues. For the strategist, the principles of war provide a set of military planning interrogatives--a set of questions that should be considered if military strategy is to best serve the national interest. For the tactician, these principles provide an operational framework for the military actions he has been trained to carry out.[103]

This definition suggests two important aspects of the principle of unity of command. First, it is based on "the critical historical analysis of warfare." Second, it is not "a precise mathematical formula for success in battle, it merely provides important questions and a proven framework for planning and carrying out military operations.

1. *Historical Bases of the Principle of Unity of Command.*

Colonel C. Kenneth Allard, in his acclaimed book on United States military command and control issues, has written that "[l]ike the ideas of

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[101] COMBINED ARMS OPERATIONS, vol. 1 of 3; Combined Arms and Services Staff School, E716/4 (1988), at p. 47.

[102] *Id.*

[103] *Id.*

concentration of forces and combined arms, the principle of unity of command was followed as an instinctive practice of land warfare long before its codification as a precept of modern strategy."[104] Allard argues that "[h]istorically, three conditions, often related, have made it necessary for a commander's reach to be extended: the size of the force, its operational characteristics, and its functional complexity."[105]

> The larger the force and the more varied its units and operating characteristics, the more complex were the tasks of logistical support and operational employment. A fundamental tension arose from the need to achieve greater efficiency by delegating functions and the necessity to retain overall operational control. Since a division of labor could easily lead to a division of authority, the usual answer was for commanders to keep the reins of control in their own hands insofar as circumstances allowed.[106]

Allard argues that the "contemporary importance" of the principle of unity of command "reflects the experience gained over the last three centuries as commanders were forced to extend their personal control to extraordinary lengths to accommodate the burgeoning needs of armies for logistical support brought about by the age of firearms."[107]

a. World War II and Unity of Command.

The history of World War II is replete with examples of the importance of the principle of unity of command. As General Henry H. ("Hap") Arnold noted in a report to the Secretary of War: "The greatest lesson of this war has been the extent to which air, land, and sea operations can and must be coordinated by joint planning and unified command."[108] It must be noted, however, that "unity of command" meant something different to the United States military establishment in World War II and the years immediately

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[104] ALLARD, *supra* note 7, at 29.

[105] *Id.* at 28.

[106] *Id.* at 29.

[107] *Id.* at 29-30.

[108] Report to Secretary of War, *quoted in* JOINT FORCE Q., Winter 1993-94, Number 3, at inside front cover.

preceding it than it does to the armed forces today. Whereas today the United States military thinks of command in terms of the different relationships spelled out in Joint Pub 0-2 (COCOM, OPCON, TACON and SUPPORT),[109] in World War II unity of command meant something less:

> [T]he commander [single commander] has the authority to direct the operations of the Army and Navy elements of his command by assigning them missions and giving them objectives. During operations, he could exercise and control as would insure success of the common mission. He could also organize task forces. *He could not issue instructions to the other services on tactics, nor could he control its administration or discipline, nor issue any instructions beyond those necessary for effective coordination.*[110]

Colonel Kenneth Allard traces the development of this version of the principle of unity of command from the aftermath of World War I to the creation of the Department of Defense.[111] Colonel Allard points out that the development of air power in the interwar years:

> [W]ould also generate fundamental conflict at the inter-service level. Traditional service autonomy was based on a clear division of labor between land and sea forces: the airplane fit neither definition cleanly and appeared to transcend both. Where, then, did it fit in the service command structures--and if it did not fit, then where was its place?
>
> These questions preoccupied the services during the interwar period . . . . World War II would force the services to come to terms with air power, as well as with other realities of true global combat--such as national mobilization and amphibious operations--which also transcended usual service definitions. The process by which that adaptation took place would change accepted notions of service autonomy; henceforth, the doctrine of "mutual cooperation" as the sine qua non of interservice relationships would be replaced by "unity of command" in the prosecution of the war. After the war, this new doctrine would be the basis for a redefinition of service autonomy, a process that culminated in

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[109] JOINT PUB 0-2, *supra* note 6; *see supra* text accompanying notes 21-25.

[110] *USAF Extension Course Institute*, *supra* note 101 (emphasis added).

[111] ALLARD, *supra* note 7, at 88-122.

the passage of the National Security Act of 1947 and the establishment of a centralized Department of Defense.[112]

The Joint Board of the Army and Navy, an interservice committee (forerunner of the JCS[113]) whose activities before World War I had been mostly ceremonial in nature, had been reconstituted after World War I.[114] Throughout the interwar years, the Joint Board worked to come up with a common plan of defense for American interests in the Pacific against potential Japanese threats.[115] These plans "were made even more difficult by the absence of an effective plan for the command of combatant forces if more than one service was involved, and with the advent of air arms in each service, those overlaps became ever more likely."[116] The Joint Board initially relied on the traditional doctrine of "mutual cooperation:"

> [W]hich in theory meant little more than the traditional separation of functions at the water's edge and the invocation of good fellowship and common sense in practice. The doctrine could not, however, resolve serious conflicts when separate service functions became intertwined, as had indeed been the case at Santiago de Cuba during the war with Spain. A possible solution was to select a leader such as General Pershing who would be placed in supreme command of all forces that might be assigned to an expeditionary force, but would exercise that authority through subordinate-level commanders. This was the principle of "unity of command," a concept so threatening to traditional service autonomy in the operational sphere that it acquired an almost pejorative meaning as it was thrashed out in Joint Board and Joint Chiefs of Staff proceedings for the next generation. At the first opportunity, for example, a planning

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[112] *Id.* at 88-89.

[113] The JCS was never formally sanctioned by Roosevelt, but grew out of the Arcadia Conference (December 1941) when a Combined Chiefs of Staff (CCS) secretariat was organized to coordinate British and American strategic planning. The JCS quickly became the agency for American representation in Allied councils of war, as well as the embodiment for the supreme command of all American forces. *Id.* at 104.

[114] The membership of the Joint Board included the Chief of Staff of the Army and the Chief of Naval Operations, their principal deputies, and the directors of their respective war planning divisions. *Id.* at 94.

[115] *Id.*

[116] *Id.* at 95.

> committee of the Joint Board recommended against unity of command in favor of a new wrinkle in the old doctrine: "The committee is of the opinion that in joint Army and Navy operations the paramount interest of one or the other branch of the National forces will be evident, and in such cases intelligent and hearty cooperation . . . will give as effective results as would be obtained by the assignment of a commander for the joint operation, which assignment might cause jealousy and dissatisfaction."[117]

Nevertheless, some progress was made by the Joint Board. By 1927, when it published its *Joint Action of the Army and the Navy*, it recognized "three principles for the coordination of armies and navies in pursuit of common objectives:"

> 1. ***Close cooperation***: when the mission could be accomplished by relatively independent action of the deployed forces. This was merely "mutual cooperation" under a slightly different name.
>
> 2. ***Limited unity of command***: when it was determined that the objective fell within the "paramount interest" of one service, and forces of the other were temporarily placed under the operational control of the service commander exercising paramount interest.
>
> 3. ***Unity of command***: when the objective required the hierarchical subordination of all component forces under a single commander in those instances where such command was specifically authorized by the president.[118]

The events at Pearl Harbor would demonstrate, however, that unity of command was never achieved in the interwar period and "mutual cooperation" was simply a "limited creature of service autonomy."[119] The American

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[117] *Id.*

[118] *Id.* at 95-96.

[119] *Id.* at 97

commanders in Hawaii have been viewed by historians, at least in part, as victims of flawed command arrangements.[120]

The writings of Roberta Wohlstetter (*Pearl Harbor: Warning and Decision*) and Gordon W. Prange *(At Dawn We Slept)* have explored in a wealth of detail the intelligence and operational failures that led to that disaster; both authors, however, place a primary emphasis on a more fundamental failure of command.

> That such mistakes could be made in the face of increasingly ominous diplomatic news and specific warnings from Washington is not so much evidence of individual failings by the on-scene commanders as a revelation of the end product of limited service perspectives. To paraphrase Elihu Root, who was also concerned with limited perspectives, cooperation was everybody's business and what was everybody's business was nobody's business. Cloaked in the mantle of organizational autonomy, the local representatives of the service sovereignties thus received an unfortunate but vivid object lesson in the deficiencies in the doctrine of mutual cooperation.[121]

General Arnold argued just before the events at Pearl Harbor that "unity of command" should be the basis for both the reorganization of the War Department and the establishment of theater commands for the war.

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[120] *Id.* at 97-98.

> Both Gen. Walter C. Short and Adm. H.E. Kimmel were all that might have been hoped for as commanders operating under "mutual cooperation." Conscientious and courteous with each other, they maintained a working relationship that was cordial if not intimate. Each conceded "paramount interest" to the other's sovereign areas, while "cooperation" was supposedly the rule in all areas of common concern. That cooperation did not extend, however, to such elemental concerns as all-around surveillance and reconnaissance of island approaches, the preparation of overlapping air defense plans, or comparative assessments of intelligence indicators. The commands were united only in a common failure to employ their air assets effectively: Kimmel left uncovered by long-range reconnaissance aircraft the precise quadrant used by Nagumo's carriers for their approach, while Short grouped all his aircraft together on the ground to avoid a chimerical threat from saboteurs, thereby exposing them to utter devastation from the air.

Id.

[121] *Id.*

> After stating that "unity of command" was a fundamental concept "throughout all the strata of military organization" when "two or more integral forces are joined together for collaboration," Arnold continued, "This Unity of Command can be expressed only by a *superior* Commander, who is capable of viewing impartially the needs and capabilities of the ground forces and the air forces. Only a superior commander can select the employment which will result in the maximum contribution of each force toward the National Objective. This kind of Unity of Command requires the establishment of a separate command agency; not the subordination of one member of the team to the other."[122]

The War Department was reorganized around the concept of unity of command in March 1942.[123]

Although World War II would result in "the sanctification of unity of command as the principle that assured operational success,"[124] the services effectively guarded their autonomy throughout the war.

> Each of the service chiefs played a critical role in the unified commands that were set up in cooperation with the Allies. The JCS acted collectively as the chief planning body for decisions on resources and grand strategy as they pertained to unified commands. The work was carried on largely through what had become by the end of the war an elaborate structure of more or less permanent committees staffed by representatives from each service. *Transmission of orders, however, continued as before through the service hierarchies.* The service with preponderant responsibilities for a given theater of operations would be designated by the JCS as its executive agent. The headquarters staffs of the Army, Navy, and (eventually) the Army Air Force then generated the orders to the theater commander carrying out the JCS directives. For example, the Navy Department staff would be used to generate orders to Admiral Nimitz for the Pacific Ocean Areas command, and the War Department General Staff would perform the same function for General

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[122] *Id.* at 101, *quoting* Memorandum from General H.H. Arnold to the Army Chief of Staff (General Marshall), Subject: Organization of the Armed Forces for War (Nov. 14, 1941).

[123] *Id.*

[124] *Id.* at 111.

> MacArthur's Southwest Pacific Area command. The concept of each service acting as executive agent for the JCS, a sensible approach to the new division of labor, was a logical outgrowth of the old idea of "paramount interest." Of equal importance were the "component commands" set up under the unified commands. Component commands were the building blocks of the unified command structure, each component comprising those elements of land, sea, or air forces assigned to the theater. *Although they were part of the unified commands, components were still tied directly to their parent services for everything other than operational control.* Consequently, this administrative linkage was maintained with a great deal of vigilance by the respective service staffs throughout the war.[125]

The recently published official history of the Unified Command Plan reports that:

> Unified command over U.S. operational forces was adopted during World War II. It was a natural concomitant of the system of combined (U.S.-British) command set up during that conflict by the Combined Chiefs of Staff. Unified command called for a single commander, responsible to the Joint Chiefs of Staff, assisted by a joint staff, and exercising command over all the units of his assigned force, regardless of Service. The system was generally applied during World War II in the conduct of individual operations and within geographic theater commands.[126]

This system of "unified command" was more effective in the European theater than in the Pacific. In the Pacific, the principle of unity of command was a casualty in the battle between General Douglas MacArthur and the Army on the one hand and Admiral Chester W. Nimitz and the Navy on the other.

> In the Pacific, attempts to establish a unified command for the entire area proved impossible. Service interests precluded the subordination of either of the two major commanders in that area (General of the Army Douglas MacArthur and Fleet Admiral Chester W. Nimitz). During the final campaigns in the Pacific, therefore, these two officers held separate commands, as Commander in Chief, U.S. Army Forces, Pacific

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[125] *Id.* at 104 (emphasis added).

[126] JOINT HISTORY OFFICE, OFFICE OF THE CHAIRMAN OF THE JOINT CHIEFS OF STAFF, THE HISTORY OF THE UNIFIED COMMAND PLAN 1946-1993 11 (1995).

(CINCAFPAC), and Commander in Chief, U.S. Pacific Fleet (CINCPAC), respectively.[127]

In addition, there were other significant inter-service command disputes during World War II. There were disputes between Army commanders and commanders of the then Army Air Force,[128] between Naval commanders and Marine commanders,[129] between Army Air Force, Naval Air and Marine Air commanders,[130] and between Army commanders and Marine commanders.

One notorious example of this last conflict, that serves as a particularly useful illustration, is the dispute between the Army and the Marine Corps/Navy over Marine Lieutenant General Holland M. ("Howlin' Mad") Smith's relief of Army Major General Ralph C. Smith from command during OPERATION FORAGER, the battle for Saipan, on June 24, 1944. Major General Ralph Smith was in command of the Army's 27th Infantry Division, while Lieutenant General Holland Smith was the commander of all ground forces in OPERATION FORAGER.[131] The initial amphibious assault of Saipan was carried out by the Second and Fourth Marine Divisions and the Twenty-seventh Infantry Division. The attack on Mount Tapotchau, "the main Japanese line of defense," began the morning of 23 June.[132] By the afternoon of that same day, General Holland Smith was sufficiently dissatisfied with the progress of the 27th to ask Army Major General Sanderford Jarman, who was on Saipan to assume the post of Island Commander once it was captured, if he would visit General Ralph Smith

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[127] *Id.*

[128] D. CLAYTON JAMES, A TIME FOR GIANTS 111-12 (1987); ALLARD, *supra* note 7, at 106-07.

[129] JAMES, *supra* note 128:

> The Marines on Guadalcanal were left on their own logistically for a critical period at first, for which they castigated the timidity of the Naval leaders about keeping their ships in the area. [Marine] General Archer Vandegrift and Admiral Kelly Turner, states the official Marine chronicle, "often disagreed on the conduct of activities ashore," the latter brazenly claiming his authority as naval amphibious force commander extended to activities of the First Marine Division on the island.

[130] ALLARD, *supra* note 7, at 105-06.

[131] JAMES, *supra* note 128, at 251.

[132] HOLLAND M. SMITH, CORAL AND BRASS 168-70 (1948), reprinted as FLEET MARINE FORCE REFERENCE PUBLICATION (FMFRP) 12-37 (1989).

"and appeal to him, as one Army man to another, on the grounds that the reputation of the Army was suffering through a lack of offensive spirit."[133] Because there was no improvement the next day, General Holland Smith sought and obtained permission from Vice Admiral Raymond A. Spruance to relieve General Ralph Smith of command.[134]

As one author has noted:

> The relief of an Army general by a Marine general was shocking to the already ragged interservice relations in POA (Pacific Ocean Areas); it precipitated an ugly controversy between Army, Navy, and Marine leaders at the time and was fully aired in the press, especially the Hearst newspapers that promoted MacArthur as Pacific supreme commander to avert such episodes. Lieutenant General Robert C. Richardson, head of Army forces in POA, was outraged, accepting as wholly valid the charge by Ralph Smith that Holland Smith was "prejudiced, petty and unstable" in dealing with Army troops; both generals maintained that Army troops should never serve under him again.[135]

General "Howlin' Mad" Smith would later write about his relief of Ralph Smith and its aftermath in his autobiography:

> I have always deplored this incident as far too typical of the amount of top echelon time and effort expended in the Pacific on matters not pertaining to the winning of the war. Inter-Service disputes, given unmerited prominence, can grow into the greatest enemy of victory when they take priority over all other interests in the minds of Generals and Admirals. Equally deplorable is the effect upon the men who carry into peacetime the animosity thus engendered in wartime.[136]

By the end of World War II:

> The Pearl Harbor disaster and the course of events in the several theaters of war had discredited mutual cooperation as an acceptable method of

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[133] *Id.* at 172.

[134] *Id.* at 172-73. Spruance was COMMANDER, FIFTH FLEET.

[135] JAMES, *supra* note 128, at 251.

[136] *Id.* at 180.

> coordinating joint operations. A few diehards may still have opposed unity of command, but for the most part there was agreement that in theaters of operations it should apply. The issue of command-vs.-cooperation at the Washington level was a different matter.[137]

The following brief treatments of American conflicts since World War II are not meant to be exhaustive or even detailed. They simply serve to further elucidate the principle of unity of command and better ground it in concrete historical experiences.

b. ***Korean War and Unity of Command.***

The Korean War saw continued problems with unified command--particularly in the area of joint air operations. As one study of the problem concluded:

> Korea was a painful lesson on the clash of doctrine with combat realities, the downstream costs of interservice conflict, the expense in blood of "savings" extracted from peacetime defense budgets, and the failure of peacetime and wartime command alike to deal adequately with the requirements for truly effective joint operations.[138]

Another study of Korean War joint air operations came to a different conclusion. "There were some false starts and heated discussions, but, on the whole, the system proved an effective means to control theater-assigned assets. One can argue that it was not always the most efficient, but it was effective."[139]

c. ***The Vietnam War and Unity of Command.***

Colonel Harry Summers devotes a chapter of his acclaimed analysis of the Vietnam War to the principle of unity of command.[140] Summers concludes

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[137] Lawrence J. Legere, Jr., Unification of the Armed Forces 264 (1950) (Harvard doctoral dissertation) (on file with the Judge Advocate General's School Library, Charlottesville, Virginia).

[138] JAMES A. WINNEFELD & DANA J. JOHNSON, JOINT AIR OPERATIONS: PURSUIT OF UNITY IN COMMAND AND CONTROL, 1942-1991 60 (1993).

[139] CARDWELL, *supra* note 100, at 17.

[140] HARRY G. SUMMERS, JR., ON STRATEGY: THE VIETNAM WAR IN CONTEXT 87-92 (1981).

that the North Vietnamese fully exploited the principle of unity of command, particularly at the strategic level of political and military coordination, and it "gave them an enormous advantage" over the United States' confused and muddled political approach.[141] There were also unity of command problems at the theater or operational level.

> In comparison with the Korean War (especially in the early period) where all of the strategic direction came from General MacArthur's GHQ Far East Command, there was no equivalent headquarters for the Vietnam War. General Westmoreland was only the tactical commander-the equivalent of the Eighth Army Commander in the Korean War. Part of the strategic direction (especially in air and naval matters) came from Honolulu, part came from Washington, and there was no coordinated unity of effort.[142]

d. *Grenada and Unity of Command*

Two aspects of the United States intervention in Grenada deserve mention. First, the problems the United States military experienced in conducting joint operations in Grenada were some of the primary forces that led to the passage of Goldwater-Nichols in 1986.[143] Second, a personal experience of then Major General Schwarzkopf in Grenada is instructive.

General Schwarzkopf had been temporarily pulled from his command of the 24th Infantry Division (Mechanized) at Fort Stewart, Georgia, and assigned the duty of Army advisor to Vice Admiral Joe Metcalf, who was commanding the JTF that was conducting the invasion of Grenada. As General Schwarzkopf tells the story in his autobiography, he had thought of an innovative idea to rescue some of the trapped American students. The concept was to fly Marine helicopters, which were sitting idle on the deck of the USS GUAM, to pick up Army Rangers and Airborne troops, who were sitting idle at Port Salines, and carry them to a landing strip on a beach near the location of the students. Admiral Metcalf approved the idea and told Schwarzkopf to make it happen. The Marine Colonel who commanded the helicopter landing

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[141] *Id.* at 88.

[142] *Id.* at 91.

[143] ALLARD, *supra* note 7, at 1-3.

team balked at the idea and said "I'm not going to do that." General Schwarzkopf tells the rest of the story:

> "What do you mean?" I asked.
>
> "We don't fly Army soldiers in Marine helicopters."
>
> "I looked at him incredulously. Colonel, you don't understand. We've got a mission, and that mission is to rescue these students *now*. Your Marines are way up in Grenville securing that area, and our helicopters are right here. The way to get the job done is to put Army troops in those helicopters."
>
> "If we have to do it, I want to use my Marines. They'll rescue the hostages," he maintained stubbornly.
>
> "How long would that take?"
>
> He looked me straight in the eye and said, "At least twenty-four hours."
>
> "Listen to me carefully, Colonel. This is a direct order from me, a major general, to you, a colonel, to do something that Admiral Metcalf wants done. If you disobey that order, I'll see to it that you're court-martialed."
>
> A couple of the colonel's subordinates who had been listening to this conversation turned to him. One said, "Sir, can we talk to you outside?"
>
> After a few minutes he came back and said, "Well, all right. I guess we'll do it."[144]

e. ***DESERT STORM and Unity of Command.***

Colonel Summers' analysis of the Persian Gulf War includes the observation that "while unity of effort was achieved at the combined coalition level through cooperation, at the joint or multiservice level at U.S. Central Command it was achieved the old-fashioned way: through assignment of 'one

[144] H. NORMAN SCHWARZKOPF, IT DOESN'T TAKE A HERO 254 (1992).

responsible commander.'"[145] This unity of command existed because of the command of General Schwarzkopf, the CINC of CENTCOM and overall commander of the DESERT SHIELD/DESERT STORM operations. His position as unified commander allowed him to issue the famous *General Order Number 1*, which would be a model for future U.S. military operations. General Schwarzkopf could enforce this order against all service members because of his authority as a CINC. General Order Number 1 has been given credit for greatly reducing the number of potential criminal incidents by virtually eliminating alcohol from the theater of operations, and by setting uniform rules on such matters as curfews, travel, sexual relations, contact with the local populations and souvenirs.[146]

f. *Somalia and Unity of Command.*

Colonel Allard has reviewed the Somalia operations in detail. He emphasizes "there should be no mistaking the fact that the greatest obstacles to unity of command during UNOSOM II (the last of the three U.S. operations in Somalia) were imposed by the United States on itself."[147] An after-action report from UNOSOM II concluded: "Unity of command and simplicity remain the key principles to be considered when designing a JTF command structure."[148]

2. *Nature of the Principle of Unity of Command.*

As was noted at the beginning of the discussion of unity of command,[149] the principle is not a precise mathematical formula. It is simply a shorthand way of grouping similar lessons that have been learned over the course of military history. As such, it provides a reliable framework for planning operations and analyzing military issues.

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[145] HARRY G. SUMMERS, JR., ON STRATEGY II: A CRITICAL ANALYSIS OF THE GULF WAR 241 (1992).

[146] DESERT STORM ASSESSMENT TEAM REPORT, CRIMINAL LAW, 1, Issues 317 and 379 (Apr. 22, 1992).

[147] KENNETH ALLARD, SOMALIA OPERATIONS: LESSONS LEARNED 60 (1995).

[148] *Id.*

[149] *See supra* text accompanying note 112.

One notable aspect of this principle, which emerges clearly from the above historical material, is how the principle has been adapted to fit the different levels of command (strategic, operational, and tactical), and how it means something slightly different in each application. The strong and pervasive influence of the various armed services has been the main cause of this fact. *Significantly, over the last fifty years of American military experience, unity of command, at least with respect to joint forces, has not included the legal authority to convene general courts-martial.* Perhaps the noted World War II historian Louis Morton said it best:

> All efforts to establish a single commander for the theater had failed, and even the unified commands set up in 1942 had been abandoned under the pressure of events. Only on the battlefield had unity of command prevailed. . . . Where the issues were life and death, all wore the same uniform. Perhaps that is the supreme lesson of the Pacific war--that true unity of command can only be achieved on the battlefield.[150]

3. *UCMJ Authority and Unity of Command.*

> *The faith some people put in machinery is childlike and touching, but the machinery does not do the task. . . .*[151]
>
> President Woodrow Wilson

President Wilson was, no doubt, absolutely completely accurate. A military force may possess the most perfect command and support systems ever created, but if the leadership is not capable, that force will not be effective. Leadership is so central to the ability of military forces to function that it almost goes without saying. As General Altenburg told me during our interview, it is more important that the system pick the right leaders and place them in the appropriate positions, than that the UCMJ is set up just right to support them.[152]

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[150] Louis Morton, *Pacific Command: A Study in Interservice Relations*, THE HARMON MEMORIAL LECTURES IN MILITARY HISTORY, NUMBER THREE, United States Air Force Academy, Colorado (1961).

[151] President Wilson made these remarks to Senator Chamberlain in 1918 when Senator Chamberlain had proposed creating a War Cabinet to help the President conduct World War I. JOSEPHUS DANIELS, THE WILSON ERA, vol. II, 503 (1944).

[152] Altenburg, *supra* note 35.

This does not mean, however, that the underlying legal "machinery" that supports the commander is unimportant. Given today's society, there are few, if any, extraordinary leaders who could command large, complex, and diverse forces without occasional recourse to the military justice system. This is particularly true because, [153] no matter how strong the leader, there will always be a small minority who will benefit from the knowledge that swift and severe punishment is likely to result from their offenses.

Another important consideration is that as the difficulty and danger of military operations increases, so does the need for stronger command disciplinary authority. In December 1986, Admiral Hays, then CINCPAC, sent Admiral Crowe, then CJCS, a message concerning military justice and the newly enacted Goldwater-Nichols act. Admiral Hays wrote, in part:

> Exercise of either review authority or disciplinary authority over principal subordinates would not be frequent. Furthermore, this review authority should be limited only to disciplinary actions taken by principal subordinates, and then only for offenses directly related to the operational mission. Likewise, I think it improbable that an instance would arise where I would feel compelled to exercise disciplinary authority over a principal subordinate for an offense directly related to the USPACOM operational mission. *Nevertheless, there could be instances, particularly during armed conflict or other hostilities, where military offenses are so egregious or debilitating to warfighting capability that it would be appropriate to exercise such disciplinary authority as the responsible joint commander.*[154]

These views of Admiral Hays are consistent with the following passage from Sir Winston Churchill:

> As the severity of military operations increases, so also must the sternness of the discipline. The zeal of the soldiers, their warlike instincts, and the interests and excitements of war may ensure obedience of orders and the cheerful endurance of perils and hardships during a short and prosperous campaign. But when fortune is dubious or adverse; when retreats as well as advances are necessary; when supplies fail, arrangements miscarry, and disasters impend, and when the struggle is

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[153] *See supra* text accompanying note 19.

[154] Message from USCINCPAC TO JCS, unclassified, Personal for Admiral Crowe from Hays, 160127Z DEC 86 (on file in the Joint Chiefs of Staff Legal Office, Pentagon) (emphasis added).

> protracted, men can only be persuaded to accept evil things by the lively realization of the fact that greater terrors await their refusal.[155]

Current definitions of command and unity of command[156] clearly include considerations of legal authority. Although the historical examples of unity of command considerations discussed above do not focus on the underlying legal authority of the various commanders to convene interservice courts-martial, this does not lessen their value. Regarding significant military operations, military justice is primarily an afterthought. Larger issues of command, leadership and warfighting tend to dominate the analysis of military operations. Nevertheless, it is incumbent upon military lawyers to help create a legal framework which can best support the commanders who will be called upon to perform the difficult missions our country asks of our armed forces. The UCMJ authority of a JTF commander is an essential, if often overlooked, factor that can assist a commander in obtaining, as much as possible, unity of command.

The principle of unity of command is related to, but different from the concept of unity of effort. Operational JTF commanders want, and need, unity of command, not unity of effort. Unity of effort is more appropriate for the strategic and political levels of our military organization.

B. *Unity of Effort.*

Joint Pub 1, *Joint Warfare of the Armed Forces of the United States,* provides that the nine principles of war, of which unity of command is one, "are applied broadly, avoiding literal or dogmatic construction, and with due regard for the unique characteristics of joint warfare."[157] Joint Pub 1 then proclaims that "[b]y applying the principles of war in the specific context of joint warfare, we can derive fundamentals of joint warfare."[158] Through this process, "unity of command" becomes "unity of effort" the first fundamental of joint warfare.[159]

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[155] WINSTON CHURCHILL, THE RIVER WAR (1899), *quoted in* FITTON, *supra* note 2, at 79.

[156] *See supra* text accompanying notes 110-111.

[157] JOINT PUB 1, *supra* note 4, at vii-viii and III-1.

[158] *Id.* at viii.

[159] *Id.*

The exact differences between unity of command and unity of effort begin to take shape when Joint Pub 1 points out that "unity of effort is a cooperative effort."

> When the United States undertakes military operations, the Armed Forces of the United States are only one component of a national-level effort involving the various instruments of national power: economic, diplomatic, informational, and military. Instilling unity of effort at the national level is necessarily a cooperative endeavor involving a variety of Federal departments and agencies.[160]

Unity of effort seems to be aimed at the national level: "Cooperation among the combatant commanders and their supporting joint force and component commanders within the framework of unity of effort directed and arranged at the national level--is critical."[161] "The President is responsible for national strategic unity of effort. The Secretary of Defense is responsible for national military unity of effort."[162] Unity of command, on the other hand, seems to be aimed at the operational level. "The primary emphasis in command relations should be to keep the chain of command short and simple so that it is clear who is in charge of what. *Unity of command is the guiding principle of war in military command relationships.*"[163]

This distinction between the strategic level (unity of effort) and the operational level (unity of command) is supported by recent scholarship. In an article exploring the principles of war in the 21st century, a panel of authors concluded that:

> Historically, militaries--as hierarchical organizations--have sought unity of effort via unity of "command." While this is achievable at the tactical and operational levels of warfare, it may not be possible at the strategic

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[160] *Id.* at ix.

[161] *Id.* at III-1--III-2.

[162] JOINT PUB 0-2, *supra* note 6, at vii.

[163] *Id.* at III-9 (emphasis added).

level, where efforts much broader than those associated with "command" apply.[164]

Perhaps the best explanation of the relationship between unity of command and unity of effort is found in Joint Pub 0-3, the operations publication. The appendix on the principles of war in that publication states:

> Unity of command means that all forces operate under a single commander with the requisite authority to direct all forces employed in pursuit of a common purpose. Unity of effort, however, requires coordination and cooperation among all forces toward a commonly recognized objective, although they are not necessarily part of the same command structure. In multinational and interagency operations, unity of command may not be possible, but the requirements for unity of effort becomes paramount. Unity of effort coordination through cooperation and common interests is an essential complement to unity of command.[165]

The above discussion of unity of effort illustrates the point that unity of effort can easily accommodate the fact of service autonomy. Indeed, the concept of unity of effort is directly traceable to the earlier ideas of "mutual cooperation," "close cooperation," "paramount interest," and "limited unity of command."[166] While this flexibility is useful for dealing with interservice problems, unity of effort is not unity of command. It is much more useful in a political environment than in an operational one.

C. *Definitions of Jointness.*

As it happens, this distinction between unity of command and unity of effort squares well with recent debate in the professional military journals over the proper definition of "jointness." There are benefits that flow from the tradition of service autonomy. These benefits can be gathered at the strategic level by using the principle of "unity of command." The services are free to compete fully at this level, they are held together by "coordination through

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[164] William T. Johnsen, et al *The Principles of War in the 21st Century: Strategic Considerations*, (Strategic Studies Institute, U.S. Army War College, Carlisle Barracks, PA, at 9.

[165] JOINT CHIEFS OF STAFF PUBLICATIONS, DOCTRINE FOR JOINT OPERATIONS, (Feb. 1, 1995), at A-2.

[166] *See supra* text accompanying notes 125-126.

cooperation and common interests" in pursuit of the best national defense. Jointness should not be used in an attempt to stifle this healthy activity.

On the other hand, at the operational level, individual service interests must yield to the need for unity of command. As one former DOD official has written, "[t]he need for teamwork when combined operations are required is incontestable."[167]

V. HISTORY OF LEGAL UNDERPINNINGS OF JOINT UCMJ JURISDICTION.

There is a long history behind both the tradition of service autonomy, and the idea, based on experience, that military victory stems in part from unified command. The inherent tension between these two ideals has manifested itself in the history of two of the legal regimes that together help create the institutional framework in which the United States military operates. The history of the UCMJ, and of the organization of DOD, as reflected most recently by the Goldwater-Nichols reorganization act illuminate the underlying strains that confront joint military justice jurisdiction. The conflict is between the "complementary yet often competing functions of the operational chain of command" which runs down from the NCA to the CINCs to the JTFs, "and the administrative chain" which runs down through the Military Departments.[168] Archie Barrett, author of "Reapproving Defense Organization" has termed these two separate chains the "employing arm" and the "maintaining arm,"[169] respectively.

This distinction between the employing and the maintaining arms corresponds to what we see in Van Creveld's distinction between the "output related" and "function-related" responsibilities of command.[170] The fact that the two arms are "mutually dependent and by no means entirely distinct"[171]

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[167] Cropsey, *supra* note 97, at 77.

[168] General W.Y. Smith, USAF (Ret.), The U.S. Military Chain of Command: Present and Future 2 (1984) (on file with the JCS Legal Office's Goldwater-Nichols legislative history collection, volume II, Tab A; and on file with the author).

[169] ARCHIE D. BARRETT, REAPPRAISING DEFENSE ORGANIZATION (1983).

[170] *See* MARTIN VAN CREVELD, COMMAND IN WAR (1985).

[171] *Id.*

helps explain the sensitive and awkward nature of the problem of joint UCMJ jurisdiction. The function-related arm of command (the services) tends to guard jealously against any perceived encroachments into its territory by elements of the output-related arm of command (DOD and the joint commands).

One senior retired military officer has suggested the distinction between the two types of command is rooted, at least in part, in a system of checks and balances designed to keep the government, and in particular the military, limited.[172] This view is supported by the congressional testimony of Admiral King regarding the creation of the Department of Defense.[173] If this is so, then a certain loss of efficiency and effectiveness is to be expected as the price to pay for having this mechanism of checks and balances. Thus, the fact that the services have historically tended to fight tooth and nail to protect their authority to administer their own personnel systems, and in particular to discipline and court-martial their own people, is only natural given that these powers are viewed as essential to institutional identity and survival. A brief review of the history behind the organization of DOD and the UCMJ will help place this friction in a concrete setting and provide a good backdrop for analyzing the current situation.

A. *Historical Development of DOD Vis-à-Vis the Services.*

Even before World War II had ended, the "Battle of the Potomac" was raging over whether and how the United States military should be reorganized after the war.[174] Although the Army and Navy would be in open conflict during the unification debate from 1945-1947,[175] the debate was really about power in Washington, not about unity of command in the field. This is evident from comparing the testimony of two of the most prominent uniformed officers of that time. Admiral Ernest J. King, who had been Chief of Naval Operations (CNO) and Commander-in-Chief, United States Fleet (COMINCH) during the war, testified that the Army's concept of a single chief of staff over all the services was:

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[172] Smith, *supra* note 168, at 2.

[173] *See infra* text accompanying note 176.

[174] ALLARD, *supra* note 7, at 111.

[175] *Id.* at 111-22.

> potentially, the "man on horseback." It is allegedly based on the premise that unity of military command in Washington is necessary to insure unity of effort in the field. . . . Although unity of command is well suited to the latter, there are positive dangers in a single command at the highest military level. I consider this fact the most potent argument against the concept of a single department.[176]

General Eisenhower, on the other hand, concluded the United States needed a single national defense department based upon his experiences as a joint force commander. He began his testimony before the Senate on the issue of military unification:

> by declaring, "At one time, I was an infantryman but I have long since forgotten that fact under the responsibility of commanding combined arms." He then added that [S]ailors and [A]irmen had come to regard him as "one of their own services, rather than of an opposing one." In summarizing his argument for a "single executive department to preside over three coequal and autonomous fighting teams," the future president said, "There is no such thing as a separate land, sea or air war; therefore we must now recognize this fact by establishing a single department of the armed forces to govern us all.[177]

Congress sided with General Eisenhower, and in 1947 created the Department of Defense by enacting the landmark National Security Act.[178] This legislation, among other things, created the Air Force, delineated the principal functions of each of the armed services, and recognized the Joint Chiefs of Staff.[179]

In 1958, Congress amended DOD's organization by creating the operational chain of command running from the President and Secretary of

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[176] Testimony of Fleet Admiral Ernest J. King, *Senate*, 1945, p. 121; *quoted in* ALLARD, *supra* note 7, at 115, 277.

[177] Testimony of General of the Army Dwight D. Eisenhower, *Senate*, 1945, pp. 361-63; *quoted in* Allard, *supra* note 7, at 118, 277.

[178] The National Security Act, Pub. L. No. 80-253, 61 Stat. 495 (July 26, 1947).

[179] ALLARD, *supra* note 7, at 112.

Defense to the unified and specified commands.[180] The act also "separately organized" the military departments and increased the size of the Joint Chiefs of Staff.

Among many other things, the Goldwater-Nichols legislation gave the CINCs additional authority over the service components assigned to their command. In addition, the powers of the Chairman of the JCS were increased and the powers and size of the military departments were further reduced.[181]

B. *History of Reciprocal Jurisdiction and the UCMJ: Article 17.*

Article 17 of the UCMJ provides:

Art. 17. Jurisdiction of courts-martial in general

(a) Each armed force has court-martial jurisdiction over all persons subject to this chapter. The exercise of jurisdiction by one armed force over personnel of another armed force shall be in accordance with regulations prescribed by the President.

(b) In all cases, departmental review after that by the officer with authority to convene a general court-martial for the command which held the trial, where that review is required under this chapter, shall be carried out by the department that includes the armed force of which the accused is a member. [182]

There is a long history and tradition of service autonomy in the United States military, traceable to the differences between the Army and the Navy. Colonel Allard's analysis of the roots of service autonomy began with the founding of the Republic. It is certainly possible, however, to trace the differences between the Army and the Navy even further back, by looking at the legal systems that historically undergird each service.

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[180] 1958 Amendments to the National Security Act of 1947, Pub.L. No. 85-599, 72 Stat. 514 (Aug. 6, 1958).

[181] ALLARD, *supra* note 7, at 3.

[182] UCMJ art. 17, 10 U.S.C. § 817 (1994).

James Snedeker has written that "[c]ourts-martial on land had a fundamentally different origin from those at sea."[183] He argues that "[o]n land, proceedings leading to punishment were based upon theories of vengeance and prevention by example; at sea, upon a theory of protection of the ships and cargoes in maritime commerce."[184] Snedeker goes on to trace the very different paths that led through the British Army and Navy to the development of the American Articles of War and the Articles for the Government of the Navy (Navy Articles).

Despite their many differences, the Articles of War and the Navy Articles shared one thing in common. They both caused a tremendous outcry after World War II that the two systems "were guilty of the grossest types of miscarriages of justice."[185] One review panel, Professor Keeffe's General Court-Martial Sentence Review Board (GCMSRB), reviewed 2,115 cases and found in "almost half" of them "serious miscarriages of justice."[186] Congressional hearings were held, the press covered the matter extensively, and numerous pieces of reform legislation were proposed. In the end, the UCMJ was passed and became fully effective on May 31, 1951.

The UCMJ was principally the result of the work of a committee appointed by Secretary of Defense Forrestal and headed by Professor Edmund M. Morgan of Harvard Law School.[187] The workhorse, and key figure, of that committee was Felix E. Larkin, the Assistant General Counsel of the Department of Defense, who was the only person to sit on all three of the bodies that together comprised the "Morgan Committee."[188] The task of the committee was to come up with a Uniform Code that reconciled the many different provisions of the Articles of War and the Navy Articles. This reconciliation had to be done in such a way that the important concerns of each

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[183] J. SNEDEKER (BRIGADIER GENERAL, USMC, RET.) A BRIEF HISTORY OF COURTS-MARTIAL 1 (1954).

[184] *Id.*

[185] WILLIAM T. GENEROUS, SWORDS AND SCALES: THE DEVELOPMENT OF THE UNIFORM CODE OF MILITARY JUSTICE 22 (1973).

[186] *Id.* at 18.

[187] *Id.* at 34-53.

[188] *Id.* at 38.

service were covered, while at the same time proper account was taken of the recommendations of the various commissions and committees that had done work on military justice issues after World War II.[189] This was an enormous task because "[t]he Articles of War and the Navy Articles were laid out in completely dissimilar fashions," and "[t]he services had different ideas about various aspects of military justice."[190]

The legislative history of the UCMJ demonstrates that great pains were taken to ground each article of the new Code in some earlier provision or provisions of the Articles of War or the Articles for the Government of the Navy.[191] The fact that Article 17 of the UCMJ has no references to the prior military justice regimes is particularly noteworthy. The drafters of the UCMJ made clear their belief that Article 17 was something completely new. Professor Morgan noted in his prepared testimony before the Senate Armed Services Committee that "[m]ost of the articles consist of a rewording and revision of provisions found at present in both the Articles of War and the Articles for the Government of the Navy. Article 17, however, is new in that it provides

[189] *Id.*

[190] *Id.* at 37.

[191] "Morgan Draft," Uniform Code of Military Justice: Text, References and Commentary based on the Report of the Committee on a Uniform Code of Military Justice to The Secretary of Defense (1950), *reprinted in* 2 INDEX AND LEGISLATIVE HISTORY TO THE UNIFORM CODE OF MILITARY JUSTICE, 1950 1325-149 (1985).

reciprocal jurisdiction of courts-martial."[192] Professor Morgan went on to explain:

> It is felt that this provision is necessary in light of unification and by virtue of the tendency to have military operations undertaken by joint forces. *Inasmuch as it is not possible at this time to* forecast the different forms of joint operation which will take place in the future, the exercise of the reciprocal jurisdiction of one armed force over the personnel of other services has been left to the regulations of the President.[193]

The uniqueness of this reciprocity provision for court-martial jurisdiction is further demonstrated by some fascinating exchanges in congressional testimony between Professor Morgan and Mr. Larkin, and the experienced and much admired friend of the military, Congressman Carl Vinson. This testimony speaks directly, even over a span of nearly 50 years, to the contemporary situation involving reciprocal court-martial jurisdiction.

During testimony before the House Committee on Armed Services on the proposed UCMJ in 1949, Professor Morgan was asked by Representative Vinson of Georgia, the committee chairman, about the structure of article 17:

> **Mr. Vinson**: Professor, I note with respect to article 17, the reciprocal jurisdiction of courts-martial, that you leave that to regulation by the President.

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[192] *Bills to Unify, Consolidate, Revise, and Codify the Articles of War, The Articles for the Government of the Navy, and the Disciplinary Laws of the Coast Guard, and to Enact and Establish a Uniform Code of Military Justice: Hearings on S. 857 and H.R. 4080 Before a Subcomm. of the Committee on Armed Services, United States Senate*, 81st Cong., 1st Sess. 35 (1949); *reprinted in* 1 INDEX AND LEGISLATIVE HISTORY TO THE UNIFORM CODE OF MILITARY JUSTICE, 1950 925 (1985). This statement concerning the complete novelty of reciprocal jurisdiction was not entirely accurate. There were prior provisions under the Articles of War, particularly dealing with situations in which Marines and the Army were serving together, which provided for some elements of reciprocal jurisdiction.

> Officers of the Marine Corps, detached for service with the Army or by order of the President, may be associated with officers of the Regular Army on courts-martial for the trial of offenders belonging to the Regular Army, or to forces of the Marine Corps so detached; and in such cases the orders of the senior officer of either corps, who may be present and duly authorized, shall be obeyed.

78th Article of War, A MANUAL FOR COURTS-MARTIAL, COURTS OF INQUIRY, AND RETIRING BOARDS, AND OF OTHER PROCEDURE UNDER MILITARY LAW (Revised Edition, 1908).

[193] *Id.* (emphasis added).

> Now, the thought is running through my mind, why should it not follow the commanding officer? When you have a joint operation and the three services are serving together, the President could prescribe who would have authority to conduct the courts martial that is, the Army, Navy, or Air Force.
>
> **Dr. Morgan**: That is right. You mean who shall be appointed?
>
> **Mr. Vinson**: That is right. Now, why should it not say that whenever there is a joint operation that the responsibility should go to the commanding officer? You see, you are writing a code here, that is a code of procedure for uniform justice, but it is going to be dependent in this instance to regulations of the President.
>
> Why should it not be positive, to say that there should be reciprocal authority, but it follows the commanding officer from whatever service he is in.[194]

As the above passage suggests, there was some confusion during this testimony between two different issues. One issue is the question of the armed service to which the commander who convenes the court-martial belongs and whether it is different from that of the accused. This is the issue which concerned Congressman Vinson in the above passage. A different issue is the composition, by branch of service, of the court-martial panel that is detailed by the convening authority to try an accused in a joint jurisdiction case. This is the issue Professor Morgan addressed.

One point clearly emerges from this testimony, however. Congressman Vinson believed it was important for the UCMJ to explicitly spell out the authority of a commander of a joint operation to convene courts-martial. This authority should not be left to the discretion of the President and the executive branch. Congressman Vinson believed it was necessary to help protect the command climate of joint commands.

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[194] *Bill to Unify, Consolidate, Revise, and Codify the Articles of War, The Articles for the Government of the Navy, and the Disciplinary Laws of the Coast Guard, and to Enact and Establish a Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the Committee on Armed Services House of Representatives*, 81st Cong., 1st Sess. 612 (1949); *reprinted in* 1 INDEX AND LEGISLATIVE HISTORY TO THE UNIFORM CODE OF MILITARY JUSTICE, 1950 80 (1985).

> It is based upon the command of the joint operation and not upon the regulations of the President. Because, you see, you are running into this, if there is not some kind of restriction somewhere: You might have it noised around that this Navy boy is going to be court-martialed by the Army or the Army boy is going to be court-martialed by the Navy.
>
> And you will begin to find out rather early that there will be a good deal of criticisms, with the boys saying: "You better not get before the Army, the Army is going to be rough," or "You better not get before the Navy, the Navy is going to be rough. . . ."
>
> You have the same rules of procedure, and everything. It is completely uniform. But it should be positive as to when the reciprocal responsibility is imposed, and it should not be discretionary.[195]

At this point, Mr. Larkin, based on his conversations with Army and Navy representatives, testified. His testimony could serve as the perfect contemporary argument for the defenders of the status quo who believe JTF commanders do not need "blanket" GCM authority:

> **Mr. Larkin**: It is our notion, Mr. Chairman, that the services would continue to try their own people to the maximum extent.
>
> In observing the tendency of military operations over the last few years and those that we can probably expect in the future, we believe that the tendency is more to joint types of operation.
>
> **Mr. Vinson**: That is right.
>
> **Mr. Larkin**: And on that basis we felt, even though we expect that each service would normally try its own personnel, that there be provisions so that each service could try the personnel of other services who happen to be serving in isolated areas with them, so that there would be an economy in the use of courts and there would be more expeditious trials.
>
> We could not forecast, however, all the different types of possible joint operations in the future. We felt, therefore, it would be more flexible to leave it to the regulations of the President so that when we came upon circumstances in which it was clearly practical to have the top

[195] *Id.* at 613, 81.

commander, whether of Army, Navy, or Air Force, have jurisdiction over all of the personnel of the other services serving under him then the exercise of that jurisdiction by the Army, if you will, over Navy and Air Force in that circumstance would be conferred.

But we did not feel it practical to provide automatically in advance the jurisdiction to the top commander because we just cannot forecast the composition of the joint forces or joint operations which may take place. . . .

But to give it on a blanket basis when in some instances it is not necessary may create interservice problems there that we just could not foresee. . . .

But it is pretty much a case-by-case basis, I think, with the idea that we ought to have each service try its own people in the main, and we just left it in this form.

Mr. Vinson: What you have said, Mr. Larkin, would almost persuade me that you do not need the reciprocal provision, if you are going to have each service trying its men. *I would visualize it from a unification standpoint, with one commanding officer being responsible for the whole operation, that he should have the right of courts martial on all services.*

If you are not going to carry it out, what is the use of putting it in here, then? If you are going to continue to have each service court martial its own men, then you do not need anything with respect to courts martial reciprocal jurisdiction.

Mr. Larkin: I think it is desirable, Mr. Chairman, that each service try its own men. I think that will take place in most cases because they usually are serving with a sufficient number of their own services and it is entirely feasible that they should do so.

Mr. Vinson: If that is true, what is the use of putting it in this article 17, which is a new article? The theory of it was to have a unification. Yet you nullify it in the next breath.

Mr. Larkin: Well, the idea was to make sure that we do have this statutory jurisdiction service-wide, but I do not think we are quite in a position at this minute to say that in each and every instance in every

place this reciprocal jurisdiction should be and can be exercised by the top commander. I do not think it is quite necessary.

The tendency--and I am no military expert--I think is for more and more joint operations and I dare say by the time we have--if we ever do--complete joint operations or where every operation is a joint one, then we have the authority for one court, say an Army court, to try the personnel of the other services.

And the right to exercise that authority at that time will be conferred by the President. We wanted to make sure that we got the statutory authority in the first place. And we are not just sure of the extent of the exercise of it at this moment.

We feel the exercise of reciprocal jurisdiction is an evolutionary matter.[195]

The end result of these hearings and other congressional proceedings was that Larkin's view on article 17 carried the day. It was not until 1986, with the passage of Goldwater-Nichols, that some of Congressman Vinson's views were adopted, but still only partially.

Since the passage of the UCMJ, the appellate courts have addressed issues of reciprocal jurisdiction in eight different cases.[197] The most recent of these cases was 1967, with the rest of them coming from the period 1952-55. These early cases dealt principally with the growing pains resulting from the Air Force splitting from the Army. This case law does not contain any information that is not currently covered by RCM 201(e).[198]

C. *Goldwater-Nichols and Changes to UCMJ Art. 22 and RCM 201.*

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[195] *Id.* at 614-15, 82-83 (emphasis added).

[197] United States v. Houston, 17 U.S.C.M.A. 280; 38 C.M.R. 78 (1967); United States v. Prisoner, 19 C.M.R. 626 (A.F.B.R. 1955); United States v. Hooper, 5 U.S.C.M.A. 391, 18 C.M.R. 15 (1955); United States v. Markovitz, 16 C.M.R. 709 (A.F.B.R. 1954); United States v. Reese, 14 C.M.R. 499 (N.B.R. 1954); United States v. Biagini, 10 C.M.R. 682 (A.F.B.R. 1953); United States v. Mack, 4 C.M.R. 536 (A.F.B.R. 1952); United States v. Caternolo, 2 C.M.R. 385 (A.B.R. 1952).

[198] MCM, *supra* note 16, at RCM 201(e).

As we saw in section A of this Part, the Goldwater-Nichols legislation, among other things, increased the power of the unified commanders at the expense of the armed services. One provision of the Goldwater-Nichols legislation is particularly noteworthy because it granted detailed statutory authority to the CINCs that the President (acting through DOD and the armed services) had not delegated to the CINCs since the enactment of the UCMJ in 1950. Specifically, section 211(b) of Goldwater-Nichols amended UCMJ article 22(a)[199] by authorizing "the commanding officer of a unified or specified combatant command" to convene general courts-martial. This was the first time joint force commanders had been given court-martial authority over all services.

The legislative history of this provision clearly shows that Congress desired to remove some of the perceived impediments to effective unified command. In particular, Congress was dissatisfied with the manner in which DOD employed such terms as "command," "operational command," and "operational control." Congress felt these were terms of art which perpetuated the power of the services and kept needed legal authority out of the hands of the unified commanders.[200]

> The conferees determined that neither the term "full operational command" nor the term "command," as currently used within the Department of Defense, accurately described the authority that combatant commanders need to carry out effectively their duties and responsibilities. Accordingly, the conferees agreed to avoid the use of either term in the conference substitute amendment, but instead to specify the authority that the conferees believe a combatant commander needs.[201]

This new authority of the CINCs was further implemented by Executive Order (EO)[202] 12586 of March 3, 1987. This EO amended RCM 201 to

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[199] Goldwater-Nichols, *supra* note 14.

[200] For an interesting analysis of the complexities involved in these definitions, and good examples of the lack of true legal authority joint force commanders had at that time, *see* Historical Division, Joint Secretariat, Joint Chiefs of Staff, Definition of Operational Command and Operational Control (Apr. 30, 1975) (declassified June 20, 1991, on file with the DOD Freedom of Information Office, 89-FOI-1226, # 265).

[201] H.R. CONF. REP. NO. 99-824, 99th Cong., 2d Sess. 121 (1986), *reprinted in* 1986 U.S.C.C.A.N. 2255, at 2286.

[202] MCM, *supra* note 16, RCM 201 (Change 3, March 3, 1987).

provide procedures to govern the exercise of reciprocal jurisdiction by CINCs and other joint force commanders. Prior to this change, CINCs had court-martial authority only when expressly authorized by the President or Secretary of Defense. After the change, the CINCs were no longer required to receive specific general court-martial convening authority delegation from the NCA, but other joint force commanders were required to obtain authorization. This remains the situation today.

VI. CURRENT LAW AND POLICY REGARDING RECIPROCAL JURISDICTION.

The current law governing reciprocal general court-martial jurisdiction is relatively straightforward. It is governed by UCMJ articles 17 and 22 and by RCM 201. However, there is one interesting twist to RCM 201. Certain commanders are empowered under the UCMJ to convene courts-martial because of their status as commanders. The level of court-martial they can convene is a function of the level of command they hold.[203] Most of these commands are uniservice commands, only the CINCs have general court-martial authority by virtue of their joint command position alone. It is legally possible, however, for a uniservice commander to court-martial a member of another service.

Interservice courts-martial are permissible under RCM 201(e)(3) when either (A) they are convened by joint force commanders authorized to convene courts-martial (CINCs or others specifically delegated court-martial authority by the NCA, as discussed above); or (B) "[t]he accused cannot be delivered to the armed force of which the accused is a member without manifest injury to the armed forces."[204] The Manual states that "manifest injury," "does not mean minor inconvenience or expense. Examples of manifest injury include direct and substantial effect on morale, discipline, or military operations, substantial expense or delay, or loss of essential witnesses."[205]

The final part of RCM 201(e)(3) is particularly interesting. It provides:

> An accused should not ordinarily be tried by a court-martial convened by a member of a different armed force except when the circumstances

[203] UCMJ arts. 22-24 (1988) list the levels of command authorized to convene general, special and summary courts-martial, respectively.

[204] MCM, *supra* note 16, RCM 201(e).

[205] *Id.* at discussion.

described in (A) or (B) exist. However, failure to comply with this policy does not affect an otherwise valid referral.[206]

One commentator has termed RCM 201(e)(3) "an unusual blend of direction and guidance."[207] The reason for this is that the rule is explicitly based, to a significant extent, on *policy,* not simply law. This is a particularly powerful policy, however, because it is rooted, as we have seen, in the strong foundations of service autonomy. A testimony to the strength of this policy is the fact that over the last five years only one court-martial has been convened under the provisions of RCM 201(e)(3)(B). An Army sergeant who was assigned to a Navy Transient Personnel Unit in the Philippines, pursuant to an international legal hold, was tried for military offenses unrelated to the foreign charges by a court convened by a Navy commander.[208]

The force and effectiveness of this policy in preventing cases of reciprocal jurisdiction from being tried lies in the fact that it is not just legal policy, it is bedrock joint, and service, *doctrine.* Joint Pub 0-2, *Unified Action Armed Forces,* provides that "[t]he JFC (Joint Force Commander) should normally exercise administrative and disciplinary authority through the Service component commanders to the extent practicable."[209] It is a well-grounded military tradition that discipline is a service-specific responsibility. This fact is buttressed by the concept of the "single chain of command with two distinct branches."[210]

VII. PROPOSED SOLUTION: GCM AUTHORITY FOR JTF COMMANDERS.

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[206] MCM, *supra* note 16, RCM 201(e)(3).

[207] Criminal Law Div. Note, *"Interservice" Courts-Martial and Reciprocal Jurisdiction,* ARMY LAW., May 1992, at 59.

[208] *Id.* at 58.

[209] JOINT PUB 0-2, *supra* note 6, at Chapter IV, Sect. C, p. IV-18, para. 11.b.

[210] *Id.* at ix.

It is an old, but often forgotten, military axiom that issuing an order is but 10% of getting the job done. The other 90% is seeing to it that the order is carried out.[211]

General W. Y. Smith, USAF (Ret.)

Laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also and keep pace with the times.[212]

Thomas Jefferson

In this study two overarching ideals are valued for different reasons. One is the ideal of service autonomy. Service autonomy is valued for reasons of history, tradition, custom, identity, institutional know-how, checks and balances, and public perception. The other ideal is that of military necessity or, at least, military efficiency. This ideal is embodied in concepts such as "unity of command" and "unity of effort." These concepts are valued because they help the military to fight the nation's wars and carry out the nation's other business entrusted to it, with the greatest chance of success and at the least possible cost. There is a problem, however, when these two principles clash.

The analysis of the issues surrounding reciprocal court-martial jurisdiction for JTF commanders reveals such a clash. The history of service autonomy is intertwined with the birth and development of the nation itself. The pull of the services and their claims for loyalty are hard to ignore. At the same time, however, history has clearly demonstrated that ignoring the principle of unity of command can result in unnecessary loss of life and potential disaster for the nation. Fortunately, there is a solution that solves this problem without causing violence to either principle.

An amendment to RCM 201(e) that would authorize commanders of most JTFs to exercise GCM authority over those commands is proposed. Specifically, inserting a new paragraph, RCM 201(e)(2)(B), and renumbering

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[211] Smith, *supra* note 168, at 9.

[212] Quotation displayed on the wall of the main staircase leading from the lobby to the Commandant's office at the Army Judge Advocate General's School, Charlottesville, Virginia.

the other subparagraphs without deleting any of them would alleviate this problem. The new RCM 201(e)(2)(B) would provide:

> A commander of a joint task force, who is a flag or general officer, may convene general courts-martial over members of any of the armed forces.[213]

This change is minimal, is based solidly on existing statutory and regulatory law, and would require only a minor shift in policy. The shift in policy it would require is the recognition that the operational chain of command, which runs through the CINCs to the JTF commanders, should be buttressed by the full weight of authority the UCMJ can bring to bear. It does not make sense to provide this authority at the level of the CINCs, where it will rarely if ever be exercised, and then not push the authority down to where it may really be needed, the operational JTFs.

The possibility of proposing an amendment to article 22 of the UCMJ with language similar to this proposed RCM was examined. This approach would have been consistent with the one taken by Congress in the Goldwater-Nichols legislation. This course of action was dismissed for several reasons. First, legislation would certainly be more difficult to obtain than a small change to a RCM. Secondly, the law is already in place to allow for reciprocal court-martial jurisdiction, and a statutory change was not needed. Third, reform is almost always more easily accepted when it comes from within, by a change to a RCM, rather than from without, as a result of unsolicited legislation.

The proposed RCM amendment would satisfy the theoretical concerns about the variety of potential missions, and the different force compositions, of JTFs.[214] Flexibility would be maintained because superior joint commanders, including the CINCs and any intermediate JTF commanders, would retain the power to withhold the court-martial authority of subordinate joint commanders on either a blanket or case by case basis.[215] Concerns about the size of the JTF, and the experience of the commander, are addressed by limiting the rule to JTF commanders who are flag officers. Of course, the other provisions of

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[213] This language is based in part on the Navy's Manual of the Judge Advocate General (commonly referred to as the JAGMAN), §§ 0101A(1), 0120(A)(1), Designation of Additional Convening Authorities, General Courts-Martial.

[214] *See supra* text accompanying notes 52-53.

[215] MCM, *supra* note 16, RCM 306(a), 401(a).

RCM 201 would remain in place, and would continue to authorize SECDEF to delegate GCM authority on a case by case basis to JTF commanders, as needed. An example would be an O-6 who was chosen to command some JTF and needed GCM authority because of the particular nature of his mission.

The United States military has developed to the point where virtually every "real-world" operation will be joint. This is a result of the operational chain of command. Given this fact, it makes sense to create a *"default setting"* which gives these JTF commanders joint UCMJ authority. The United States has reached the point in our military history where it is "practical to provide automatically in advance the jurisdiction to the top commander."[216] Continuing to require individual SECDEF delegation of GCM authority for every JTF commander serves no legitimate purpose other than to pander to the misplaced concerns of service autonomy. Concerns about protecting service autonomy are appropriate for the strategic, national and political levels, not the operational level. Legitimate service concerns would continue to be protected by this proposed rule.[217] Furthermore, as a practical matter, joint commanders will almost certainly rely, virtually exclusively, on component command service channels to administer discipline in JTFs. The CINCs have relied on command service channels for the past ten years, since Goldwater-Nichols became law. This, when coupled with the ability of superior commanders to withhold court-martial authority should provide for a system flexible enough to avoid being a "cookie-cutter" approach.

This grant of GCM authority to JTF commanders will naturally lead to further developments and refinements of joint military justice authority. In particular, a joint military justice regulation, analogous to AR 27-10,[218] would be very beneficial. Suggestions on the contents of such a regulation are beyond the scope of this thesis. Nevertheless, some uniform provisions concerning nonjudicial punishment procedures would surely be in order.

VIII. CONCLUSION.

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[216] *See supra* text accompanying note 196.

[217] MCM, *supra* note 16, RCM 201(e).

[218] *See supra* note 18.

However brilliant an action may be, it ought not to pass for great when it is not the result of a great design.[219]

LaRochefoucauld

The military forces of the United States have been by and large very successful throughout the course of the nation's history. This success has come despite the fact that the various armed services were responsible for disciplining their own personnel in all operational settings. Nevertheless, this history should not be allowed to obscure the reality of the fact that contemporary JTF commanders should posses interservice general court-martial authority.

Problems of joint command have plagued our forces over the last fifty years. The principle of unity of command, well grounded in historical experience, provides a solid guide that should be followed in order to establish effective joint operational commands. It should be true unity of command, however, not simply unity of effort. The fact that today virtually all of our real-world missions are carried out by operational JTFs demands that these commanders should be given full command authority, including the ability to convene general courts-martial, if JTFs are to be optimally configured. Less than full command authority unnecessarily risks undermining the JTF commander.

Whether JTF commanders will actually use this new authority on many occasions, or whether they will rely on the component commanders and traditional service lines to administer discipline, is not the issue. The point is that the demands of interservice operational command require that the JTF commander be cloaked in the full mantle of legal authority the UCMJ can muster, in order to ensure, to the maximum extent possible, that his/her orders will be carried out, regardless of the branches of service involved.

[219] LaRochefoucauld, *quoted in* Legere, *supra* note 137, at 1.

COUNTER-GUERRILLA OPERATIONS: DOES THE LAW OF WAR PROSCRIBE SUCCESS?

*Lieutenant Commander Kenneth B. Brown, JAGC, USN**

I. INTRODUCTION.

> *People on the outside just have no idea of what this war is all about or how it is fought. It's a rough and brutal war. The Viet Cong has never heard of the Marquis of Queensbury or Geneva Conventions, and we can't afford to lose just because we have heard of them.*[1]

While the above quote was obviously a product of the U.S. war in Vietnam, the underlying philosophy could easily be applied to almost any counter-guerrilla operation conducted throughout history. The idea proposed is that a counter-guerrilla operation that restricts its tactics to those allowable by the laws of war will necessarily be defeated. This concept, then, serves as the primary justification for operating outside the legal limits, and for adopting tactics at least as brutal as those used by the guerrillas. It is an easy theory to adopt since the prime motivators of frustration with an unseen enemy and a desire for revenge seem to override any humanitarian concerns. Besides, as General William T. Sherman so aptly stated, "War is hell."

However, for a counter-guerrilla force that uses this theory as its basis for an operational strategy, the unfortunate result is almost certain defeat. With few exceptions, history clearly shows that those who rely on brutality and indiscriminate firepower to quash a guerrilla movement will likely only fuel the

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* *The positions and opinions stated in this article are those of the author and do not represent the views of the United States government, the Department of Defense, or the United States Navy. Lieutenant Commander Brown is an active duty Naval Officer, currently assigned as the Officer in Charge of the Trial Services Office Northeast, Washington DC Detachment. This article was edited by LT James R. Crisfield, JAGC, USN.*

[1] Lawrence C. Petrowski, *Law and the Conduct of the Vietnam War*, in 2 THE VIETNAM WAR AND INTERNATIONAL LAW 487 (Richard A. Falk, ed., 1969)(quoting an American official in Saigon as reported by Malcolm W. Browne, AP, Mar. 25, 1965).

fire they are attempting to extinguish.[2] If this is not motivation enough for a force to restrain its operations within the laws of war, democratic governments, at least, must worry about the effects of such brutal campaigns on popular support for the war effort. But these facts leave the tactician in a quandary: just how is a law-abiding counter-guerrilla force going to succeed in a fight against an opponent who knows no rules? This Article will endeavor to answer just that concern.

II. GUERRILLAS AND COUNTER-GUERRILLAS.

> *You can kill ten of my men for every one I kill of yours. But even at those odds, you will lose and I will win.*[3]

A. The Essence of Guerrilla Warfare.

Guerrilla warfare is not a new idea. While many of the recent writings on the subject focus on Communist doctrine, and the theories developed by Mao, the fact of the matter is, this style of warfighting has been used for thousands of years.[4] For example, Alexander the Great encountered guerrilla opposition to his rule over Bactria and Sogdiana (northern Afghanistan) around 329 B.C. As J.F.C. Fuller stated:

> In this theater the whole mode of fighting was to differ from what it had been. No great battles awaited Alexander; he was to be faced by a people's war, a war of mounted guerrillas who, when pursued vanished into the Turkoman steppes. To overrun such a theater of war and subdue such an enemy demanded generalship of the highest order, much higher than needed against an organized army on the plains.[5]

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[2] *See generally* ARCHER JONES, THE ART OF WAR IN THE WESTERN WORLD (1987). One of the rare exceptions to this general rule was the Turkish conquest of Asia Minor in the face of widespread Christian resistance. In their campaign, the Muslims systematically terrorized, massacred, or enslaved every Byzantine inhabitant they encountered, pillaging and burning the cities as they left. While this strategy was effective, it clearly exceeded the bounds of any rudimentary limits on the conduct of war (unknown at that time), and, one would hope, would not be used by any civilized power today. *Id.* at 102.

[3] STANLEY KARNOW, VIETNAM: A HISTORY 169 (1983)(quoting Ho Chi Minh).

[4] Jones, *supra* note 2, at 62.

[5] J.F.C. FULLER, THE GENERALSHIP OF ALEXANDER THE GREAT 117 (1958).

Guerrilla Warfare is still commonplace today. United Nations forces encountered urban guerrilla tactics in Somalia, and were subsequently defeated in their attempts at nation building, despite efforts at pacification. As Colonel David Hackworth stated, ". . . the Cold War's end will usher in a new wave of guerrilla warfare not seen since the fifteenth century."[6]

Despite its long history and varied application, however, the theory behind guerrilla warfare remains unchanged. It is a seemingly natural response of a relatively small, undermanned and outgunned force to the overwhelming firepower and strength of another. In other words, for the militarily weak, it is a strategy of survival.[7] As one of President Eisenhower's advisors said in criticism of the "New Look" strategy of massive retaliation:

> To the extent that the H-bomb reduces the likelihood of full-scale war, it increases the possibilities of limited war pursued by widespread local aggression.
>
> . . . .
>
> [I]ronically, the further we have developed the "massive" effect of the bombing weapon, the more we have helped the progress of this new guerrilla-type strategy.[8]

But there is much more to this strategy than just wanting to survive. As with any military operation, the guerrillas must win battles and exploit the victories in order to achieve their objectives. However, the manner in which they fight, and the battles that they must win, differ considerably from that of a conventional force. While the ultimate goal of any guerrilla operation is to coordinate with conventional forces, or to gather so much power as to allow a change in tactics, to accomplish that objective they must first be successful unconventionally.[9]

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[6] Col. David H. Hackworth, USA (Ret.), COVER JACKET to ROBERT B. ASPREY, WAR IN THE SHADOWS: THE GUERRILLA IN HISTORY (1994).

[7] B.H. LIDDELL HART, STRATEGY 376 (1967).

[8] *Id.*

[9] MAO TSE-TUNG, ON GUERRILLA WARFARE 42 (Brig. Gen. Samuel B. Giffith, USMC (Ret.), trans., 1961)("We consider guerrilla operations as but one aspect of our total or mass war because they, lacking the quality of independence, are of themselves incapable of providing a solution to the struggle."). *See also* CHE GUEVARA, ON GUERRILLA WARFARE 9 (1961)("It is obvious that guerrilla warfare is a preliminary step, unable to win a war all by itself. What happens is that the

However, unlike modern conventional standing armies, a guerrilla movement must first develop into a viable fighting force. In order to accomplish this, the leaders generally follow a three stage process: (1) Organization: recruiting, arming, and training; (2) Guerrilla operations: gradual increases in violence; and (3) Conventional, mobile warfare.[10] These phases however, cannot be isolated from one another. In other words, by necessity, while the guerrillas gradually increase the level of violence and attack more important targets, recruiting and training continue.

Besides the distinctive organizational and developmental aspects of guerrilla movements, there are certain peculiarities in their strategic, tactical and operational approach to combat. First, to guerrillas, the terms "front" and "rear" are applicable only to the enemy.[11] As such, they see no benefit in capturing territory, but prefer to accomplish their goals of destroying the enemy by way of physical and mental attrition through combat and psychological warfare.[12] In addition, while a guerrilla necessarily must maintain some method of supply and communication with a coordinating command, the methods used to achieve these ends are far less formal than with a conventional force. As a natural corollary to these concepts, positional warfare is virtually unknown to guerrillas. As Mao Tse-tung stated:

> The strategy of guerrilla warfare is manifestly unlike that employed in orthodox operations, as the basic tactic of the former is constant activity and movement. There is in guerrilla warfare no such thing as a decisive battle; there is nothing comparable to the fixed, passive defense that

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guerrilla army swells in size until it becomes a regular army. Only then will it be ready to deliver a knock-out blow."). This is also obvious from history in general. For example, while much is made of the American usage of unconventional warfare during the Revolution, victory would not have occurred without the conventional manueverings that led to such battles as Bunker Hill, Saratoga, and Yorktown. *See generally* DAVID R. PALMER ET AL., EARLY AMERICAN WARS AND MILITARY INSTITUTIONS 1-19 (1986).

[10] *See* JAMES ELIOT CROSS, CONFLICT IN THE SHADOWS: THE NATURE AND POLITICS OF GUERRILLA WAR 85-86 (1963); JOHN S. PUSTAY, COUNTERINSURGENCY WARFARE 31 (1965). *See also* JOHN J. MCCUEN, THE ART OF COUNTER-REVOLUTIONARY WAR: THE STRATEGY OF COUNTER-INSURGENCY 17 (1966)(further subdividing category two into low-scale guerrilla warfare and general guerrilla warfare).

[11] MAO TSE-TUNG, *supra* note 9, at 52-53.

[12] *Id.* at 67.

> characterizes orthodox war. In guerrilla warfare, the transformation of a moving situation into a positional defensive situation never arises.[13]

Second, in an effort to avoid a disastrous application of the enemy's superior firepower, guerrillas endeavor to disperse in the face of concentration. This is at variance with conventional strategic thinking, since military forces generally seek out enemy concentrations in an effort to close and destroy them. According to B.H. Liddell Hart:

> Guerrilla action reverses the normal practise of warfare, strategically by seeking to avoid battle and tactically by evading any engagement where it is likely to suffer losses.
>
> . . . .
>
> [It also] inverts one of the main principles of orthodox war, the principle of "concentration". . . . Dispersion is an essential condition of survival and success on the guerrilla side, which must never present a target and thus can operate only in minute particles, though these may momentarily coagulate like globules of quicksilver to overwhelm some weakly guarded objective.[14]

On the other hand, while they seek to avoid strength, guerrillas aspire to concentrate against weakness. While any competent military planner would necessarily agree with this concept, for the guerrillas, it is the *only* option they have. A conventional force can viably go "head to head" with a superior enemy army and gain victory.[15] For the guerrillas, however, such an engagement only invites substantial loss of invaluable personnel and equipment.[16] The end result of this doctrine, therefore, is probably best termed "hit and run," where the guerrillas will attempt to attack a weak enemy formation, and then disperse before retaliatory firepower or a rescue detachment reaches the area.

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[13] *Id.*

[14] HART, *supra* note 7, at 377.

[15] For example, at the battle of Chancellorsville, General Robert E. Lee faced at least 2:1 odds, but out-maneuvered the Union forces, gaining an incredible victory. BURKE DAVIS, GRAY FOX: ROBERT E. LEE AND THE CIVIL WAR 177-206 (1956).

[16] HART, *supra* note 7 ("For in a fight, as distinct from an ambush, the best of the leaders and men are likely to suffer so disproportionately to the total strength of the partisans that the whole movement may be crippled and the flame of its spirit extinguished.").

Third, in places where a conventional army would find difficult terrain, an unfriendly environment, and a weak national infrastructure, the guerrilla sees opportunities. The areas that are difficult to reach offer the beginning guerrilla movement a refuge and a location to set up "hospitals, training centers, supply dumps, [and] propaganda mills."[17] They also restrict the enemy's mobility and hamper his ability to locate the guerrillas and mass firepower against him. This offers the guerrillas an opportunity to isolate and annihilate small enemy detachments sent on reconnaissance missions.[18] However, such areas do have a drawback for the guerrillas: when the force becomes proficient enough to warrant an engagement, then the guerrillas must move closer to the enemy, and away from any support structures they have developed.

The fourth major difference is logistics. For the guerrillas, most of their supplies must come from any of three sources: the enemy; the population; or outside assistance.[19] The first of these is highly important and the most reliable since the guerrillas can plan to use low risk combat opportunities as a means of collecting supplies.[20] Besides, often the enemy is the only source for specialized military weapons such as explosives and light machine guns. The second source, the population, as will be discussed in detail below, is essential to the very survivability of a guerrilla movement. The third, on the other hand, is the least reliable since the guerrillas have little direct impact on another nation's decision to assist their efforts, and the dependability of the support is always subject to external political forces.

Although the differences discussed above are significant, the fifth and sixth are the most fundamental, and form the keys to successful guerrilla warfare: fifth, popular support and sixth, mobility. Concerning the former, any military organization's operations would be facilitated by cooperation from the

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[17] GUEVARA, *supra* note 9, at 21.

[18] *Id.* at 43 ("In the first stage of guerrilla warfare conducted in irregular terrain, enemy columns will make deep incursions into rebel territory. It is not difficult to ambush the leading elements . . . while the main body is momentarily held at bay.").

[19] A.H. Sollom, *Nowhere Yet Everywhere*, *in* MODERN GUERRILLA WARFARE: FIGHTING COMMUNIST GUERRILLA MOVEMENTS, 1941-1961 18 (Franklin M. Osanka ed., 1962). While it may be possible for the guerrillas to produce some basic necessities through cottage-type industries, rarely does the organization have sufficient control of valuable manufacturing areas that would allow for the production of significant quantities of major war materials.

[20] GUEVARA, *supra* note 9, at 11 ("Keep in mind that the guerrilla's most important source of supply is the enemy himself.").

population. However, the guerrillas need more than passive cooperation- there must be "a fair proportion [of the population] who will give them active and willing assistance."[21] As Mao Tse-tung stated, "The moment that this war of resistance dissociates itself from the masses of the people is the precise moment that it dissociates itself from hope of ultimate victory. . . ."[22] For the unconventional force, popular backing ensures support through intelligence, shelter, logistics and recruiting.[23] It also denies the enemy the same resources and puts them in an uncomfortable position of being unpopular. As stated by Che Guevara, "Throughout the day in woods and crags, and throughout the night in open country, the enemy is made to feel that he is inside hostile jaws. To put the enemy in such a state of mind, the guerrilla must have absolute cooperation from the people living in the area. . . ."[24]

Regarding the latter fundamental difference, Che Guevara also stated: "The guerrilla relies on mobility. This permits him quickly to flee the area of action whenever necessary, constantly to shift his front, to evade encirclement . . . and even to counterencircle the enemy."[25] Indeed, the essence of guerrilla warfare absolutely requires a force to be unfettered. According to Mao Tse-tung:

> In guerrilla warfare, select the tactic of seeming to come from the east and attacking from the west; avoid the solid, attack the hollow; attack; withdraw; deliver a lightning blow, seek a lightning decision. When guerrillas engage a stronger enemy, they withdraw when he advances;

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[21] VIRGIL NEY, NOTES ON GUERRILLA WAR: PRINCIPLES AND PRACTICES 88 (1961)(quoting BERT LEVY, GUERRILLA WARFARE 16 (1942)).

[22] MAO TSE-TUNG, *supra* note 9, at 44. *See also* GUEVARA, *supra* note 9, at 6 ("Popular support is indispensable."); Eliot D. Hawkins, *An Approach to Issues of International Law Raised by United States Actions in Vietnam, in* 1 THE VIETNAM WAR AND INTERNATIONAL LAW 188, 193 n. 125 (Richard A. Falk, ed., 1968)("'Thus the extent of control and protection of population is the true measure of progress rather than control of territory.'")(quoting General Maxwell Taylor).

[23] With active support from a willing population, the guerrillas are able to place more combatants on the field and spend less time foraging, or conducting logistically oriented raids. Also, where the support is truly voluntary, the unconventional forces avoid potential problems with forceful collection of supplies, heavy taxes, or other repressive methods.

[24] GUEVARA, *supra* note 9, at 11.

[25] *Id.* at 13.

harass him when he stops; strike him when he is weary; pursue him when he withdraws.[26]

While mobility is the hallmark of any modern military theory, a conventional army often neither needs nor is capable of the same degree of flexibility as a guerrilla force. This is true because, while unconventional tactics are designed around small, independent units with essentially no supply lines, conventional theory presupposes a coordinated, relatively centralized command network relying on a complicated supply and support structure.

B. Tactics and Counter-Guerrilla Problems.

In view of the key role of popular support and mobility in maintaining a guerrilla movement, it is obvious that these are the most valuable targets of any counter-guerrilla force. Ironically, however, this is often where the greatest problems are encountered.[27] Unfortunately for counter-guerrilla strategists, this phenomenon stems from the fact that, while the concepts appear simple, in practice they are very complex. As Carl von Clausewitz said, "Everything is very simple in War, but the simplest thing is difficult."[28] In guerrilla warfare, von Clausewitz's difficulties arise in the methodology utilized by the guerrillas to secure popular support and to maintain freedom of movement, while functioning as a viable military force. As Dr. Howard-Johnston, the translator of the work, *On Shadowing Warfare*, stated in regard to the incursive raids by the Moslem General Sayf al-Dawla:

> [Their] methods resembled those of modern guerrilla warfare, in that they relied heavily upon the natural advantages offered by the terrain, on the willing cooperation of the civilian population, on good intelligence, on interrupting the enemy's line of communication, and finally on the demoralizing effect of an endless sequence of small, surprise, "carefully planned tactical attacks in a war of strategical defensive."[29]

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[26] MAO TSE-TUNG, *supra* note 9, at 46.

[27] *See* infra Part C, Counter-Guerrilla Operations and their Historic Failure.

[28] CARL VON CLAUSEWITZ, ON WAR 164 (J. J. Graham trans., F. N. Maude ed., 1984).

[29] ASPREY, *supra* note 6, at 33 (quoting James Howard-Johnston, Studies in the Organization of the Byzantine Army in the Tenth and Eleventh Centuries (1971)(unpublished Ph.D. thesis, Oxford University).

More broadly stated, then, guerrillas use various specialties such as propaganda, deception, surprise, and harassment to achieve their ends. For a conventional soldier, attempting to restrict the guerrillas' basis of support and freedom of movement involves a frustrating fight for nebulous goals against a "shadowy" foe.[30] As one author described the Roman occupation of Spain:

> [T]he ordinary legionnaire . . . found himself in a strange and generally hostile land, his day devoted either to tiresome garrison routine or to extended campaigns "upcountry." Such campaigns called for hard physical labor expended either in hewing elaborately fortified camps out of unfriendly soil or in chasing elusive guerrillas. Conventionally minded commanders insisted on using "mass" tactics that, inappropriate to the terrain, frequently resulted in dreaded and costly ambush by the lurking enemy. . . . Casualties were high and, even worse, the numerous campaigns seemed never-ending in this land ". . . where large armies starved and small armies got beaten."[31]

Of all the tactics employed by guerrillas, probably the most difficult to counter and understand is terror.[32] As Colonel Ney stated in his book, *Notes on Guerrilla Warfare*, "In the twentieth century, terrorism has become an orthodox part of guerrilla strategy. . . . Terror, the guerrilla leader's most potent weapon, is used by him not only to demoralize the enemy and extort the support of his own people, but also to exact unswerving loyalty from the individual guerrilla."[33]

During the Vietnam War - which involved notorious amounts of terroristic tactics - the Viet Cong considered terror to be an essential part of its overall

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[30] *See* CROSS, *supra* note 10, at 96 ("Unconventional aggression presents a painfully complex combination of challenges to the government under attack for . . . it strikes at the social, economic, and military foundations of the state.").

[31] ASPREY, *supra* note 6, at 16 (quoting C.V.H. SUTHERLAND, THE ROMANS IN SPAIN 71 (1939)).

[32] The term "terror" here includes such tactics as assassinations, executions, abductions, and torture.

[33] NEY, *supra* note 21, at 14. *See also* ROBERT A. FRIEDLANDER, 1 TERRORISM: DOCUMENTS OF INTERNATIONAL AND LOCAL CONTROL 14 (Yonah Alexander, et al. eds., 1979)("From the time of the French Revolution, terrorism and guerrilla movements have become inextricably intertwined.").

strategy to gain victory. Under the Viet Cong plan, terror targeted against government officials and the general populace served a number of purposes, including: (1) destroying the Government of South Vietnam (GVN) administrative apparatus; (2) weakening the faith of the people in the government by showing its inability to protect them; (3) controlling the population by weeding out "undesirables"; and (4) forcibly motivating the population to support them and not the GVN troops.[34]

Therefore, for the Viet Cong, terror was a highly useful subversive weapon against the established government. Indeed, in view of the specialized goals of their repressive campaign, the Viet Cong were careful to ensure that any applied terror was in furtherance of the desired result. As Hosmer stated in his book, "Repression, far from being a mindless or random bloodletting, is, according to Viet Cong doctrine, a carefully calculated and controlled process designed to support the immediate objective in each phase of the revolutionary struggle and closely integrated with other political-military operations."[35] This doctrine was based on the planners' knowledge that too much repression could back-fire, resulting in a loss of popular support.[36]

Unfortunately for the United States and GVN, this was a lesson they seemed to overlook. Facing an uncooperative population, the endless slaughter of those village officials who supported them,[37]the never-ending search for an elusive

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[34] STEPHEN T. HOSMER, VIET CONG REPRESSION AND ITS IMPLICATIONS FOR THE FUTURE 10-18 (1970). In fact, the type of repression used differed depending upon how much governmental control existed over the area. Hosmer divided Viet Nam into two categories: (1) the area under GVN control; and (2) the area under Viet Cong control. In the former, repression took the primary form of assassinations and abductions. In the latter, the range of sanctions for "crimes" was much wider and less severe initially. *Id.* at 41-78. The discussion here involves those areas where the guerrillas are attempting to obtain control (i.e., category (1)).

[35] *Id.* at 21. Here, Hosmer refers to the Viet Cong's *repression* program vice just terror alone. While terror is a primary element of repression, the latter is much broader in scope and purpose. Repression, for example, is not only useful in controlling the population by strict curfews and travel restrictions, but can also provide the guerrillas with invaluable logistics through heavy taxes, crop quotas, and conscription.

[36] *Id.* "Captured directives also reveal a strong sensitivity to the danger that uncontrolled repression may lessen popular support for the Viet Cong. They warn against 'reckless seizure and killing' and 'the irresponsible punishment of innocent persons' which might weaken popular support." *Id.*

[37] Hosmer cites the following figures for the number of officially reported assassinations and abductions: 1966, over 5,500; 1967, over 9,000; 1968, estimated more than double 1967. He also notes that these figures probably understate the actual losses. *Id.* at 44.

enemy, and grueling losses in seemingly pointless battles, the government and U.S. troops became severely frustrated. Often the response was to further repress the population, frequently in an arbitrary and disorganized manner.[38] In his seminal book, VIETNAM, A HISTORY, Stanley Karnow described just such a reaction from Marines taking a village after three days of bloody fighting:

> The enemy had evaporated, leaving not even a cartridge shell. The peasants, mostly old men and women, were running around in panic, screaming and denying any connection with the Vietcong. . . . "Our emotions were very low because we'd lost a lot of friends. . . . So when we went through those hutches, we gave it to them, and whoever was in a hole was going to get it. And whatever was moving was going to move no more. . . ."[39]

This, unwittingly, served the Viet Cong's purposes, since the troops crossed the line, producing hostility.[40] Terror, therefore, is a double-edged sword that is useful to those who know how to employ it, and deadly to anyone else.

However, terror is not a mandatory tactic. Instead, it is often a last resort where the civilian population is either ambivalent or potentially hostile.[41] According to Ney, "Where voluntary community support is not spontaneously forthcoming at the outbreak of the struggle or cannot be sustained at the desired level, the guerrilla movements almost inevitably will resort to terrorism. . . ."[42] This was the case in much of South Vietnam, where many of the villagers who found themselves involved in the war for the countryside were primarily concerned with ensuring that their land (and, hence, ancestors) were cared for. Frances Fitzgerald in her best selling book, FIRE IN THE LAKE, writes of an old

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[38] *See e.g.*, United States v. Calley, 46 C.M.R. 1311 (A.C.M.R. 1973).

[39] STANLEY KARNOW, VIETNAM: A HISTORY 468-468 (1983)(quoting former Marine Private Jack Hill).

[40] *Id.* at 468 (describing the impact on the Vietnamese peasants of "cordon-and-search" missions designed to separate them from the Vietcong: "At the end of the day, the villagers would be turned loose. Their homes had been wrecked, their chickens killed, their rice confiscated-and if they weren't pro-Vietcong before we got there, they sure as hell were by the time we left.")(quoting former Marine Captain E.J. Banks).

[41] NEY, *supra* note 21, at 14.

[42] *Id.*

man who, when South Vietnamese soldiers attempted to evacuate him, refused to leave his land although his village would soon become a free-fire zone. In essence he chose death over abandoning his "family."[43]

Indeed, in guerrilla warfare, the best method of gaining popular support is not by coercion, but by "winning them over" to your side.[44] In order to accomplish this, Mao Tse-tung provided an outline of how to treat the population. Stating that "[t]here is . . . a unity of spirit that should exist between troops and local inhabitants," he enumerated the "The Three Rules and the Eight Remarks:"

Rules:
1. All actions are subject to command.
2. Do not steal from the people.
3. Be neither selfish nor unjust.

Remarks:
1. Replace the door when you leave the house.
2. Roll up the bedding on which you have slept.
3. Be courteous.
4. Be honest in your transactions.
5. Return what you borrow.
6. Replace what you break.
7. Do not bathe in the presence of women.
8. Do not without authority search the pocketbooks of those you arrest.[45]

This doctrine is important because it in turn points to one of the most neglected elements of guerrilla warfare: politics.[46] In approaching an unconventional conflict, counter-guerrillas frequently forget that the main driving force behind the resistance or uprising is patriotism, hatred of an invader, or

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[43] FRANCIS FITZGERALD, FIRE IN THE LAKE 12 (1972).

[44] MAO TSE-TUNG, *supra* note 9, at 92.

[45] *Id.*

[46] In fact, all war consists of a political element. As Carl von Clausewitz stated, "The War of a community - of whole Nations, and particularly of civilized Nations - always starts from a political condition, and is called forth by a political motive. It is, therefore, a political act." CLAUSEWITZ, *supra* note 28, at 118. Mao agrees: "Military action is a method used to attain a political goal. While military affairs and political affairs are not identical, it is impossible to isolate one from the other." MAO TSE-TUNG, *supra* note 9, at 89.

discontent with the output of the nation's political machinery. Alexander the Great, for example, was unable to militarily quell the resistance in Bactria and Sogdiana until he turned to politically accommodating the guerrillas. Unfortunately for him, it took over two years of frustrating pursuits, widespread applications of terror, and untold resources and lives before he changed his approach.[47]

This political element, therefore, is an important consideration in guerrilla warfare planning. It is the means whereby the combatants are motivated, and the people's support obtained. Without a political purpose, the guerrilla movement has no goal, and will founder.

Just having a political purpose is not, in and of itself, enough, however. Unless the guerrillas and the people are aware of the movement's platform, and understand its implications, they will have no reason to risk their lives for it. Also, if they do not find what the guerrillas represent to be significantly better than what the conventional forces have to offer, any support will be weak at best.[48] Indeed, the people and soldiers must see the counter-guerrillas as equating to an unmitigated evil that must be destroyed, and they must be instinctively ready to lay down their lives in the process.[49] This is a difficult threshold to meet. It requires the creation of a mental state whereby their belief in "the cause" is so strong as to overcome the basic human instinct for survival.

To achieve this goal, the guerrillas employ two primary methods. One is terror, which was discussed in detail above. The other is propaganda. While widely misunderstood and often viewed with cynicism, this psychological tool is invaluable to any guerrilla movement. Propaganda sets the tone for the fighters and people, giving them an image of what they stand for. It also has external political value, since outside pressure may be applied where a government is seen as overly repressive, brutal or otherwise inhumane. Additionally, propaganda can have a negative effect on the counter-guerrilla forces, demotivating them by planting questions about the legitimacy or futility

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[47] JONES, *supra* note 2, at 64. In the end, Alexander abandoned terror and married the daughter of "one of the principal magnates of Bactria" in order to placate his foes. *Id.*

[48] As stated above, this is often where terror is used extensively by the guerrillas.

[49] "[I]n the main, guerrilla fighters are strongly motivated. They hate the established regime or the ruling elite. They live under a deep sense of social injustice. If this were not so, they would rarely be effective, for the life of a guerrilla fighter is one of danger, hardship, and austerity." W. H. Hessler, *Guerrilla Warfare is Different*, in STUDIES IN GUERRILLA WARFARE 9, 12 (1963).

of their strife.[50] In Vietnam, for example, the Viet Cong emphasized that they were fighting a just, anti-colonial war.[51] This had the dual purpose of appealing to the Vietnamese sense of patriotic duty, and representing the United States to the American public and the rest of the world as a bully that was bloodily repressing self-determination.[52]

Therefore, where a force endeavors to successfully counter a guerrilla movement, its leaders must be aware of why the guerrillas began fighting, and what keeps them fighting, and be prepared to counter any benefits they may receive from political maneuvering. In other words, in counter-guerrilla operations, the venerable maxim, "Know thy enemy," rings as true as ever.

C. Counter-Guerrilla Operations: An Historic Failure.

In view of the complexity of guerrilla warfare and its nebulous character from the conventional soldier's viewpoint, it is no wonder that history is replete with failed attempts to thwart such movements. As mentioned above, Alexander had severe difficulties in quelling unconventional resistance. Other historical military "greats" encountered similar problems too, with most eventually succumbing at least in part due to guerrilla actions. For example, Hannibal was ultimately driven from Italy following thirteen years of constant harassment. During that period he was able to bring the Roman Army to battle only on rare occasions (such as, unfortunately for the Romans, Cannae), with the remainder of his time spent in pursuit of fleeing attackers or pinned to logistical bases for protection.[53] Napoleon, of course, encountered relentless resistance following his invasion of Spain in 1808. This popular uprising, to which guerrilla warfare owes its name, proved impossible to overcome, eventually being dubbed "The

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[50] In this sense, propaganda, or more generally, psychological warfare, has three targets: (1) the people and troops (i.e., "friendlies"); (2) the public; and (3) the enemy. *See generally*, George A. Kelly, *Revolutionary Warfare and Psychological Action, in* MODERN GUERRILLA WARFARE: FIGHTING COMMUNIST GUERRILLA MOVEMENTS, 1941-1961 425-438 (Franklin M. Osanka, ed., 1962).

[51] HOSMER, *supra* note 34, at 80.

[52] *Id.*

[53] JONES, *supra* note 2, at 65-70.

Spanish Ulcer."[54] And many great nations, with awe inspiring conventional power, found lightly armed guerrillas to be beyond their capabilities.[55]

While the specific strategies used by each of these unsuccessful counter-guerrilla forces have differed due to geographical and temporal peculiarities, historically they have been similar in their general approach to the guerrilla problem. Usually, a regime or force encountering such opposition initially responds in one of two ways.[56]

Some react reflexively, attacking the local population as representative or supportive of the guerrillas' cause. In such circumstances, the methods utilized vary considerably, dependent upon the repressiveness of the regime being attacked. They can take the form of a law enforcement crackdown,[57] or harsh repression through curfews, mass arrests, and public executions.[58] Often, where the government is not shy about applying force, the planners will take on

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[54] *Id.* at 358-367. This was not Napoleon's only encounter with guerrilla forces. He also met such resistance in Russia during his invasion and retreat in 1812, and Tyrolea in 1809. ASPREY, *supra* note 6, at 84-89.

[55] These include France, Germany, Great Britain, Japan, U.S.S.R., and the United States.

[56] The following summary is a generalization drawn from counter-guerrilla operations throughout time: Alexander in Sogdiana and Bactria; Great Britain in the American Colonies; Napoleon in Spain; Germany in France, Yugoslavia, Denmark, and Norway (World War II); Japan in China and the Philippines (World War II); France in Angola and Indochina; United States in Vietnam; U.S.S.R. in Afghanistan; the United Nations in Somalia; Chiang Kai-shek v. Mao Tse-tung; and Batista v. Castro.

[57] For example, the British attempt to control American colonists following raids on warehouses, protests, and the like, involved random searches and armed street patrols to enforce the law. Unfortunately for them, a number of violent clashes occurred, which only increased the resistance. THEODORE ROPP, WAR IN THE MODERN WORLD 86-88 (1962). Ngo Dinh Diem also initially applied increased law enforcement efforts against the Viet Minh, eventually escalating the repression to include authorized tortures and killings of anyone remotely suspected of communist sympathies. As if this was not bad enough, these laws were frequently abused by officials seeking revenge on innocent citizens. FITZGERALD, *supra* note 43, at 141-141.

[58] For example, following the German occupation of the most of mainland Europe during World War II, some disorganized resistance movements developed. However, in their initial efforts to defeat the guerrillas, the Germans employed widespread "mass arrests, imprisonment, torture, deportation to forced-labor and concentration camps, and summary executions. . . . Besides further alienating the general population, this drove thousands of young men to mountain and forest sanctuaries, where some of them in time formed effective guerrilla bands." ASPREY, *supra* note 6 at 305.

a "we'll teach you a lesson" attitude, intending to scare the guerrillas away from future actions. This rarely, if ever, works and usually backfires.[59]

Others take the opposite approach, ignoring the guerrillas during the early stages of their development. This doctrine, however, also poses problems. Where the authorities see the guerrilla movement as mere "bandits"[60] or prefer not to take substantial countermeasures against them for fear of giving the guerrillas legitimacy or appearing insecure, they "inevitably find themselves running out of thumbs to stop holes in the dike, and the whole structure begins to weaken."[61] In other words, while the opposing forces ignore the guerrillas, they just become stronger.

Usually it does not take long before the regime recognizes that the guerrilla threat is more serious than initially thought. At this point, the military action taken normally consists of two overlapping phases. In the first phase the strategic planners attempt to locate and destroy the "main body" of guerrillas in a set-piece conventional battle, believing it can bring the conflict to a quick end. Where the guerrilla forces are strong relative to their conventional foe, as with the Spanish in Aragon under Mina, a conventional battle may ensue, but will likely result in victory for the guerrillas.[62] On the other hand, in the case where the guerrillas lack enough strength to face a conventional force, and wisely choose not to do so,[63] the set-piece battle never materializes, and the campaign results in only wasted time and assets.[64]

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[59] As Asprey states, "Perhaps the outstanding lesson of this period of European resistance should be the innate booby trap contained in reprisal philosophy. Reduced to its simplest terms, reprisal illustrates the fallacy of answering lawless behavior with lawless behavior." *Id.*

[60] *See, e.g.*, Hessler, *supra* note 49, at 12 ("It is common practice for anti-guerrilla leaders and established political leaders to refer to their guerrilla targets as 'bandits'. . . . But no government is likely to succeed in stamping out a guerrilla movement if it really thinks of them as bandits, for that does not take account of their motives.").

[61] CROSS, *supra* note 10, at 97. The Soviets made this error in Afghanistan by "underestimating the fighting capabilities" of the Mujaheddin, referring to them derisively as "counterrevolutionary bandits." ASPREY, *supra* note 6, at 1206.

[62] JONES, *supra* note 2, at 362.

[63] Unlike the North Vietnamese, who in 1965 attempted an offensive through the Ia Drang Valley, losing nearly two thousand men. KARNOW, *supra* note 3, at 479-480.

[64] *See, e.g.*, BERNARD FALL, STREET WITHOUT JOY (1963)(chronicling the French failure in Indochina and the manueverings that lead to Dien Bien Phu); KARNOW, *supra* note 3, at 439

Once the planners realize that the guerrillas will not acquiesce to their own doom, the strategy then usually expands to include a second phase: lightning strikes into areas believed to be guerrilla "hot beds."[65] In order to allow for the requisite mobility, speed and stealth, the attacking forces commonly consist of smaller-sized units than those utilized in the first phase of combat operations. Often they include "commando" elements, trained in unconventional warfare, in an effort to use the guerrillas' own tactics against them.[66] While this approach has had some success, it often turns into a "wild goose chase," with the victory going to the side with the best intelligence and mobility.

When combined, the conventional force sweeps and tactical strikes have a dual purpose. First, they are designed to catch and eliminate bands of guerrillas by outmaneuvering them and then applying superior firepower. Second, as is often the case, when no guerrillas are found, the forces pursue a logistical raiding strategy,[67] destroying whatever crops, livestock, or other useful property they can find in order to deny the guerrillas the benefit of their use. One such operation in Vietnam was reported by AP:

(discussing OPERATION CEDAR FALLS, a sweep consisting of some 30,000 American troops, designed to destroy the Viet Cong influence near the Cambodian border north of Saigon); ASPREY, *supra* note 6, at 1206 (discussing the Soviet attempts to attack the Mujaheddin in northern Afghanistan using "large airborne and armor formations in mountain country with troops neither tactically nor technically trained for that type of warfare").

[65] For example, a Reuters news story in 1985 stated:

> The Soviet army showed . . . it was learning how to fight a guerrilla war in Afghanistan, putting the Moslem rebels there mostly on the defensive for the first time in the six-year conflict. Moscow added sharper intelligence and crack commando raids . . . to the sweeping ground offensives and "scorched earth" attacks it has used since stepping into the civil war between communists and Moslem insurgents.

REUTERS, Dec. 21, 1985, available in LEXIS, Nexis Library, ARCNWS File.

[66] As Colonel David Hackworth, USA (Ret.) stated, "We would no longer be counterinsurgents who, like actors on a well-lit stage, gave all their secrets away to an unseen, silent, and ever-watchful (insurgent) audience . . . . Instead we would approach the battlefield and the war as our enemy approached it, and in so doing begin to out-guerrilla the guerrilla - 'out-G the G' . . . ." DAVID H. HACKWORTH, ABOUT FACE: THE ODYSSEY OF AN AMERICAN WARRIOR 679 (1989).

[67] This term is borrowed from ARCHER JONES, THE ART OF WAR IN THE WESTERN WORLD (1987).

> The 25th Division's Wolfhounds trudged through the vast swamp-lands thirty miles west of Saigon, destroying homes, food, gardens, livestock and even pets - everything that could be of use to the Communists.
>
> . . . Colonel Marvin Fuller, Commander of the 25th's Second Brigade, said . . . the systematic slaughter of water buffalo, ducks, chickens, and pigs was to deny fresh meat to the enemy battalions.[68]

Often these assaults are supported by large amounts of firepower, indiscriminately applied to the area of operations.[69] Typically, the greatest impact is on the local population who suffers heavily at the hands of the attacking forces, frequently by design.[70] The goal of this massive application of firepower can be two-fold: First, it is useful to suppress resistance in the target area by disrupting enemy communications, transportation, and the formation of defenses.[71] Secondly, massive bombing and shelling campaigns encourage the local population to leave, thereby removing the essential popular support discussed above.[72] These "debasing" tactics are also often coupled

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[68] Lawrence C. Petrowski, *Law and the Conduct of the Vietnam War*, *in 2* THE VIETNAM WAR AND INTERNATIONAL LAW 465, 497 (Richard A. Falk, ed., 1969)(quoting John T. Wheeler, AP, Mar. 13, 1967).

[69] *See, e.g.*, FITZGERALD, *supra* note 43, at 459 (describing how, during OPERATION CEDAR FALLS, "the U.S. armed forces in effect drove a steamroller over the densely populated area of the Iron Triangle, flattening the villages with five-hundred-pound bombs, bulldozing the miles of tunnels, and destroying the jungle cover with herbicides").

[70] *Id.* (stating that OPERATION CEDAR FALLS generated 7,000 refugees). By far, the United States was not the only power to use such methods. As will be seen below, the Soviets, in their battles against the Mujaheddin, were even more brutal and caustic in applying massive firepower. The French, too, often attacked villages based on scanty evidence that they were Viet Minh. *See, e.g.*, FALL, *supra* note 64, at 195. These sweeps, when not closely controlled, can do more harm than good.

[71] In other words, targeting the enemy's mobility.

[72] The Soviets used this tactic extensively in Afghanistan, applying a "scorched earth policy carried out both by ground troops burning villages and crops and slaughtering livestock, and by indiscriminate bombing of cities, towns, and villages in order to create more refugees and to deprive guerrillas of food and information - a deliberate attempt to make 'terror reign.'" ASPREY, *supra* note 6, at 1207. Applying Mao's language, the destruction of the villages was designed to "dry up the 'water' where the 'fish' of the Liberation forces swam." FITZGERALD, *supra* note 43, at 459.

with the active removal of civilians and their internment in camps, or "strategic hamlets." This latter method has met with mixed results.[73]

Indiscriminate firepower, however, is not always the result of carelessness or cruel design. Instead, attacking forces often face the inherent problem in guerrilla warfare of discerning who is and who is not the enemy.[74] Also, the conventional forces may be unable to physically separate the guerrillas from civilians, or lack sufficient pinpoint targeting to allow for sufficient discrimination.[75]

Regardless of the reason behind the lack of discrimination, most often the response of the local population is to grow angry with the attackers, not infrequently to the point of wanting revenge. Therefore, counter-guerrilla operations pose a serious problem for conventional forces. While every orthodox soldier's inherent response is to follow the maxim, "firepower kills," when facing the elusive guerrilla, this truism, as with most other conventional theories of warfare, seems out of place and possibly counter-productive.

D. Successful Counter-Guerrilla Operations.

While history clearly reflects that counter-guerrilla operations are difficult at best, and frequently result in defeat, there have been some noteworthy successes. Among them are: The Second Boer War (1899-1902), the

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[73] Civilian interment was used by the British during the Second Boer War and in Malaya with some success. *See, e.g.*, E.D. SWINTON, THE DEFENCE OF DUFFER'S DRIFT ix (1986); Ralph L. Muros, *Communist Terrorism in Malaya, in* STUDIES IN GUERRILLA WARFARE 64, 67 (1963)(respectively). It was also attempted by South Vietnam in the notorious "strategic hamlet" program. While theoretically valid, the concept failed in practice due mainly to corruption among the village officials, insufficient logistical and military support, and the government's failure to consider the strong belief each peasant held in the sanctity of his land. FITZGERALD, *supra* note 43, at 168.

[74] *See, e.g.*, HACKWORTH, *supra* note 66, at 680 (quoting a "Night Hunter" sniper's remarks following one mission: "And I turned my scope on this one . . . and it was a girl. And all I could think was how beautiful she was.").

[75] The problem of target separation was one that jeopardized the Somalia U.N. peacekeeping mission in the Fall of 1993. According to RUETERS Wire Service, the Italian government threatened to withdraw from the operation following a U.N. helicopter attack on "gunmen and mobs" who had earlier ambushed a U.N. patrol. Italy "criticized the shooting of civilians" and said that "'[t]o shoot women and children is the antithesis of a humanitarian mission.'" According to a U.S. Army major, the casualties were unavoidable because, "[i]n an ambush . . . there are no sidelines for spectators." RUETERS, Sep. 10, 1993, available in LEXIS, Nexis Library, ARCNWS File.

Philippines (1899-1916), and Greece (1945-1949).[76] In each of these cases the counter-guerrilla forces adjusted to the threat in some manner, eventually going beyond the classical measures outlined above by adopting methods considered highly unconventional at the time. While these short histories do not provide a formula for success in counter-guerrilla operations, they are illustrative of the fact that guerrillas can be defeated.

The Second Boer War (1899-1902) was originally fought on conventional terms, but shifted to unconventional tactics in 1900 after the British defeated the regular Boer forces. In response to the Boers' adoption of guerrilla tactics the British imprisoned thousands of civilians in concentration camps, crisscrossed the open velt with barbed wire and mutually supporting blockhouses, and launched systematic destructive sweeps throughout the countryside, demolishing anything of use to the residents.[77] The barbed wire and blockhouses significantly decreased the Boers' mobility, while the sweeps were designed to keep the separated guerrilla elements off-balance and out of touch with one another.[78] Meanwhile, the Sherman-like sweeps and mass imprisonments also had the desired effect of debasing the guerrilla movement.

Although these tactics eventually succeeded in suppressing the Boers, the concentration camps alone accounted for the deaths of approximately 20,000 civilians due to poor sanitation, bad food, and uncontrolled diseases.[79] Additionally, the terrain involved was unique in that much of the contested area consisted of open plains that lended themselves to such measures as barbed wire and blockhouses. An attempt to utilize such methods in mountainous terrain or jungles would probably not meet with the same level of success.

The attempted suppression of the Philippine insurrection against American occupation following the Spanish-American War also was originally conducted much along the lines of the typical counter-guerrilla operation. However, in 1901, there were two major changes to the failing strategy that reversed its direction. First, Douglas MacArthur formed the "Scouts" who were to provide

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[76] Malaya is often cited as a model counterinsurgency effort. However, the insurrection involved only 5,000 Chinese communists with weak popular support, fighting in militarily unfavorable terrain. In view of these facts, it was a unique situation with little precedential value. MUROS, *supra* note 73, at 66-67.

[77] LARRY H. ADDINGTON, THE PATTERNS OF WAR SINCE THE EIGHTEENTH CENTURY 113 (1984).

[78] ASPREY, *supra* note 6, at 148.

[79] ADDINGTON, *supra* note 77, at 113.

an unconventional element by using deception and intelligence to infiltrate the guerrilla command structure. In practice they were so successful that they were able to capture the guerrilla leader, thereby decapitating the movement.[80]

The second change came with the appointment of William Howard Taft as civilian governor of the islands. In an effort to downplay the bloodiness of the suppression, Taft instituted land and education reforms that eventually "won over the bulk of the population."[81] Therefore, by rejecting the conventional warfare approach, and paying attention to the insurrection's political element, the United States was able to suppress a major uprising within three years. However, due to the original failings of the counter-guerrilla efforts, over four thousand American soldiers and an estimated two hundred thousand civilians were killed.[82]

In Greece, the counter-guerrilla effort also initially encompassed many of the classical errors. However, as the strategic failures came to light, the government made adjustments that were considerably different from those used in the Boer War or the Philippines. First, when the large scale clumsy "sweeps" miscarried, the Greek forces adopted a "strategy of staggered expansion of control" designed to slowly strangle the guerrillas by seizing and holding important territory.[83] Second, while the local population was often moved under the same "debasing" premise as in the unsuccessful campaigns, their removal was done only at critical times, and for as short a period as possible. Even though this approach was not without disadvantage, it offered a compromise whereby the people were able to return to their land once the government forces had secured it under the slow expansion strategy.[84] Therefore, in its counter-guerrilla operations, the government chose a more gradual, politically sensitive strategy. However, the guerrillas' own failures[85]

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[80] ASPREY, *supra* note 6, at 130-131.

[81] *Id.* at 133.

[82] *Id.*

[83] D. G. Kousoulas, *The War the Communists Lost*, in STUDIES IN GUERRILLA WARFARE 83, 86 (1963). This is also the strategy adopted by the British in their conquest of South Wales in the Eleventh Century. ARCHER JONES, *supra* note 2, at 129-130.

[84] KOUSOULAS, *supra* note 83, at 86.

[85] The communists relied heavily on terroristic campaigns, espoused no tangible political goals, and changed to conventional tactics too soon. Therefore, they denied themselves popular support

and Tito's policy shifting played as much of a role in their defeat as did these distinctions.[86] Thus, the potential successfulness of the counter-guerrilla measures is speculative, and the lessons to be drawn from Greek conflict are limited.

In view of the illusory concepts of guerrilla strategy, the frustrating failure of classical counter-guerrilla operations, and the massive blood-letting deemed necessary in the two clear victories against unconventional forces, it is perhaps understandable that "guerrilla wars . . . are one of the nastiest forms of violence, where both the guerrilleros and those who try to subdue them easily slip into an escalation of uncontrolled brutality."[87]

III. THE LAW OF WAR: THRESHOLD REQUIREMENTS.

There is but one International Law - The best Army.[88]

A. International v. Internal Conflicts.

In discussing how guerrillas are affected by the law of war, the first important issue to address is whether the conflict in question is "international" or "internal." While this distinction is unclear at times, it is important because the categorization directly affects which body of law is involved.[89] In the first instance, where the war rises to the level of an international armed conflict either by invasion, foreign intervention, or occupation, the four 1949 Geneva

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and the advantages of a guerrilla strategy before the opposition had a real opportunity to do so. *Id.*

[86] By closing the Yugoslavian border to Communist guerrillas, Tito took away a source of military support and an important refuge. *Id.* According to Robert Asprey, this change had little impact when compared to the guerrillas' own failures. ASPREY, *supra* note 6, at 524.

[87] Dietrich Kappeler, *Michael Veuthey's Guerilla et Droit Humanitaire*, 78 AM.J.INT'L.L. 537 (1984) (book review).

[88] ROGER H. NYE, THE PATTON MIND: THE PROFESSIONAL DEVELOPMENT OF AN EXTRAORDINARY LEADER 35 (quoting a May 1915 letter from General (then Lieutenant) George S. Patton, Jr. to his father).

[89] For the purposes of this paper it will be assumed that the bodies of law discussed are binding on all parties involved. While this may be a controversial assumption, especially with regard to the 1977 Additional Protocols to the Geneva Conventions of 1949, it is necessary for the sake of brevity and to show that, even under the highest legal threshold, a counter-guerrilla force can be successful.

Conventions[90] and Protocol I[91] apply. However, in the second instance, where the conflict is deemed purely "internal," such as an armed uprising against the government, the body of law is much smaller, including only Common Article 3 of the 1949 Geneva Conventions, and Protocol II.[92]

In order for a conflict to qualify as "international" for the purposes of the law of war, it must first cross the threshold established by Common Article 2 of the Geneva Conventions. This provision specifies that:

> [The] Convention[s] shall apply to all cases of declared war or any other armed conflict which may arise between two or more of the High Contracting Parties. . . [as well as] to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.[93]

While this language appears to give relatively specific guidance for determining when the conventions' requirements apply, in practice states have resisted against admitting that the circumstances warrant such international

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[90] These are: Convention for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field [hereinafter Geneva I]; Convention for the Amelioration of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea [hereinafter Geneva II]; Convention relative to the Treatment of Prisoners of War [hereinafter Geneva III]; and Convention relative to the Protection of Civilian Persons in Time of War [hereinafter Geneva IV], Aug. 12, 1949, *reprinted in* THE LAWS OF ARMED CONFLICT: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS 373-594 (Dietrich Schindler & Jiri Toman eds., 1988).

[91] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, Jun. 8, 1977 [hereinafter Protocol I], *reprinted in* THE LAWS OF ARMED CONFLICT, *supra* note 90, at 621.

[92] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, Jun. 8, 1977 [hereinafter Protocol II], *reprinted in* THE LAWS OF ARMED CONFLICT, *supra* note 90, at 689.

[93] *Id.* at 429. The article continues, addressing the situation where one of the combatant nations is not a party to the Conventions. However, in view of the likelihood that the principles espoused in the Conventions qualify as customary international law (as will be assumed for this Article's purposes), binding on all nations, this language has become redundant.

regulation.[94] Also, the obvious question remains: how much violence must be involved before the Geneva Conventions are deemed binding?[95]

Additionally, while Protocol I adopts the same threshold standard as that contained within Common Article 2, in Article 1(4) it adds the further confusing provision that the situations falling within the common article are deemed to "include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination."[96] This somewhat controversial language creates a "grey zone" of internal conflicts that are nonetheless considered "internationalized."[97] If a conflict fails to qualify under Common Article 2, it does not necessarily become an internal conflict subject to Common Article 3. Instead, it first must meet a level of violence requirement that separates internal conflicts from civil disturbances such as riots or large-scale protests.[98] However, before the provisions of Protocol II are applicable, the hostilities must reach an even higher standard enumerated in Article 1 to Protocol II:

> This Protocol . . . shall apply to all armed conflicts [not otherwise covered] . . . and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other *organized armed groups* which, *under responsible command, exercise such control over*

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[94] This is mainly a domestic diplomatic concern since, once the administration states that the Geneva Conventions apply, the seriousness of the matter increases significantly from the population's point of view. *See, e.g.*, United States v. Noriega, 808 F.Supp. 791 (S.D.Fla. 1992)(holding that Geneva III applied to OPERATION JUST CAUSE and General Manuel Noriega).

[95] *See* INGRID DETTER DE LUPIS, THE LAW OF WAR 18 (1987)(discussing the Geneva Convention's applicability to various situations such as raids, terrorism, and expeditionary forces).

[96] THE LAWS OF ARMED CONFLICT, *supra* note 90, at 628.

[97] HILAIRE MCCOUBREY & NIGEL D. WHITE, INTERNATIONAL LAW AND ARMED CONFLICT 198 (1992). Despite these potential interpretive difficulties, the criteria is sufficiently specific for the analysis here.

[98] Although the article does not specify a threshold test, state practice and reasonable interpretation have implied such a rule. JAMES E. BOND, THE RULES OF RIOT: INTERNAL CONFLICT AND THE LAW OF WAR 36 (1974). The International Committee of the Red Cross has stated that Article 3 applies in "any situation where, within a State's territory, clear and unmistakable hostilities break out between the armed forces and organized armed groups." INTERNATIONAL COMMITTEE OF THE RED CROSS, BASIC RULES OF THE GENEVA CONVENTIONS AND THEIR ADDITIONAL PROTOCOLS 52 (1983).

> *a part of its territory* as to enable them to carry out *sustained and concerted military operations.*[99]

This criteria, which raises almost as many questions as it solves,[100] was established primarily to allow states to retain sovereign control over internal problems that did not rise to a level requiring international concern.[101] Therefore, once a conflict has crossed this threshold, but has not progressed to the point of international hostilities,[102] the applicable body of law is found in Common Article 3 to the Geneva Conventions, and additional Protocol II, as opposed to the broad based customary rules established by the remaining Geneva Articles and additional Protocol I.[103]

From a combatant's point of view, this is an important distinction since parties to international conflicts enjoy much greater protections than are available to those involved in strictly internal hostilities.[104] For example, under the Geneva Conventions, prisoners of war are given vast protections in such areas as their quarters, religious rights, and financial resources.[105] In comparison, however, Common Article 3 requires only that "members of the armed forces who have laid down their arms . . . shall in all circumstances be treated humanely without any adverse distinction founded on race, colour, religion or faith[,] sex, birth or wealth, or any other similar criteria."[106]

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[99] THE LAWS OF ARMED CONFLICT, *supra* note 90, at 691 (emphasis added).

[100] While Article 1 seems to establish a fairly clear set of standards, it suffers from many of the same ambiguities as Common Article 2 of the Geneva Conventions. *See, e.g.*, DETTER DE LUPIS, *supra* note 95, at 174 (discussing the interpretation problems presented by Article (1)).

[101] Protocol II, art. 1(2) states: "This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts." THE LAWS OF ARMED CONFLICT, *supra* note 90, at 691.

[102] And does not fall within one of the "grey areas" established by Protocol I, Article 1(4). *See supra* note 97 and accompanying text.

[103] In the situation where the Protocol II threshold is not crossed, but the conflict does meet the requirements of Common Article 3, then only the latter's minimalist protections will apply.

[104] THE LAWS OF ARMED CONFLICT, *supra* note 90, at 430.

[105] *See, e.g.*, Geneva III, articles 25, 34, and 58, respectively.

[106] THE LAWS OF ARMED CONFLICT, *supra* note 90, at 430. Additionally, Article 3 contains certain limited prohibitions that likely qualify as *jus cogens* under international humanitarian law,

While Protocol II substantially increases a prisoner's protections under the law of war,[107] there is still a wide gulf between those rights available in international conflicts as compared with conflicts deemed to be of an internal nature.[108]

B. The Legal Status of Guerrillas.

The second major issue that must be addressed is the legal status of guerrillas under the international law of war. Traditionally, they have been divided into two categories: (1) partisans, who "[wore] the uniform of their army," and (2) intermittent combatants, who did not act under commission and wore no uniforms. Those captured personnel qualifying for the first category were "entitled to all the privileges of prisoner of war." However, those who fell outside its definition and in the latter category, were to be "treated summarily as highway robbers or pirates," receiving none of the privileges of a recognized combatant.[109]

This concept was basically upheld by the 1949 Geneva Convention on Prisoners of War, which required that members of organized resistance movements, to qualify for combatant privileges, fulfill the conditions "of having a fixed distinctive sign recognizable at a distance," and "carrying arms openly," among others.[110] While some commentators have claimed, perhaps rightfully,

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and therefore result in no additional protections for those within its terms. Theo C. Van Boven, *Reliance on Norms of Humanitarian Law by United Nations' organs*, *in* HUMANITARIAN LAW OF ARMED CONFLICT: CHALLENGES AHEAD 495, 502 (Astrid J.M. Delissen & Gerard J. Tanja eds., 1991).

[107] Although it does not establish a "prisoner of war" status per se, the protocol significantly expands the rights available to "persons deprived of their liberty for reasons related to the armed conflict." Protocol II, article 5(1). For example, it grants them basic protections in areas such as religious practices, working conditions, and medical care, subjects not addressed in Common Article 3. Protocol II, article 5(1)(d), (e), and 2(d), respectively. Since these safeguards are "in addition to the provisions of Article 4," which establish fundamental guarantees for persons not participating in the conflict (including those who lay down their arms), they clearly apply to those who are captured and interned. THE LAWS OF ARMED CONFLICT, *supra* note 90, at 693-694.

[108] DETTER DE LUPIS, *supra* note 95, at 172. This inequity between the protections of the two protocols is the result of a "whittling" process by developing countries concerned over how international regulation of internal conflicts would impact on their sovereignty. *Id.* at 170-172.

[109] Francis Lieber, *Instructions for the Government of Armies of the United States in the Field* 81-82 (1863), *in* THE LAWS OF ARMED CONFLICT, *supra* note 90, at 3, 14.

[110] THE LAWS OF ARMED CONFLICTS, *supra* note 90, at 423, 431. This article, which is common

that in view of modern guerrilla warfare practice, adherence to such a requirement is unrealistic and "would be tantamount to suicide,"[111] the provision was based on practical considerations. Mainly, the drafters were concerned with the problem of distinguishing combatants from innocent civilians, thereby reducing the risks to those not directly involved in hostilities.[112] Therefore, the result of the Geneva Conventions was to leave the practical question of guerrillas to the customary law of war, and thus to the mercy of their enemy.[113] However, in Protocol I some changes were made to these seemingly harsh rules. Specifically, Article 43 recognizes guerrillas as potential members of the armed forces if they meet certain basic criteria.[114] Additionally, Article 44(3) lessened the Conventions' conditions, requiring only that combatants "distinguish themselves from the civilian population *while they are engaged in an attack or in a military operation preparatory to an attack.*"[115] Continuing, it further relaxed the Geneva Convention criteria by allowing an exception to this rule:

> Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries arms openly:
> (a) during each military engagement, and

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to Conventions I through III, specifies six categories of persons who qualify as privileged combatants.

[111] Petrowski, *supra* note 68, at 480.

[112] *Id.* at 480-481.

[113] KEITH SUTER, AN INTERNATIONAL LAW OF GUERRILLA WARFARE: THE GLOBAL POLITICS OF LAW-MAKING 14 (1984). The only safeguard provided by the Geneva Convention was the requirement in Article 5 of Geneva IV that suspected guerrillas cannot be executed until a judicial determination has been made that they indeed did participate in "illegal" activities.

[114] Article 43(1) reads in part: The armed forces of a Party to a conflict consist of organized armed forces, groups and units which are under a command responsible to that party for the conduct of its subordinates . . . . Such armed forces shall be subject to an internal disciplinary system which . . . shall enforce compliance with the rules of international law applicable in armed conflict. THE LAWS OF ARMED CONFLICT, *supra* note 90, at 647.

[115] *Id.* at 646.

(b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.[116]

While these provisions have been criticized as unnecessarily increasing the risks to the civilian population,[117] they represent a compromise that is designed to extend some realistic protections to guerrillas,[118] while providing sufficient safe-guards to noncombatants.[119]

When the analysis shifts to the guerrillas' status in internal conflicts, however, such concerns over specificity are lost. This is because, under Common Article 3 to the Geneva Conventions, there is no specific criteria established to determine when a guerrilla force becomes a "party to the conflict." Therefore, since no detailed requirements for eligibility exist, it must be assumed that any group participating in an act sufficiently violent to cross Article 3's implicit threshold is protected by its provisions.

Although this was partially rectified by Protocol II's framing of an articulated baseline requirement that combatants must adhere to before they can be covered by its terms,[120] some additional confusion was created as well. For example, it is unclear which protocol applies where a conflict falls both within the "grey zone" of Protocol I, Article 1(4) and the broad criteria of Protocol II, Article 1. As previously noted, for the parties to the conflict this is an important distinction since the protections offered by Protocol I and the

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[116] *Id.*

[117] "'Giving quarter to a handful of guerrilleros who camouflage themselves as civilians may have its merits, but the outcome will be counterproductive from a humanitarian standpoint if, as a result, a multitude of civilians be subjected to the rigours of total war.'" DETTER DE LUPIS, *supra* note 95, at 116 (quoting Y. DINSTEIN, ANOTHER STEP IN CODIFYING THE LAWS OF WAR 284-285 (1974)).

[118] This is achieved by reading Article 44 in conjunction with Article 43, which recognizes guerrillas as members of the armed forces, and therefore as privileged belligerents as long as they meet the established conditions.

[119] That is, by requiring combatants to display distinguishing characteristics during combat and its preparatory phases so that the enemy does not assume all civilians to be hostile.

[120] *See supra* note 99 and accompanying text for a discussion of these standards.

attending Geneva provisions are considerably greater than those of Common Article 3 and Protocol II.[121]

IV. COUNTER-GUERRILLA TACTICS AND THE LAW.

> *In the age of the revolution of the peoples oppressed by the world imperialist system there can be no geographical or political boundaries or moral limits to the operations of the people's camp. In today's world no one is "innocent," and no one is a "neutral."*[122]

A. Guiding Commanders.

However ignorant or barbaric this quote may seem, it clearly represents a particularly seductive theory for those involved in a guerrilla conflict, where war has traditionally been the bloodiest, the rules the least restrictive, and the enforcement mechanisms essentially nonexistent. In spite of this inescapable background, however, the current international trend is towards regulating such behavior, and holding violators responsible for their actions.[123]

The law of war in unconventional conflicts then, is not a topic of merely academic relevancy. As mentioned above, campaigns conducted outside the bounds of humanity have deleterious effects on the popular support for the movement and on its diplomatic legitimacy.[124] Therefore, although the quote contains a tempting proposition, it represents a belief that is becoming politically, legally, and practically untenable.

Merely saying that military commanders should obey the laws of war, however, does not provide enough guidance. Instead, to ensure that this is a practical demand, a legal framework must be provided to assist in deciding what and who qualify as legitimate "military objectives." Since this term is not clearly defined in any of the conventions on the law of war, probably the best

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[121] DETTER DE LUPIS, *supra* note 95, at 172. *See also* WILLIAM J. O'BRIEN, THE CONDUCT OF JUST AND LIMITED WAR 158 (1981)("[W]ar treated as a non-international conflict is only covered by a modest and precarious body of positive international law.").

[122] Charles J. Reid, Jr., *Robert L. Phillip's War and Justice*, 34 CATH. U.L. REV. 1173, 1183 (1985) (book review) (quoting George Habbash, head of the Popular Front for the Liberation of Palestine)).

[123] *E.g.*, the Bosnian and Rwandan war crimes tribunals.

[124] *See supra* part II.C.

manner of determining what it entails is to determine what it does not cover. As will be discussed below in further detail, the categories excluded from the classification of military objective can generally be summarized as: "civilians," "civilian objects," and "protected areas."

B. Civilians.

Few would argue with the statement that, as protected persons, innocent civilians cannot be purposely targeted for annihilation.[125] However, in the context of a guerrilla conflict, this becomes a complicated concept due to the inherent role that the civilian population must play in the guerrillas' day to day survival and success. This complexity, then, results in a blurring of the distinction between combatants and non-combatants, complicating the ever-present issue of target discrimination. However, while this ambiguity exists, it does not negate all relevant law on the subject, giving the counter-guerrilla force free rein to kill any and all who are not clearly uninvolved.[126] Instead, it raises an important issue regarding the law of war, namely: What is the status of those members of the population who assist the guerrillas, but do not actively participate in hostilities?

Prior to Protocol I, most protections available to non-combatants came from the Hague Conventions Respecting the Laws and Customs of War on Land of 1907.[127] Although the convention was a significant step towards codifying the law of war, it offers only limited and narrow safeguards for civilians. For example, Article 25 (prohibition against attacking undefended towns); Article 26 (requirement that a commander notify a town's authorities before bombing it); Article 27 (protection for civilian objects); and Article 28 (prohibition on pillaging).[128]

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[125] *But see supra* note 122 and accompanying text.

[126] As stated in Protocol I, Article 35, "In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited." This is interpreted by the International Committee of the Red Cross as establishing two basic requirements: (1) it restricts the use of such weapons and procedures that cause unnecessary injury; and (2) it "obliges the Parties to the conflict to distinguish at all times between the civilian population and combatants." INTERNATIONAL COMMITTEE OF THE RED CROSS, *supra* note 98, at 35-36.

[127] Hereinafter Hague IV.

[128] THE LAWS OF ARMED CONFLICT, *supra* note 90, at 83-84.

Geneva IV, Article 4, on the other hand, offers significantly enhanced security to persons who fall within the category of "protected persons." Under the provision, the class includes "those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals."[129] While this definition seemingly encompasses a broad spectrum of individuals, it is, by necessity, much narrower. In practice the terms have been limited to include only those persons actually under the control of an occupying force or state, rather than those who happen to be within the zone of occupation.[130] However, the application of Geneva IV is not limited solely to those persons who fall within this limited criteria. Rather, according to a later clause in Article 4, Part II of the Convention applies more broadly to include,[131] in accordance with Article 13, "the whole populations of the countries in conflict. . . ."[132] Through this link, then, some basic protections are provided for those members of the civilian population not under the armed forces' direct control. Despite these improvements, Geneva IV failed to clarify the distinction between civilians and combatants, instead relying on "understood" rules of warfare to establish baseline criteria.[133]

Protocol I, on the other hand, significantly enhances the protections available to the general population. One of its major contributions is actually defining the term "civilian" in Article 50(1), as "any person who does not belong to one of the categories of persons referred to in Article 4(A)(1), (2), (3), and (6) of the Third Convention and in Article 43 of this Protocol."[134] These provisions of

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[129] *Id.* at 502.

[130] *See, e.g.*, Stanislaw E. Nahlik, *From Reprisals to Individual Penal Responsibility, in* HUMANITARIAN LAW OF ARMED CONFLICT, *supra* note 106, at 163, 167 (stating that Article 4(1) in practice is restricted to "civilians sent to concentration or labour camps or, at the very best, merely interned"). This, however, appears extreme in view of Article 79, which establishes the criteria under which protected persons may be interned. Therefore, if protected persons can only be interned under certain circumstances, how is it that protected persons by definition are already interned?

[131] The text reads, "The provisions of Part II are, however, wider in application, as defined in Article 13." THE LAWS OF ARMED CONFLICT, *supra* note 90, at 502.

[132] *Id.* at 506.

[133] DETTER DE LUPIS, *supra* note 95, at 108.

[134] THE LAWS OF ARMED CONFLICT, *supra* note 90, at 650. Additionally, Article 50 resolves any doubt in favor of civilian status.

Article 4(A) of Geneva III, in turn, establish specific criteria for those who will be treated as prisoners of war if they fall "into the power of the enemy."[135] Generally, they are: (1) members of the armed forces; (2) members of militias, volunteer corps, and organized resistance movements not forming part of the armed forces, but meeting certain criteria; (3) "Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power;" and (4) levee en masse.[136]

Protocol I, Article 43, which establishes the other group of persons excepted from the term "civilian," is the provision that provides guidelines for deciding if a guerrilla movement qualifies as part of the armed forces of a party to the conflict, and therefore may lawfully "participate directly in hostilities."[137]

In view of the nature of the article 4(A) and 43 categories, and of the two excepted provisions to the former, it appears that only those individuals who are members of an armed, organized force engaged in hostilities are excluded from the protected classification of "civilian." While these terms are broad enough to include supply and support and other such personnel who normally do not serve "at the front," the provisions indicate that those people must be part of a formal organization.[138] This leads to the conclusion that those persons who assist the guerrilla forces by growing food, providing shelter, or passing intelligence fall within the category of "civilians" for the purposes of Protocol I, Article 51 and its enumerated protections,[139] as long as they do not become

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[135] *Id.* at 430.

[136] *Id.* at 430-431. Subsections (4) and (5) cover "persons who accompany the armed forces without actually being members thereof," and "members of crews . . . of the merchant marine and the crews of civil aircraft," respectively. *Id.*

[137] *Id.* at 647.

[138] While the text of Article 4(A)(6) seems contrary to this premise, it covers a narrow and anachronistic method of resistance that is far different from the organized guerrilla efforts envisioned here. *See* SUTER, *supra* note 113, at 13.

[139] This is especially true where the civilians are providing assistance under duress. However, such protections do not mean that those individuals who do provide assistance to the guerrillas are not subject to disciplinary action in accordance with the domestic laws. Instead, the restriction here is against armed attack and the general rigors of war. *See, e.g.*, Protocol I, article 51 *in* THE LAWS OF ARMED CONFLICT, *supra* note 90, at 651.

part of the guerrillas' formal command structure, thereby crossing the line into hostile participation.[140]

With regard to conflicts of a non-international nature, the analysis is significantly different. Under Common Article 3 and Protocol II, Article 4, the limited protections enumerated apply to those "persons taking no active part in hostilities."[141] Since this ambiguous provision is not in any manner qualified, interpretations by the parties are inevitably going to be result oriented. Thus, the language will become an elastic tool that will be construed narrowly or broadly depending upon whether the interpreter wants to protect or attack the people in question.[142]

C. "Civilian Objects."

In its attempt to distinguish military from civilian objects, Protocol I, Article 52(2), comes the closest of any provision to defining what is considered to be a "military objective." Under this provision, "military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage."[143] Although this definition is very broad, and would allow the

[140] This conclusion is further buttressed by Article 51(3) which states that, "[c]ivilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities." However, there is a distinction made in the law between purposely attacking these categories of non-combatants, and accidently killing those who are present at a military target. For example, while an air attack on a city cannot lawfully target civilians, if those same people happen to be present at a munitions plant that is bombed, and are killed, no violation of the law of war has occurred. Therefore, while persons may be protected under the law in some respects, they are not totally immune from the rigors of war in certain circumstances. Roman Jasica, *Civilian Population, in* GUERRILLA AND INTERNATIONAL HUMANITARIAN LAW 69, 70 (1984) ("[Civilians] may become victims of attacks against military installations, military objectives or other objects which, by their nature, location, purpose or use, make an effective contribution to military actions and in which those civilians work.").

[141] THE LAWS OF ARMED CONFLICT, *supra* note 90, at 502, 692.

[142] *See* Jasica, *supra* note 140, at 75.

[143] THE LAWS OF ARMED CONFLICT, *supra* note 90, at 652. However, the article states that this definition applies only "in so far as *objects* are concerned," thereby limiting its application.

destruction of almost anything plausibly connected with the enemy's military capabilities, it clearly was not meant as such.[144]

Under Article 52(1), civilian objects are defined as "all objects which are not military objectives as defined in paragraph 2." However, since, as discussed above, the definition of military objective is so broad, this provision achieves little. Therefore, in order to clarify what is covered by these two nebulous terms, the remainder of the chapter must be analyzed.

Probably the best clarifying language is contained in subsection 3 to the same article. This states: "In the case of doubt whether an object *which is normally dedicated to civilian purposes* . . . is being used to make an effective contribution to military action, it shall be presumed not to be so used."[145] Considering this provision, then, "civilian objects" are at least those that qualify under the highlighted language.[146]

In view of the other articles that make up the chapter on civilian objects, the scope of the term includes other things, such as: "cultural objects and places of worship,"[147] "objects indispensable to the survival of the civilian population,"[148] "the natural environment,"[149] and "works and installations

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[144] *See* Protocol I, article 52(3).

[145] *Id.* (emphasis added).

[146] This provision includes specific reference to places of worship, private homes or other dwellings, and schools.

[147] In this category, Protocol I expands on the protections offered by Hague IV, Article 27, and the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954. DETTER DE LUPIS, supra note 95, at 250. However, these objects lose their protections if used for military purposes. *Id.* at 263 ("Exceptions from the rules on targets or protection under humanitarian rules can be suspended by acts of perfidy. Even if there is no intention of deceiving the enemy, any link between protected objectives or persons and military activities may cause the disruption of the protective regime."). *See also* Hague IV, article 27 ("In sieges and bombardments all necessary steps should be taken to spare as far as possible [cultural objects] . . . provided they are not used at the same time for military purposes."). THE LAWS OF ARMED CONFLICT, *supra* note 90, at 84.

[148] Article 54(2) prohibits a force to: attack, destroy, remove or render useless objects indispensable to the survival of the civilian population . . . for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive. THE LAWS OF ARMED CONFLICT, *supra* note 90, at 652 (emphasis added). However, subsection 3 of the same

containing dangerous forces."[150] Therefore, the term "civilian objects" embodies not only those things "normally dedicated to civilian purposes," but also those that threaten the civilians' long and short term survival and their cultural heritage, as long as those objects do not, by combatant usage, become exceptions to the rules.[151]

D. "Protected Areas."

Unlike civilians and civilian objects, the idea of protected places was codified at an early stage. This was accomplished by Hague IV, Article 25, which establishes a prohibition on attacking "towns, villages, habitations or buildings which are not defended,"[152] as well as Article 27, which, although it includes cultural property, also covers "hospitals and places where the sick and wounded

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article creates an exception where the objects are used by an adverse party "solely for the members of its armed forces," or are used in direct support of military action," as long as the objects' destruction may not "be expected to leave the civilian population with such inadequate food or water as to cause its starvation or force its movement." *Id.* at 652-653.

[149] "Article 55 prohibits the use of methods or means of warfare which are intended or may be expected to cause widespread long-term and severe damage to the natural environment." Jasica, *supra* note 140, at 73.

[150] Article 56(1) prohibits attacking "works or installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations . . . even where these objects are military objectives, if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population." THE LAWS OF ARMED CONFLICT, *supra* note 90, at 653 (emphasis added). Additionally, military objectives in the vicinity of any of these installations are not to be attacked if such action will have the same effect. However, as with the cultural objects provision, this article contains an exception where the installation provides "significant and direct support of military operations and if such attack is the only feasible way to terminate such support." *Id.* at 653-654.

[151] With regard to internal conflicts, Article 3 does not cover civilian objects, and Protocol II "institutes only the protection of objects indispensable to the survival of the civilian population (Article 14), of works and installations containing dangerous forces (Article 15) and of cultural objects and of places of worship (Article 16) . . . ." Jasica, *supra* note 140, at 79. It does not address environmental protection. However, Protocol II also does not contain the exceptions to civilian object protections that are found in Protocol I. Therefore, one could argue that the protections offered in internal conflicts are much broader. *Id.* However, to assume that the absence of such language would allow a force to abuse such protected areas is going too far.

[152] THE LAWS OF ARMED CONFLICT, *supra* note 90, at 83-84. Although "undefended" is not defined anywhere in Hague IV, Protocol I, Article 59 establishes specific criteria that a locality must meet in order to qualify for such protection. Generally speaking, these criteria require that the place involved has no potential to resist occupation by another force. *Id.* at 656.

are collected."[153] Also, Part II of Geneva IV, which covers "the whole of the populations of the countries in conflict,"[154] includes broad-based protections for hospitals and "safety and neutralized zones."[155]

As with the categories of civilians and civilian objects, Protocol I further expands upon, and clarifies these protections. This is done in Chapter V to the protocol, which establishes "localities and zones under special protection," and enumerates specific criteria for them in articles 59[156] and 60.[157] In essence these two special areas are the same as those covered by Hague IV and Geneva IV, with the Protocol providing greater specificity as to the combatants' duties, and the qualifications that must be met.[158]

E. Indiscriminate Firepower.

As discussed above, the use of indiscriminate firepower by counter-guerrilla forces is usually the result of one or both of the following reasons: (1) a feeling

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[153] *Id.* at 84.

[154] *Id.* at 506 (Article 13). This is in contrast to the remainder of Geneva IV, which is dedicated only to the narrow category of "protected persons" as defined above.

[155] Articles 14 and 15 of Geneva IV, respectively. *Id.*

[156] Article 59 states in part:

1. It is prohibited for the Parties to the conflict to attack, by any means whatsoever, non-defended localities.
2. The appropriate authorities of a Party to the conflict may declare as a non-defended locality any inhabited place near or in a zone where armed forces are in contact which is open for occupation by an adverse Party. Such locality shall fulfill the following conditions:
(a) all combatants, as well as mobile weapons and mobile military equipment must have been evacuated;
(b) no hostile use shall be made of fixed military installations or establishments;
(c) no acts of hostility shall be committed by the authorities or by the population; and
(d) no activities in support of military operations shall be undertaken.

Id. at 656.

[157] Demilitarized zones are established by agreement between the parties. The requirements for qualification are equivalent to those of non-defended localities with minor exceptions. *Id.* at 657.

[158] For example, Protocol I provides for the presence of law enforcement forces in the protected areas as long as their sole purpose is to maintain law and order. Neither the Hague nor Geneva articles contain any such provision. *Id.* *See also supra* note 156 (discussing the definition of "undefended").

of frustration with "having such vast firepower and so few stationary targets of a conventional military character;"[159] and (2) its usefulness as a tool to terrorize the civilian population, causing them to flee the area (i.e., a "debasing" tool). Regardless of the reason for unsystematically targeting areas and people of unknown belligerent status, the use of indiscriminate bombing or shelling is unlawful.

While it is clear that indiscriminate firepower by definition includes the use of force against any of those categories excluded from the term military objective, it can be elaborated upon in two ways. First, in article 23(g) of Hague IV there is a broad prohibition against the unnecessary destruction of the enemy's property, "unless such destruction . . . be imperatively demanded by the necessities of war."[160] Under this language, then, the use of destructive firepower is limited by "military necessity." Unfortunately, this term is undefined and is highly controversial.[161]

Second, Protocol I further provides significant guidance on the subject. In subsection 4 to Article 51, which covers "protection of the civilian population," the protocol establishes clear criteria for what qualifies as "indiscriminate attacks."[162] Additionally, subsection 5 to the same article expands on this definition to include "an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military

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[159] Petrowski, *supra* note 68, at 477, 491.

[160] This general prohibition is also contained in Geneva IV, Article 53, although it only applies to the narrow category of "protected persons," since it is not in Part II of the Convention.

[161] According to McCOUBREY & WHITE, *supra* note 97, at 343, the definition is highly dependent upon interpretation, and the field of application. In the circumstances of property destruction, they suggest that the term depends on "the extent of the military need in contrast with the gravity of the harm to be done." *Id.* In view of the further elaboration provided in Protocol I, discussed below, this view point seems to be well accepted.

[162] 4. Indiscriminate attacks are prohibited. Indiscriminate attacks are:
(a) those which are not directed at a specific military objective;
(b) those which employ a method or means of combat which cannot be directed at a specific military objective; or
(c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.
THE LAWS OF ARMED CONFLICT, *supra* note 90, at 651.

advantage anticipated."[163] Under this language, then, Protocol I establishes a form of balancing that the combatant commander must consider when deciding whether or not to attack an inhabited area.[164]

While this balance could be seen as subjective, it is more probable that it parallels the international legal doctrine that an armed response should be proportionate to the threat presented. Although this does not mean that only equal numbers or force may be used, it does require "reasonable necessity," which depends on "the relation of legitimate military effects to civilian casualties and to other damage resulting from the use of force."[165] Therefore, before engaging a target, the commander must decide whether it is a legitimate military objective, and whether the desired effect of the bombing or shelling outweighs any collateral damage that may result.[166] Any use of force falling outside this test likely falls within the category of "indiscriminate," and is therefore unlawful.[167]

F. Terror.

Unlike the subject of indiscriminate firepower, the prohibition against using terror tactics on civilians was specifically addressed in Geneva IV, and covers most of those who could be affected. Although Article 33, which prohibits "all measures of intimidation or of terrorism," is not within section II of the

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[163] *Id.*

[164] As would be expected, Protocol II contains none of this specific language. Instead, it only states that "[t]he civilian population shall enjoy general protection against the dangers arising from military operations," and that they "shall not be the object of attack." THE LAWS OF ARMED CONFLICT, *supra* note 90, at 696 (Protocol II, Article 13(1) and (2)). While this language does not mean that firepower may be used without discretion (otherwise the civilian population would not be protected at all), it provides very little guidance for commanders, thereby giving them much more leeway in making such determinations.

[165] Eliot D. Hawkins, *An Approach to Issues of International Law Raised by United States Actions in Vietnam*, *in 1* THE VIETNAM WAR AND INTERNATIONAL LAW 189, 192 (Richard A. Falk ed., 1968).

[166] Obviously this is not only a legal question, since a commander must also determine if the damage to the target is worth the possible political repercussions.

[167] Geneva IV and Protocol II do not directly address the problem of indiscriminate firepower. Implicitly, however, internal conflicts are subject to the same restrictions with regard to the protection of any persons, places or things protected under the applicable law as international conflicts. That is, any person, object, or location that is protected by Geneva IV and Protocol II is also immune from attack indiscriminately.

convention, and therefore only applies to "protected persons,"[168] in this case those who are the potential victims of terror are likely to be "in the hands" of the enemy and therefore qualify for the enhanced protective status.[169]

However, Article 51 to Protocol I further clarifies these protections by the express language that "[a]cts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited."[170] Therefore, it is clear from this language, as well as that included in Geneva IV, that any current attempts to terrorize civilians into giving up support for a guerrilla movement are unlawful.[171]

G. Evacuations and Confiscations.

While the previous section makes it clear that the use of terror to force the civilian population to flee is unlawful, this leaves the remaining question of the legality of forcibly moving the population through techniques other than terroristic inducement.[172] Generally, the other methods used to debase the guerrilla movement through removal of the population are: (1) destroying personal property, crops, and livestock so as to make staying in the area

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[168] Geneva IV, article 33; *See also* article 27 ("[Protected persons] shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof. . . ."); Article 31 ("No physical or moral coercion shall be exercise against protected persons. . . ."). THE LAWS OF ARMED CONFLICT, *supra* note 90, at 510-511.

[169] This conclusion, however, does not apply where the method of terrorism is indiscriminate shelling or bombing, since the civilians in those circumstances likely are not under the forces' control. At this point, the general protections afforded civilians are all they have.

[170] THE LAWS OF ARMED CONFLICT, *supra* note 90, at 651 (Protocol I, article 51(2)).

[171] Common Article 3 to the Geneva Conventions does not specifically address terror, although it outlaws many of the techniques used by forces to inflict such fear (e.g., "violence to life and person," "taking of hostages," "outrages upon personal dignity," and executions without judicial process). THE LAWS OF ARMED CONFLICT, *supra* note 90, at 502. However, Protocol II specifically prohibits "acts of terrorism" against "all persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted." *Id* at 692. As discussed *infra* p.46, the actual protections afforded by this language are dependent upon the interpretation given by the parties involved.

[172] Therefore, the tactic of bombing or shelling the population in order to force them to leave for fear of their lives is unlawful. However, if Protocol I is considered non-binding, then this is a questionable conclusion since the Geneva IV prohibitions against terror apply only to those persons "in the forces' hands."

impossible; and (2) "rounding up" the population and transporting them to secure areas.

Under Hague IV, Article 46 and Geneva IV, Article 53, the first method is restricted in certain situations. Generally, these two articles set forth the requirement that personal property be respected by an "occupying power."[173] However, as can be seen by this generalization, both of these restrictions apply only in case of "occupation."[174] According to Hague IV, a "[t]erritory is considered occupied when it is actually placed under the authority of the hostile army."[175] While this definition is far from explicit, interpretation has established that an area falls under "occupation" only after a hostile force moves to establish some form of governing apparatus over it.[176] Thus, where a military force temporarily possesses control over the area, and does not attempt to govern the population, these rules do not apply.

This does not mean that civilian property is open for unmitigated confiscation and destruction. Article 23(g) to Hague IV states that, "it is especially forbidden . . . [t]o destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war."[177] Although the article's language states that it applies to the "enemy's property," there are strong arguments that, even if it does not apply to enemy civilians' property, such belongings are protected nonetheless.

First, in 1907, when the Hague Convention was adopted, the law of war already recognized the need to protect civilians and their property. Therefore, even if the convention did not recognize such a rule outside of occupied

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[173] Hague IV, Article 46 reads, "Family honour and rights, the lives of persons, and private property . . . must be respected. Private property cannot be confiscated." *Id.* at 89. Geneva IV, Article 53 reads in part: "Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons . . . is prohibited, except where such destruction is rendered absolutely necessary by military operations." *Id.* at 517.

[174] Although Article 46 of Hague IV does not specify that it applies only in the case of occupation, it falls within Section III of the Convention, which is entitled "Military Authority Over the Territory of the Hostile State."

[175] Article 42. *Id.* at 88.

[176] McCOUBREY & WHITE, *supra* note 97, at 280.

[177] THE LAWS OF ARMED CONFLICT, *supra* note 90, at 83.

territories, it already existed by custom.[178] Secondly, Article 28 of the same convention establishes a prohibition on pillaging towns.[179] While the term "pillage" connotes something more extreme than the seizure or destruction of property as part of a military strategy, at the same time such a prohibition shows an inherent distaste for the needless devastation of personal belongings.

Despite these niceties, however, the prohibition on the destruction of civilian property is not without exception. Rather, the text of Hague IV, Article 23(g), and practicality, imply the presence of a military necessity "escape clause."[180]

Protocol I, further expounds on the legality of forcing the population to leave an area by destruction of its livelihood. As discussed above, Article 54(2) prohibits the destruction or removal of "objects indispensable to the survival of the civilian population . . . for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party, whatever the motive, whether in order to starve out civilians, to cause them to move away or any other motive."[181] Under this sweeping language, and the narrow exception provided in subsection (3) to the article,[182] a counter-guerrilla force may not destroy or confiscate such objects as "foodstuffs, crops, livestock," and the like, where the effect will be felt on the civilian combatants.[183]

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[178] *See* John Dugard, *The Treatment of Rebels in Conflicts of a disputed character: The Anglo-Boer War and the 'ANC-Boer War' Compared, in* HUMANITARIAN LAW OF ARMED CONFLICT: CHALLENGES AHEAD 447, 449 (1991).

[179] THE LAWS OF ARMED CONFLICT, *supra* note 90, at 84.

[180] Article 23(g) specifically states that such destruction is prohibited "unless [it] be imperatively demanded by the necessities of war." THE LAWS OF ARMED CONFLICT, *supra* note 90, at 83. As for practicality, this is a recognition of the fact that "in any armed conflict, a question of balance between principles of humanity and demands of military necessity" arises, and that "too strict [an] application of the laws of war would lead to military disadvantage . . . ." DETTER DE LUPIS, *supra* note 95, at 334.

[181] THE LAWS OF ARMED CONFLICT, *supra* note 90, at 652-3.

[182] The exception allowed for the destruction of such objects where they are used "as sustenance solely for the members of its armed forces or in direct support of military action" as long as the population does not likewise suffer starvation. *Id.*

[183] *Id.* This is essentially the tact taken in Protocol II, Article 14, although it does not contain an exception clause, and therefore is even broader in scope. *See, e.g., id.* at 697.

A literal reading of this article could lead to absurd results. For example, on its face, the language appears to outlaw the ancient military tactic of laying siege. This is the case even if the commander of the attacking forces allows any willing civilians to leave, destroying the supplies only of those who continue to stay and resist occupation.[184] It is unlikely that the rule could legitimately be so sweeping.

As for the second method of debasing a guerrilla movement, Geneva IV provides that:[185]

> [b]oth in the case of enemy civilians on the territory of a Party to the conflict, and that of protected person in occupied territory, the principle is that if the Detaining Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment.[186]

Therefore, where a counter-guerrilla force can justify such a measure on the basis of security, it may move the civilian population to areas of internment or "assigned residence." However, once the movement has occurred, the force conducting the operation must provide for the civilians' basic needs.[187] As stated above, this is often where counter-guerrilla forces have crossed the line into illegal conduct.[188]

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[184] *See, e.g.*, Yoram Dinstein, *Siege Warfare and the Starvation of Civilians*, *in* HUMANITARIAN LAW OF ARMED CONFLICT, *supra* note 106, at 145, 150-2.

[185] Protocol I does not directly address this issue.

[186] INTERNATIONAL COMMITTEE OF THE RED CROSS, *supra* note 98, at 50 (emphasis deleted).

[187] "The conditions of internment are virtually the same as those applying to prisoners of war and, by and large, the rules of internment applicable to civilians follow almost word for word those concerning [POW's]." *Id.* (citing Geneva IV, articles 41 and 78). However, the requirements for treatment of civilian internees in the areas of property management, legal proceedings, visits, family life, and working conditions are more expansive than those provided in Geneva III. *Id.* at 50-51 (citing Geneva IV articles 95, 82 and 114-116). Protocol II, Article 17 establishes the same requirements with regard to internal conflicts. THE LAWS OF ARMED CONFLICT, *supra* note 90, at 697.

[188] *See, e.g.*, *infra* p. 27 (discussing the massive loss of life among interned civilians during the Boer War due to neglect by the British).

V. A FORMULA FOR LAWFUL SUCCESS.

The guerrilla warfare enigma cannot be solved by dropping a nuclear weapon on it. The military leader, experienced only in conventional warfare, must learn and adapt his thinking to this new problem, or be defeated.[189]

Although it may appear that a counter-guerrilla force is hamstrung from the start of any operation if it attempts to abide by the laws of war, such a conclusion is insupportable. As was discussed above, not only are many of the methods historically used to fight guerrillas presently unlawful, but they have also proven to be unsuccessful. The solution to the problem, then, cannot be obtained by simply repeating these failed techniques. Instead, as the quote above indicates, a counter-guerrilla planner must be willing to adapt to a changing threat, or face failure.

With this in mind, it is clear that while history cannot directly answer the question of how a guerrilla force can be defeated lawfully, it provides a well defined template of which way to go. The following proposal, then, draws on historical successes and failures in an effort to provide a realistic and legal method for addressing this significant problem.

A. Intelligence.

Undoubtedly, the most important consideration that a commander can keep in mind is that guerrillas are subject to the same, if not greater, frictions of war as any other military force. Therefore, a counter-guerrilla planner must first and foremost be *proactive*. If he is not, and allows the guerrillas to maintain the initiative, the entire campaign will be spent chasing the elusive enemy, and engaging him only where he wishes to fight.

In order to be proactive, a commander must first understand what the enemy is doing, what his goals are, and where his support population resides. Without this, the decision maker will likely just repeat the same mistakes outlined above by using indiscriminate firepower to suppress an enemy he cannot find. Or, in order to find the enemy, will engage in one of the classic "sweeps" that have inevitably failed time and time again throughout history.

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[189] H. Douglas Stewart, *How to Fight Guerrillas, in* STUDIES IN GUERRILLA WARFARE 28 (1963).

It quickly becomes clear that one of the first bases for a successful counter-guerrilla campaign is reliable intelligence. Although today's military has a well-established tactical information gathering and dissemination structure, in the case of counter-guerrilla operations, it will likely prove to be insufficient. The reason for this insufficiency is that modern advances in electronics have made us very reliant on technological devices to collect data. In the case of conventional warfare, electronic surveillance, satellite imagery, and acoustic monitoring are all very useful. However, where the enemy force is dispersed and using crude methods of communication and travel, such means of intelligence collection offer only limited advantages. Therefore, the primary source of operational intelligence must be a reliable and low-tech instrument: spies.[190]

In planning a counter-guerrilla operation, then, a commander must ensure that sufficient personnel are properly trained and allocated to do the dangerous job of working a spy network. Otherwise, if he does not ensure a sufficient intelligence support structure, the entire operation will be hamstrung from the start. As stated by Sun Tzu, "Spies are a most important element in war, because upon them depends an army's ability to move."[191] In other words, without reliable intelligence, the decision makers will be blind, and any force, no matter how powerful, will be paralyzed.

B. Propaganda.

Once the counter-guerrilla commander realizes that the guerrillas are just using another form of warfare, and obtains the ability to gather useful intelligence on them, then he is in the position to destroy their ability to fight. However, before launching such a campaign, he must have the proper resources and force structure to adequately accomplish the mission. He also must have the proper support.

This is not to say, however, that the initial response to a guerrilla threat should be on the battlefield. Instead, long before the resort to force is attempted, the first attack against the enemy should be made in the most neglected theater of counter-guerrilla operations: politics. As stated above, the

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[190] Or, in current vernacular, human intelligence ("HUMINT"). This is best accomplished by infiltration of the guerrilla movement, or by capturing prisoners. However, once the guerrilla is captured, he is protected by the applicable law, and must be treated properly. This is not only to avoid legal problems, but, where they are treated well upon capitulation, people are more likely to prove useful. *See* Hessler, *supra* note 49, at 20.

[191] SUN TZU, THE ART OF WAR 82 (James Clavell, ed., Lionel Giles, trans., 1983).

political element of guerrilla warfare is essential to any movement's success. Therefore, if the government or occupying force can win in the political field, the guerrillas' support will likely wither, leaving only a minor military or law enforcement problem. This approach was favored by Sun Tzu, who said, "To fight and conquer in all your battles is not supreme excellence; supreme excellence consists in breaking the enemy's resistance without fighting."[192]

Often the method of gaining such a victory is distasteful to the politicians, or, as is frequently the case, recognition of the threat comes too late. Regardless, even where one of these situations rings true, the political element should not be ignored. In both circumstances, propaganda must be used to counter what the guerrillas are saying, and to broadcast what the government has to offer. Any material concessions that the government is willing to make must be publicized. Additionally, and of essential importance, the military forces in the field must be careful to treat the population with respect and care so as to not give the guerrillas any fuel for their fire.

C. Preparation.

As with any military force, preparation is essential to success on the field of battle. However, in a counter-guerrilla operation, preparation must be of greater depth because it is not a type of combat to which men easily adjust. As a result, the shrewd commander will not just allocate the first available bodies to go annihilate the guerrillas - that will not work. Instead, he must first lay the ground work of a successful campaign by ensuring that the force is ready to take on such a task.

This, the second phase of operations, should have a three-fold focus. First, the personnel must be highly disciplined. As Marshal Maurice de Saxe stated, "[Discipline] is the soul of armies. If it is not established with wisdom and maintained with unshakable resolution you will have no soldiers. Regiments and armies will be only contemptible, armed mobs, more dangerous to their own country than to the enemy."[193] While this maxim is unquestionably applicable to any armed force, in view of the severely frustrating nature of counter-guerrilla operations, it applies here with even greater weight.

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[192] *Id.* at 15.

[193] Marshal Maurice de Saxe, *My Reveries Upon the Art of War (1757)*, *in* ROOTS OF STRATEGY: THE 5 GREATEST MILITARY CLASSICS OF ALL TIME 177, 245 (Brig. Gen. Thomas R. Phillips trans., ed., 1940).

Second, a force must be properly trained. If a force does not receive sufficient training to accomplish its mission, it will likely fail. Therefore, in determining how to fight the guerrilla threat, a commander must consider what his personnel are trained to do and what they can be trained to do, and ensure that the necessary training is carried out. The suggestion, then, is that all elements of a counter-guerrilla force must be subject to the strictest of discipline when in the field and must receive special training to prepare them for the rigors of this style of warfare. Otherwise, as discussed above, random acts of violence or looting will likely occur, with the resultant popular alienation.

Third, the personnel must be properly equipped. A counter-guerrilla force cannot rely exclusively, or even heavily, on high technology or massive firepower. Instead, these two advantages must be brought to bear only where a clear target presents itself that does not needlessly endanger the civilian population, their property, or protected areas. Therefore, the use of armor, bombers, heavy artillery, and satellites is best reserved for those rare opportunities where the guerrillas attempt to mass a force, or expose themselves in some other manner. Otherwise, the main weapons for the counter-guerrilla operation should be reliable small arms, innumerable helicopters, and possibly light, portable artillery (e.g., mortars) if deemed mission essential. Attempting to over-arm such a force will only result in decreased mobility and over-reliance on massive firepower and elaborate equipment.[194]

D. Organization.

While it is essential to have a properly informed and prepared unit, without an appropriate command structure capable of capitalizing on those skills, little can be gained. Thus, either before a guerrilla threat emerges, or once it begins to show, a special force must be organized that is capable of taking the information provided and doing the most damage with the smallest cost.

While all military forces have a predetermined structure that at least in theory is capable of responding well to the call to arms, in the case of guerrilla style conflict, most are unprepared to react successfully. Nations by their defensive natures are conventionally minded when it comes to war. They spend

[194] This, of course, does not mean that the counter-guerrillas should be under-supported. Having dedicated close air or artillery support may be highly desirable by those on the ground (especially the small, offensive units). However, personnel must be well trained in the proper use of these powerful and destructive assets or else they will overuse them, thereby producing indiscriminate destruction. Generally, such heavy weapons will be necessary only where the guerrillas take on a more conventional approach; otherwise, they may be utilized as a last resort, where extrication of friendly forces can be accomplished in no other manner.

vast quantities on weapons systems in order to best ensure that open warfare with another nation does not end in their own destruction. While this is obviously necessary, in most cases it does little to prepare these nations for a guerrilla threat. The Vietnam War is an excellent example of this concept in action.

The natural conclusion then, is that simply applying a conventionally organized force to a counter-guerrilla problem is not going to work. Rather, the force structure must be adjusted in order to meet the threat, or else the campaign will likely revert to the failed and unlawful methods of past counter-guerrilla efforts. The structure, is a dedicated one that should be established ahead of time, and frequently exercised. As discussed in the preparation section above, the soldiers' lives will be arduous, so they must be properly prepared.

For the employment strategy outlined below, the force must consist of two separate but unified elements. First, there must be a branch of highly mobile, specially trained units that specialize in employing guerrilla tactics against the guerrillas. The mission of this branch is to attack the enemy's mobility by constantly harassing him and thereby providing little time for him to plan the next move or get comfortable in one spot. Second, there must be a branch of personnel who are also specially prepared, but who focus on controlling and caring for the population.[195] This branch will attack the guerrillas' support structure by working with the general population to secure the population centers, thereby preventing their usage by the enemy. In other words, through a unified but dual branch organization, the counter-guerrilla force will be able to simultaneously strike at the two pillars of the guerrilla movement: Mobility and popular support.[196]

The greatest hurdle in this endeavor, however, is likely to be overcoming the conventionally minded thinking that permeates every army. What makes the proposed structure hard to accept is that it does not rely on the two hallmarks of modern military theory: mobility and firepower. Instead, the force will be designed to engage in small scale offensive warfare at the same time that it conducts large scale defensive operations. For a conventional planner, this is the wrong approach; overwhelming, massive application of force is the way wars are won. While this may be true in the standard conventional battle, the same theory does not translate to the guerrilla art of war. Rather, as discussed

[195] However, it is crucial that both units consist of highly disciplined troops, equipped for their jobs. As previously mentioned, failure to adhere to this requirement will lead to disastrous results.

[196] The exact technique to apply in reaching this result will be discussed *infra* Part E (Employment).

above, it is conventional thinking that has resulted in numerous defeats throughout history.

E. Employment.

The employment strategy to be used in attacking the guerrilla movement will vary widely depending on how the situation presents itself. Flexibility in approach must be maintained or else failure will likely ensue. As stated by General George S. Patton, Jr, "[O]ne does not plan and then try to make circumstances fit those plans. One tries to make plans fit the circumstances. I think the difference between success and failure in high command depends upon the ability, or lack of it, to do just that."[197]

Despite the need for flexibility, application of the general principles of warfare make it possible to lay out some general approaches. Based on the organizational structure discussed above, the obvious targets are the civilian population and the guerrillas' mobility. These will be simultaneously attacked, but in a widely diverse manner.

The first target is the civilian population. As discussed in detail above, popular support for a guerrilla movement is essential to its very existence. As such, when this pillar of support is removed, the guerrilla force will either succumb to defeat or take some desperate action designed to relieve the pressure. This is where the specially trained defense-oriented branch of the organization is to be employed. Their main job will be to ensure that the civilian population is separated from the guerrillas as much as possible, while at the same time safeguarding them from reprisal actions and training them to take care of themselves. Of course, the exact method that the counter-guerrillas use to accomplish this separation is highly dependant on the environment in which the combat is occurring.

Where, as in Somalia, the concentration of guerrillas is in the urban areas, the counter-guerrilla force must react quickly and with overwhelming numbers to immediately suppress any resistance.[198] Then, while the guerrillas are recovering from the initial shock of the occupation, the counter-guerrilla force

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[197] GEORGE S. PATTON, JR., WAR AS I KNEW IT: THE BATTLE MEMOIRS OF "BLOOD 'N GUTS" 113 (1947).

[198] This does not mean that the counter-guerrillas arrive with their guns blazing. Instead, as originally occurred in Somalia, the mere arrival of such overwhelming numbers will initially send the guerrillas into hiding. It is during this crucial hiatus in hostilities that the counter-guerrillas must seize and maintain control.

must establish roadblocks, initiate law enforcement patrols, and commence a rebuilding of the infrastructure.[199]

On the other hand, where the threat is mainly in the rural areas, the process will be much slower. In these circumstances, the counter-guerrilla force must start at a predetermined area and progressively expand its control outward, securing each individual population center as it advances.[200] Where the guerrillas are in the first stage of development, this is a considerably easier task than if they are more highly organized. Regardless of the level of organization of the opposition, however, this technique of strangling the guerrillas will require massive amounts of time and large numbers of personnel.[201]

Although the method of debasing guerrillas by moving the population to centralized areas can be effective, and is legal, it also can be highly expensive, and significantly enhances the ever present risk of popular alienation. Therefore, the better of the two techniques of popular isolation is to gain positive control over the civilians where they live.[202]

Thus, unlike the United States' strategy in Vietnam, those counter-guerrilla personnel who are in the support denial category will not be sent on purely offensive missions designed to strike at the guerrilla movement. Instead, their

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[199] Unlike in Somalia, the counter-guerrilla force must be given the ability to maintain the requisite level of control. Under these circumstances then urban warfare may provide an exception to the rule against the use of armor or other such highly intimidating and protective devices. Of course, this does not mean that heavy firepower should be used in urban environments. Instead, armor offers an outstanding advantage when enforcing roadblocks, and transporting units within potential hostile fire zones. It also, of course, is the backbone of any conventional mobile ground force, and has unquestionable value in that arena.

[200] Actually "securing" a town will require significant amounts of time. Generally, the force must: (1) advance and clear the area of any resistance; (2) establish secure perimeters and patrols; (3) provide support, protection and benefits for the inhabitants to take away their motivation for backing the guerrillas; and (4) train and arm the population so they can protect themselves from future guerrilla incursions.

[201] Although the question of how many personnel will be needed to fight a guerrilla movement is frequently couched in terms of how many guerrillas there are, this is the wrong focus. *See* Hawkins, *supra* note 165, at 191. Instead, in view of the fact that unconventional wars are fought for the control of the population, the determination of force levels should be dependent upon how many people must be protected and isolated from the guerrillas.

[202] There are likely to be situations where the guerrilla threat and popular resistance to the government are too strong to secure a town. In such circumstances, then, it would be better to move the population to secure areas, provided they are properly cared for once they are interned.

primary purpose will be to isolate the population from the guerrillas, thereby cutting off the enemy's essential popular support. The only active operations to be conducted by this branch will be the initial advance and occupation of new territory, area offensive operations designed to break up known guerrilla concentrations, or perimeter and immediate area defensive patrols. The hunting and destruction of the enemy is to be primarily left to the other branch of the organization. Once the progressive safeguarding of individual towns has commenced, then the guerrillas themselves must be targeted. This, the second target, is the main objective of the specialized, guerrilla trained units. Thus, their main purpose is to take the fight to the enemy by using the intelligence network to locate guerrilla sanctuaries and attack them by infiltration, sniping, and direct combat operations. These units by nature must be small and highly mobile, and must know their area of operations very well. They must be able to live off the land, and carry only rudimentary supplies.[203] In other words, their job is to use the guerrillas' own tactics against them in their own environment. Or, as Colonel David Hackworth said, they are to "out-G the G."[204]

In short, the unit's structure is designed to permit the commander to assume an offensive and defensive stance at the same time. This is a crucial combination that unites the concepts of support denial with active destructive operations. In general, the strategy is intended to harass the guerrillas so much that they lose their freedom of movement because of fear, while at the same time, also taking away their ability to support themselves or to retreat to a safe haven to recover.[205]

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[203] For example, each team (maybe 4-6 people) will need to carry emergency dehydrated food supplies, standard caliber sniper and light automatic rifles, night observation goggles, a small allocation of packaged explosives (i.e., satchel charges), two hand-held GPS units, and maybe a secure portable UHF satellite communications suite. Although each man should also receive an initial allotment of ammunition, future supplies should be obtained in the same way that the guerrillas supply themselves (hence the requirement for standard caliber weapons).

[204] HACKWORTH, *supra* note 66, at 679.

[205] For a rough historical example of how this strategy can work, refer to the English conquest of Wales in the century following the Norman Conquest of 1066. Generally speaking, by using a gradual encroachment strategy of occupying territory and then erecting castles on it that could control the nearby countryside, the English were highly successful in driving the Welsh irregulars out of the fertile country and into less desirable lands. Unfortunately, it took nearly 100 years to complete due to English domestic problems and a number of failed attempts to expedite the process by large scale deep thrusting offenses. JONES, *supra* note 2, at 127-134.

Throughout the time of active operations, political warfare must also continue. Primarily, the military forces must use propaganda to weaken the guerrillas' support further, especially in those areas not yet under their control. Additionally, the government should use such tools as amnesty and arms for cash or land programs for those guerrillas who willingly turn themselves in. The counter-guerrillas must make a concerted effort to take good care of those who do voluntarily give up; that news will get back to the enemy, some of whom may be willing to quit if it would mean a better lifestyle.

This combined plan of attack should continue as long as the guerrillas persist with their unconventional campaign. Then, once the enemy desperately shifts to conventional techniques, the counter-guerrillas can safely apply the more familiar methods of massive firepower and large scale maneuvers. It is at this stage, and only once a clear target has been identified, that the conventional operations can commence and likely isolate and annihilate an enemy force without a serious risk of indiscriminate use of firepower and reversion to historically disproved counter-guerrilla methods.

In summary, the purpose behind counter-guerrilla operations is to break the guerrillas' will to fight. Since unconventional warfare offers so few targets to attack, the possibility of meeting the guerrillas in combat under such circumstances as to put them to their disadvantage is slim. Therefore, by using propaganda to make them question their motives, support denial to make their lives more difficult, and guerrilla tactics to prevent their resting, the counter-guerrilla force will eventually wear the guerrillas down. However, in the interim, the pursuing force, and its sponsoring government, face a long-term, expensive, and potentially difficult battle, attempting to defeat those who have a tendency to win.

THE MILITARY'S DNA REGISTRY: AN ANALYSIS OF CURRENT LAW AND A PROPOSAL FOR SAFEGUARDS

Sarah Gill[*]

> *How do I know that someone won't get a hold of that information and use it to deny me a promotion or assign me to a job I don't want?*
>
> Technical Sergeant Warren Sinclair, U.S. Air Force.[1]

I. INTRODUCTION.

Technical Sergeant Warren Sinclair, USAF, refused to provide blood and saliva samples for the Department of Defense (DoD) deoxyribonucleic acid (DNA) specimen registry (hereinafter the DoD Registry).[2] On May 10, 1996, Sinclair became the third serviceman to be found guilty at a special court-martial

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[*] *The positions and opinions stated in this article are those of the author and do not represent the views of the United States government, the Department of Defense, or the United States Navy. The author is a student in the Navy Judge Advocate General's Corps Student Program; JD candidate, 1997, UCLA School of Law; BA, Bioethics and Philosophy, University of Pennsylvania, 1992. I would like to thank Lena and David Gill, for their editing and invaluable support and understanding; Professor Steve Munzer, for his thoughtful critiques of various drafts of this paper; my former colleagues at The Hastings Center, for giving me the tools and knowledge to write about this and other bioethics topics; and Lieutenant Barry Harrison of the Naval Law Review for his insightful editorial comments and recommendations. I dedicate this Article to the memory of Eric Holmberg, for his intellect and his humanitarianism, which will always provide me with inspiration.*

[1] Darryl van Duch, *DNA = Do Not Appropriate, Say Soldiers and Civilians*, NAT. L.J., May 27, 1996, at B1.

[2] *See* Record of Trial at 105, United States v. Sinclair (Central Judicial Circuit, U.S.A.F. Trial Judiciary, May 10, 1996)(Sinclair was sentenced to a reduction in grade to E-4 and to 14 days of hard labor without confinement)[hereinafter Sinclair Record]. The DoD obtains blood and saliva samples from members of the military, then places these samples in a DNA registry. The samples can be used to determine an individual's genetic profile and DNA typing. 60 Fed. Reg. 31287, 31287-88 (1995).

for disobeying the lawful written order to provide blood and saliva samples for the DoD Registry.[3] Sinclair and the other servicemen, Corporal Joseph Vlacovsky, USMC, and Lance Corporal John Mayfield III, USMC, argued that they did not want to give blood and saliva samples (DNA samples) for the registry because the DoD did not have adequate safeguards to prevent the DNA information from being abused.[4] In 1994 and 1995, when these servicemen were asked to give DNA samples, the DoD policies regarding the registry were vague enough that testing for certain diseases or for susceptibility to contracting certain diseases was a conceivable future use for the DNA samples stored in the registry.[5] This genetic information could then be used to deny or terminate enlistment or commission, or, if an individual has separated from the military, to deny or terminate civilian employment, health care, or insurance.[6] In 1996 the DoD limited the uses of the information in the registry to identification purposes.[7] However, the DoD had not yet implemented adequate notice or

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[3] Sinclair Record, *supra* note 2, at 135.

[4] Record of Trial at 63, 68, United States v. Mayfield and Vlacovsky (Special Court-Martial, Navy-Marine Corps Trial Judiciary, Island Judicial Circuit, Apr. 16, 1996). (Mayfield and Vlacovsky were each sentenced to a reprimand and were restricted to the base for a week)[hereinafter Mayfield Record]; Sinclair Record, *supra* note 2, at 105.

[5] Memorandum #47803 and Policy Statement at 2, by Deputy Secretary of Defense, to Secretaries of the Military Departments, subject: Establishment of a Repository of Specimen Samples to Aid in Remains Identification Using Genetic Deoxyribonucleic Acid (DNA) Analysis (16 Dec. 1991) (explaining need for DNA registry to store information needed for identification of remains)[hereinafter Memorandum, Dec. 1991]; Memorandum and Policy Statement, Assistant Secretary of Defense (Health Affairs), to Secretaries of the Military Departments, subject: Establishment of a Repository of Specimen Samples to Aid in Remains Identification Using Genetic Deoxyribonucleic Acid (DNA) Analysis (5 Jan. 1993)(initial policy for implementation, organization, and administration for DoD Registry and Specimen Repository for Remains Identification)[hereinafter Memorandum, Jan. 1993]; Memorandum and Policy Statement, Assistant Secretary of Defense (Health Affairs), to Secretaries of the Military Departments, subject: Collection and Shipment of Specimens for Submission to the Deoxyribonucleic Acid (DNA) Specimen Repository 1 (9 Mar. 1994)[hereinafter Memorandum, Mar. 1994].

[6] *See* Lisa N. Geller et al., *Individual, Family, and Societal Dimensions of Genetic Discrimination: A Case Study Analysis*, 2 SCI. & ENGINEERING ETHICS 71 (1996) (documenting 455 questionnaire respondents who asserted that they experienced genetic discrimination); Testimony of Dr. Paul Billings, defense expert witness, Mayfield Record, *supra* note 4, at 75 (explaining the risk of genetic discrimination, and the ability to use the DoD Registry for purposes which could lead to discrimination).

[7] Memorandum and Policy Statement, Assistant Secretary of Defense (Health Affairs), to Secretaries of the Military Departments, subject: Implementing Instructions for Elimination of Remains Identification Reference Specimen Samples from the Health Record References 1 (11 Oct. 1996)(requiring that all samples in health records be destroyed by Oct. 11, 1997)[hereinafter

informed consent procedures.[8] Furthermore, as genetic technology progresses, the DoD could decide to issue another policy memorandum which provides for additional uses of the information in the DNA registry.

These three servicemen are not alone in their fear of the misuse of genetic information. Many people recognize the danger of genetic information.[9] Others simply do not want to be informed about their susceptibility to diseases. For example, in a recent study of 279 civilians, 57% rejected the opportunity to learn whether they carried the BRCA1 gene, which raises their risk of developing breast, ovarian, or prostate cancer.[10] These participants' major reason for declining the test was a fear that a positive result could lead to discrimination by employers or insurers.[11] In contrast, a spokesman from the Health Insurance Association of America claimed that consumers should not withhold such information from insurers, rather, "[t]he insurance industry needs to be on an equal footing with an applicant."[12]

In 1990, the Human Genome Project began to map and attempt to understand human genes.[13] At that time, criminal courts were already considering genetic

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Memorandum, Oct. 1996]; Memorandum, Assistant Secretary of Defense (Health Affairs), to Secretary of the Army, subject: Policy Refinements for the Armed Forces Repository of Specimen Samples for the Identification of Remains (2 Apr. 1996)(stating that DoD has no intention of using DNA specimens to discriminate based on genetic conditions)[hereinafter Memorandum, Apr. 1996].

[8] *See infra* part I.B.1.

[9] *See* Jean E. McEwen & Philip R. Reilly, *State Legislative Efforts to Regulate Use and Potential Misuse of Genetic Information,* 51 AM. J. HUM. GENET. 637, 641 (1992)(reviewing proposed and existing legislation aimed at regulating the collection, use, and possible misuse of genetic information); Geller, *supra* note 6.

[10] Caryn Lerman et al., *BRCA1 Testing in Families with Hereditary Breast-Ovarian Cancer--A Prospective Study of Patient Decision Making and Outcomes,* 275 JAMA 1885, 1885 (1996). Women who carry BRCA1 have an 80-90% lifetime risk of developing breast cancer (about eight times higher than the average probability), and a 40-65% lifetime risk of developing ovarian cancer. *Id.* Men who carry BRCA1 have an increased risk of developing prostate cancer and transmitting to their daughters a breast-ovarian cancer susceptibility. *Id.*

[11] *Id.*

[12] Terrence Monmaney, *Many Don't Want to Know Genetic Risk of Cancer,* L.A. TIMES, June 26, 1996, at A1.

[13] Mark Rothstein, *Foreword to Symposium: Legal and Ethical Issues Raised by the Human Genome Project,* 29 HOUS. L. REV. 1, 1 (1992) [hereinafter Rothstein].

information by permitting the use of DNA fingerprint evidence for the identification of criminals.[14] In 1993, the military created their DNA registry which stores service members' DNA samples.[15] The DoD Registry stores specimens which the DoD is authorized to use to identify both human remains and suspects in criminal investigations.[16] This registry can provide very helpful and important information. Identifying human remains is clearly a compelling interest of the military, service members, and their families. In addition, this use of DNA information in criminal investigations can be compelling so long as law enforcement retrieves and analyzes the DNA lawfully and with scientific accuracy.

In this Article, I analyze issues raised by the DoD Registry using analytical tools from the disciplines of both law and bioethics.[17] In part II, I provide a layperson's overview of the use of DNA for identifying individuals and discuss the implications of this process. Next, I describe and analyze the DoD policies regarding the implementation of the Registry and the court decisions regarding the servicemen who refused to give DNA samples. The third section of part II offers an analysis of state and federal laws pertaining to the storage and use of DNA samples for law enforcement purposes. In part III, I lay the foundations for a descriptive[18] ethical analysis that considers context and the dynamics of power relations. I also explain why these considerations are useful in analyzing the military's use of genetic information. In part IV, I apply the ethical analytical tools to explore the issues raised by the existence of such a registry in the military context and the potential for discrimination. I conclude by judging which uses (present and future) of genetic information might be ethically acceptable, given the necessary safeguards, and which might not. Finally, in order to illustrate what types of safeguards are necessary, I present a proposal for legislation which anticipates future uses of genetic information (uses that will become available as technology improves), outlines which uses should be

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[14] Yale H. Yee, *Criminal DNA Data Banks: Revolution for Law Enforcement or Threat to Individual Privacy?*, 22 AM. J. CRIM. L. 461, 461 (1995).

[15] Memorandum, Jan. 1993, *supra* note 5.

[16] Memorandum, Apr. 1996, *supra* note 7.

[17] For an explanation of bioethics principles and the use of ethical theory to analyze health care issues, *see* TOM L. BEAUCHAMP & JAMES F. CHILDRESS, PRINCIPLES OF BIOMEDICAL ETHICS (3rd ed. 1989).

[18] *Id.* at 10 (defining descriptive ethics as the factual investigation and analysis of moral behavior and beliefs).

permitted, and guarantees confidentiality, notice, and informed consent in a way that is specific to genetic information.[19]

II. DNA FINGERPRINTING.

In this section I examine the current state of military and civilian DNA databanks, the type of information stored, and what this information is and can be used for. Both military and civilian courts have accepted the use of DNA fingerprints for the investigation of criminal suspects.[20] Regarding the DoD Registry, three service members have already been convicted at special courts-martial for refusing to obey an order to provide specimens for the registry and a federal district court has upheld the constitutionality of this order.[21]

A. *An overview of the technology.*

1. DNA Databanks.

In 1990, the U.S. embarked on the Human Genome Project: a 15 year project to map and sequence the estimated 50,000 to 100,000 human genes.[22] The Human Genome Project is quickly mapping human genes, and determining who is susceptible to or has certain diseases and disorders. [23] As scientists discover genetic markers, they are developing genetic tests for a number of genetic traits and disorders and genetic therapies aimed at curing genetic diseases. [24] For example, testing for certain mutations in the p53 gene can

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[19] Even though the Privacy Act of 1974 covers confidentiality and consent, specifying these requirements in legislation specifically tailored to the Registry would be more effective. 5 U.S.C. § 552a *see infra* part I.B.1.

[20] Memorandum, Apr. 1996, *supra* note 7 (stating that DoD can use the registry for law enforcement purposes); Yee, *supra* note 14, at 476-82.

[21] Sinclair Record, *supra* note 2; Mayfield Record, *supra* note 4; Mayfield v. Dalton, 1997 U.S. App. LEXIS 5821 (9th Cir.), *vacating as moot* 901 F. Supp 300 (D. Haw. 1995).

[22] Rothstein, foreword, *supra* note 13, at 1.

[23] *Id.*

[24] Kathleen Nolan, *First Fruits: Genetic Screening, in* Special Supplement: *Genetic Grammar*, 22 HASTINGS CTR. REP. S2 (1992). Already, in 1996, there exist a number of genetic tests which determine whether a person has a high likelihood, or a certainty, of developing a certain disease. For example, if a woman with a family history of certain forms of cancer tests positive for the BRCA1 gene test, she has a 80-90% risk of developing breast cancer, a 40-65% risk of developing ovarian cancer, and men who carry BRCA1 have an increased risk of developing prostate cancer and

signal an increased risk of developing many types of cancer including breast, colon, and prostate cancer.[25]

"DNA is able to reveal, with chilling accuracy, facts about a person's past, present, and future, which he himself might not know."[26] By 2020, people will be able to give a pharmacist an identification card from which the pharmacist can obtain information about an individual's genome.[27] This card will reveal information about recessive traits people carry for diseases and characteristics, people's genetic predisposition for developing multifactorial disorders, and late-onset genetic disorders people will develop later in life.[28] For people who want this type of information, this card will help them make decisions regarding reproduction. It could also assist people with health promotion and preventive medicine. While genetic information would be very valuable if medical interventions are available, it could be damaging if there are no interventions, or if a person does not have access to the interventions.[29] The information could also be damaging if someone else uses the information improperly to pressure an individual not to reproduce, to abort, or to tell an individual that she is not eligible for certain employment or health benefits. These are all individual issues worth considering before DNA is mapped and stored in a databank.

Once a person gives a blood or saliva sample for a DNA databank, scientists analyze variations in the individual's DNA sequence, particularly the restriction fragment length polymorphisms (RFLP), which are extremely variable DNA sequences.[30] Apparently, RFLP reveals little more than an "old fashioned"

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transmitting to their daughters a breast-ovarian cancer susceptibility. Lerman, *supra* note 10. Public policy guidelines developed at Stanford University warn against testing for the BRACA gene because it's identification could lead to denial or health or life insurance. Monmaney, *supra* note 12.

[25] Geoffrey Cowley, *Flunk the Gene Test and Lose Your Insurance*, NEWSWEEK, Dec. 23, 1996, at 48, 49.

[26] Rothstein, *supra* note 13, at 12.

[27] *Id.* The genome of an individual is the specific genetic make-up of that individual, while the human genome refers to all the genes that individuals can have (i.e. one individual would have some of these genes).

[28] *Id.*

[29] *Id.*

[30] Yee, *supra* note 14, at 464.

fingerprint.[31] This means that the information in the databank can identify the individual but reveals little else about her genome.[32] DNA identification patterns are especially useful for investigating crimes, determining relatedness, identifying anonymous human remains, and identifying missing children.[33]

RFLP identifies a very small segment of DNA. To make a diagnosis for disease, a doctor would require further information about her patient's medical history.[34] This diagnosis could also be possible with further sequencing of RFLP fragments in order to reveal their nucleotide code, but this would be extremely expensive.[35] There is a small possibility that a stigmatizing gene[36] could be located near enough to the RFLPs used for DNA identification that the technique would uncover the stigmatizing gene as well.[37] However, stigmatizing genes could be discovered from the blood or saliva samples from which the DNA is derived. Once an actual sample is preserved, scientists are capable of conducting genetic tests to gain information beyond what is needed for identification.[38] Many DNA databases might preserve the samples in case new and improved tests for identification develop. The DoD registry preserves the samples for fifty years or until the service member is discharged and requests destruction of his specimen samples.[39] As technology changes, the samples may become more and more revealing of a person's propensity for

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[31] Dan L. Burk, *DNA Identification Testing: Assessing the Threat to Privacy,* 24 U. TOL. L. REV. 87 (Fall 1992).

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.* Of course, the expense will decrease as the technology improves.

[36] A stigmatizing gene is one that could show, through genetic testing, that a person has a disease or susceptibility to develop a disease which others such as health care providers, insurers, and employers may deem costly or undesirable in some other way. As a result, these entities would deny the individual health care, coverage, or employment because of the presence of the stigmatizing gene. These denials are examples of genetic discrimination: discrimination based on genetic information. Sometimes this type of discrimination is justified, ethically and legally, other times it is not. *See infra* part V.

[37] Burk, *supra* note 31, at 92.

[38] *Id.* at 92-93.

[39] Memorandum, Apr. 1996, *supra* note 7.

diseases and genetic disorders.[40] The more information about stigmatizing genes can be obtained from DNA databanks, the higher the probability that discrimination based on genetic information could result.[41]

2. Privacy of medical records.

Currently, no national policy affirms a legal right of medical privacy.[42] Recognizing the possibility of computerized medical records in the near future, the General Accounting Office has recommended that the federal government set out national standards to safeguard the privacy of automated medical records.[43] Some state laws affirm a legal right to privacy of medical records, but they are erratic and inconsistent.[44] The Privacy Act of 1974 requires federal agencies to maintain the security and confidentiality of their records, however, it does not clarify who in the agency is permitted access to the records and for what purposes.[45]

Privacy issues are especially pertinent now that the development of electronic health care networks containing medical information is imminent. Eventually, it might be possible for health care providers or insurers to access patients' information through a computer, thus creating the possibility for significant privacy risks.[46] If DNA information is also computerized, these same privacy risks could exist for DNA information.[47] Ensuring that the DNA samples will

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[40] Burk, *supra* note 31, at 98.

[41] *See supra* note 36 (explaining the concept of genetic discrimination).

[42] Lawrence O. Gostin et al., *Privacy and Security of Health Information in the Emerging Health Care System*, 5 HEALTH MATRIX 1, 5 (1995).

[43] *Id.* at 13.

[44] *Id.*

[45] The act requires the agency to "establish appropriate administrative, technical, and physical safeguards to insure the security and confidentiality of records and to protect against any anticipated threats or hazards to their security and integrity which could result in substantial harm, embarrassment, inconvenience, or unfairness to any individual on whom information is maintained[.]" 5 U.S.C. § 552a (e)(10). For discussion of the Privacy Act and how it applies to the DoD DNA registry, see part II.B.1, *infra*.

[46] Gostin, *supra* note 42, at 8.

[47] Burke, *supra* note 31, at 6.

be legitimately obtained, analyzed, and stored is especially crucial for DNA databases as significant genetic information could be obtained from the DNA.[48] One commentator identified a number of issues to consider:

> What rights to or interests in his or her DNA fingerprint does that person have? Who has access to the databank and the stored DNA fingerprints? When, if ever, can an individual have his or her DNA fingerprint removed from the databank? Do the statutes provide any protection against unauthorized use or dissemination?[49]

In the ensuing discussion, I will attempt to answer some of these questions.

B. *DNA fingerprinting in the military.*

1. Procedure.

DNA fingerprinting techniques are very valuable for the military because they provide an accurate means for identifying human remains.[50] The government has an interest in definitive identification of remains to determine whether the deceased service member's group life insurance, burial benefits, veteran' benefits, survivor' benefits, and other entitlements triggered by the death of a service member should be paid.[51] This is also crucial for society because people have an interest in learning when a missing family member or friend is found.[52] After the Gulf War, the DoD began to store reference DNA specimens that could be used to identify human remains when necessary.[53] In

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[48] Yee, *supra* note 14, at 480; Lynda M. Fox & Barbara A. Kakenmaster, *The Genetic Privacy Act: Proposed Model Legislation,* 24 COLO. LAW. 2317 (1995).

[49] Yee, *supra* note 14, at 479.

[50] Memorandum, Dec. 1991, *supra* note 5.

[51] Brief for the Government at 3-4, United States v. Vlacovsky and Mayfield (Special Court-Martial, Navy-Marine Corps Trial Judiciary, Island Judicial Circuit, May 26, 1995).

[52] Memorandum, Dec. 1991, *supra* note 5, at 2.

[53] *Id.* (authorizing the Assistant Secretary of Defense for Health Affairs to establish policies and requirements for the creation of a DNA registry which will use DNA analysis to aid in the identification of remains); Mayfield v. Dalton, 901 F. Supp 300, 302 (D. Haw. 1995). On May 19, 1993, the DoD announced in the Federal Registry that they were adding a category of records to the Health Care and Medical Treatment Record System, "a blood smear that can be used for DNA typing to identify human remains." 58 Fed. Reg. 29207, 29208 (1993). On June 14, 1995, the

1991, the Deputy Secretary of Defense authorized the Assistant Secretary of Defense for Health Affairs to facilitate the creation of a DNA registry.[54] In 1993, the Assistant Secretary of Defense for Health Affairs issued a detailed policy for the implementation, organization, and administration for the DoD Registry and Specimen Repository for Remains Identification.[55]

The registry now includes samples from more than one million people on active duty.[56] The military aims to obtain specimens from all active and reserve personnel by year 2001.[57] Specimens are collected from all new enlisted or officer accessions at their initial reception station, from students at service academies before graduation, and from personnel preparing for operational deployment.[58] The procedure dictated in the 1993 memorandum involved storing one bloodstained card in the individual's military health record, and sending another identical card plus the swab sample to the DNA repository. The specimen was originally intended to be stored for 75 years,[59] but in 1996 (subsequent to Mayfield, Vlacovsky, and Sinclair's refusal to give samples for the registry), the DoD issued a new policy which requires destruction of the specimens after 50 years.[60] Also as of 1996, samples in health records (not in the registry) must be destroyed and sample donors (for the registry) who leave the military can request that their DNA sample be destroyed within 180 days of release from active duty.[61]

DoD gave public notice that it would create a DoD DNA Registry which would store specimens from which DNA typing could be obtained. 60 Fed. Reg. 31287, 31287-88 (1995).

[54] Memorandum, Dec. 1991, *supra* note 5.

[55] Memorandum, Jan. 1993, *supra* note 5 (initial policy for implementation, organization, and administration for the DoD Registry and Specimen Repository for Remains Identification).

[56] *Marines Convicted in DNA Standoff*, U.P.I., Apr. 17, 1996, *available in* LEXIS, Curnws Library, News file [hereinafter *Marines Convicted*].

[57] *Id.*

[58] Memorandum Mar. 1994, *supra* note 5.

[59] 60 Fed. Reg. 31, 287-88 (1995).

[60] Memorandum, Apr. 1996, *supra* note 7, at 2.

[61] *Id.*; Memorandum, Oct. 1996, *supra* note 7.

The possible uses of the information in the registry has been a contentious issue, at least for Mayfield, Vlacovsky, and Sinclair.[62] The records in the DoD Registry can be retrieved by entering a person's surname, social security number, specimen reference, or Armed Forces Institute of Pathology accession number, and date of birth.[63] The January 5, 1993, DNA registry policy states, "in extraordinary cases, when no reasonable alternative means of obtaining a specimen for DNA profile analysis is available, a request for access to the DoD Registry and Specimen Repository shall be routed through the appropriate Secretary of the Military Department or his designee, for approval by the Assistant Secretary of Defense for Health Affairs."[64] The court in *Mayfield v. Dalton* explains that according to the DoD, no such request has ever been granted, though the government is unclear about how many, if any, requests have been made.[65] The court is also unclear about the level of discretion the Secretary has in this regard. [66] Even though approval may be a difficult process, this exception allows for broad uses of the DNA information, uses which might not even be anticipated.

In April, 1996, the Department of Defense narrowed the scope of "extraordinary cases" of uses of DNA samples that would be permitted. Permissible uses are now limited to:

a. identification of human remains;
b. internal quality assurance activities;
c. a purpose for which the donor of the sample (or surviving next-of-kin) provides consent; or
d. as compelled by other applicable law in a case in which <u>all</u> of the following conditions are present:
    (1) the responsible DoD official has received a proper judicial order or judicial authorization;
    (2) the specimen sample is needed for the investigation or prosecution of a crime punishable by one year or more of confinement;

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[62] *See infra* part II.B.2.

[63] 60 Fed. Reg. 31, 287-88 (1995).

[64] Memorandum, Jan. 1993, *supra* note 5, at 2.

[65] Mayfield v. Dalton, 901 F. Supp. 300, 302 (D. Haw. 1995).

[66] *Id.* at 302.

> (3) no reasonable alternative means for obtaining a specimen for DNA profile analysis is available; and
> (4) the use is approved by ASD(HA) after consultation with the DoD General Counsel.[67]

While the memorandum did narrow the scope of uses of the DNA information, some of the limitations are still vague. For example, the term "other applicable law" is quite broad, and could allow for many uses of DNA information as it applies to criminal investigations. In addition, "a purpose for which the donor . . . provides consent" is extremely broad. If consent is not fully informed and freely given, this clause could permit numerous uses of the information. Despite the narrowing language in the April 2, 1996 memorandum, a new compelling interest could convince a DoD official to issue a new policy statement that permits new uses of the genetic information.

Though the memoranda and policies regarding the registry say almost nothing about informed consent, confidentiality, and notice, these are all required by the Privacy Act of 1974.[68] However, this act does not address the specific case of genetic information.[69] The 1993 memorandum and policy statement for the registry mandates that uses of specimens in the DNA registry comply with the Privacy Act of 1974.[70] This act requires that federal agencies maintaining records with information about personnel follow certain procedures.[71]

The plaintiffs in *Mayfield* were concerned about the privacy and confidentiality of the DNA information that would be in their medical records and in the registry.[72] The Privacy Act states that the agency must ensure the

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[67] Memorandum, Apr. 1996, *supra* note 7, at 3.

[68] *See* Memorandum, Dec. 1991, *supra* note 5; Memorandum, Jan. 1993, *supra* note 5; Memorandum, Mar. 1994, *supra* note 5; Memorandum, Apr. 1996, *supra* note 7; Memorandum, Oct. 1996, *supra* note 7; 5 U.S.C. 552a (West 1996).

[69] *Id.*

[70] Memorandum, Jan. 1993, *supra* note 5, at 2.

[71] 5 U.S.C. §552a.

[72] Mayfield record, *supra* note 4, at 63, 68. Regarding reference specimens samples in medical records, in October the Assistant Secretary of Defense (Health Affairs) ordered that they be destroyed. Memorandum, Oct. 1996, *supra* note 7.

confidentiality and security of records by establishing safeguards to this effect.[73] Any officer or employee of the agency who willfully discloses information from the system of records to another not entitled to receive the information will be guilty of a misdemeanor and can be fined up to $5,000.[74] After Mayfield and Vlacovsky refused to provide DNA samples, the DoD submitted a Federal Registry entry regarding the DoD Registry which outlines several safeguards which can maintain confidentiality of records: "records are maintained in controlled areas only accessible to authorized personnel," personnel must be "trained in the proper safeguarding and use of the information," and "[a]ny DNA typing information obtained will be handled as confidential medical information."[75]

Regarding informed consent, the registry memoranda and policies do not provide instructions for obtaining informed consent from an individual before obtaining a DNA sample.[76] The Privacy Act, however, requires that the agency inform each individual of the authority for requesting the information, whether disclosure is mandatory or voluntary, the principal purpose(s) intended for the information, the anticipated routine uses of the information, and the consequences of refusing to provide the information.[77] Nevertheless, when Mayfield and Vlacovsky asked their superior officers about access to and future uses of the DNA specimens, they received few answers.[78] In order to ensure that adequate informed consent is obtained from service members before they provide samples for the registry, a registry memorandum should specify in detail what informed consent should entail: the current purposes of the registry, the anticipated uses of the genetic information, when the samples will be destroyed, confidentiality, and the consequences of refusing to provide a sample. The

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[73] 5 U.S.C. §552a (e)(10).

[74] 5 U.S.C. §552a (i).

[75] 60 Fed. Reg. 31287, 31287-88 (1995).

[76] *See supra* note 68; Brief of Amicus Curiae, The Council for Responsible Genetics, In Support of the Plaintiffs-Appellants, Mayfield v. Dalton, 901 F. Supp. 300 (D. Haw. 1995)[hereinafter CRG Brief]; 60 Fed. Reg. 31287, 31287-88 (1995).

[77] 5 U.S.C. §552a (e)(3).

[78] Mayfield Record, *supra* note 4, at 63, 68; *see* Appellants' Opening Brief at 12-13, Mayfield v. Dalton, (No. 95-00344-SPK)(arguing that the "deprivation of any opportunity to consent to the subsequent uses of those samples [is] in direct violation of every concept of medical research ethics which has been established over the past fifty years").

Privacy Act statements which Mayfield, Vlacovsky, and Sinclair all signed do not provide such detailed information.[79]

Furthermore, DoD policy concerning the DoD Registry does not require the military to warn applicants that they will have to give a DNA sample, or even to mention it in their service contract.[80] In contrast, the March 9, 1994 memorandum does require that civilian DoD employment agreements specify that giving a specimen for the DoD Registry is required.[81] However, the policies might not have required notice to service members because they defaulted to the Privacy Act's notice requirement that the agency publish a notice in the Federal Register if they establish or revise a system of records.[82] This notification must detail the types of records that will be stored, the categories of individuals that will have to provide the information, the uses intended for the information, the policies and practices that will be followed for the system, and other details about the system of records.[83] The problem with notice in the Federal Register is that few people would be aware of it. The privacy act also requires the agency to "make reasonable efforts" to notify an individual whose record will be made available to another due to a compulsory legal process.[84] Similar to civilian DoD contracts, enlistment and commissioning contracts should specify that the DoD requires samples for the registry.

2. Federal and military case law pertaining to the DoD DNA Registry.

In *Mayfield v. Dalton*, Lance Corporal John Mayfield and Corporal Joseph Vlacovsky alleged that the collection, storage, and use of their DNA samples, taken without their consent and without any disclosure of information, should be prohibited because it violates their Fourth Amendment right against unreasonable

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[79] *See* Sinclair Record , *supra* note 2, at defense exhibit C (Privacy Act Statement -- Health Care Records); Mayfield Record , *supra* note 4, at defense exhibit D (Privacy Act Statement -- Health Care Records).

[80] Memorandum, Jan. 1993, *supra* note 5, Memorandum, Mar. 1994, *supra* note 5, Memorandum, Apr. 1996, *supra* note 7, Memorandum, Oct. 1996, *supra* note 7.

[81] Memorandum, Mar. 1994, *supra* note 5.

[82] 5 U.S.C. §552a (e)(4).

[83] *Id.*

[84] 5 U.S.C. §552a (e)(8).

searches and seizures.[85] The plaintiffs argued that the military might in the future use the samples to obtain genetic information and diagnose future diseases or disorders.[86] They also argued that the military could give the genetic information to future employers or insurers.[87]

The court held that because the plaintiffs had no evidence of such malign intent, a hypothetical future use is not a justiciable controversy.[88] Similar to the Fourth Circuit's decision in *Jones v. Murray*,[89] upholding the constitutionality of a law requiring all convicted felons to submit blood samples for a DNA databank, the district court agreed that the government's compulsory taking of blood and tissue samples constituted a seizure under the Fourth Amendment, but held that the seizure was reasonable. Also similar to the *Jones* decision, upholding a decreased expectation of privacy for prisoners, the court reasoned that certain government employees are subject to a diminished expectation of privacy due to their occupation.[90] The *Mayfield* court concluded that the seizure was reasonable because it did not violate a service member's (diminished) reasonable expectation of privacy, and because the military has a significant and benign interest in being able to identify the remains of people who have died in combat.[91]

The plaintiffs also claimed that the DNA testing requirement violated their enlistment contract with the Marine Corps.[92] The enlistment contract does not warn recruits that the military will take blood samples for a DoD Registry.[93] The court held that there was no breach of contract because the clause stating "law and regulations that govern military personnel may change without notice

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[85] Mayfield v. Dalton, 901 F. Supp. 300, 302-3 (D. Haw. 1995).

[86] *Id.* at 304.

[87] *Id.*

[88] *Id.*

[89] Jones v. Murray, 962 F.2d 302, 306-08 (4th Cir. 1992); *see* discussion *infra* part I.C.

[90] *Id.*

[91] Mayfield v. Dalton, 901 F. Supp. 300, 304 (D. Haw. 1995).

[92] *Id.*

[93] *Id.*

to me," was sufficiently broad.[94] Also, the court explained that the plaintiffs knew that there were numerous physical requirements, as they had already been subjected to numerous medical and physical fitness tests in order to be enlisted, though these tests also were not outlined in the contract.[95] The court reasoned that the requirement of a blood and tissue sample for the DNA registry is not so qualitatively different from drug, physical, or other medical tests that it would require a separate, more specific form of consent than that required for other testing.[96] Considering that the DoD could use the DNA samples to determine a person's susceptibility to numerous diseases, this sampling does seem qualitatively different from the other tests.

The Ninth Circuit Court of Appeals recently reviewed *Mayfield,* holding that the district court's decision should be vacated and remanded with instructions to dismiss as moot.[97] The appellate court reasoned that the case was moot because, since the district court issued its decisions, Mayfield and Vlacovsky have been honorably separated from active duty.[98] They never gave DNA samples, and, due to their separation, any future possibility that they would be subject to the DNA collection program is remote.[99]

In addition to the federal courts, Mayfield and Vlacovsky's case was reviewed by military courts. They were convicted by a special court-martial for disobeying a lawful written order from their commanding officer when they refused to submit samples for the DNA registry.[100] In Vlacovsky and Mayfield's initial special court-martial, on May 16, 1995, the military judge dismissed the case because there was no military policy that required service members to submit samples for DNA analysis, nor did any punitive regulation

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[94] *Id.* at 305.

[95] *Id.*

[96] *Id.*

[97] Mayfield v. Dalton, 109 F. 3d 1423 (9th Cir. 1997).

[98] *Id.* at 1425.

[99] *Id.* at 1425-1426.

[100] Mayfield Record, *supra* note 4, at Memorandum #5810, Trial Counsel Captain S. T. Peterson, USMC, to Commanding General, MCBH Kaneohe Bay, HI, Subject: Report of Results of Trial by Court-Martial (Apr. 16, 1996).

provide that failure to supply a sample would result in punishment.[101] However, the U.S. Navy-Marine Corps Court of Criminal Appeals found that the trial judge had erred on this point of law, and remanded the case.[102]

In its trial brief, the government argued that privacy is initially safeguarded because the DNA is not actually extracted from the blood and saliva sample until it is needed for the purpose of identifying the individual's remains.[103] The government further argued that the Privacy Act of 1974 need not be applied because the sample contains no information about the donor. Such information would not be obtained unless identification of remains becomes necessary.[104] However, the government argued, if the Privacy Act did apply, Lieutenant Colonel Monreal (the superior officer who ordered the blood and saliva samples), did comply with the Privacy Act's requirement that service members be given notice regarding where the samples would be sent and the purpose of the DNA registry.[105] With regard to the sample to be stored in the service members' medical files, Monreal complied with the Privacy Act by giving Mayfield and Vlacovsky Privacy Act statements.[106]

During their testimony at the April 1996 special court-martial, Mayfield and Vlacovsky explained that when they enlisted, they were not informed that they would have to give the military a DNA sample.[107] Prior to January 1995, when they refused the DNA sample order, neither of them had ever been the subject of a criminal or disciplinary proceeding, or refused to obey an order or medical procedure.[108] Though they were in separate rooms when asked to give samples for the DNA registry, both Vlacovsky and Mayfield had similar

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[101] Record of Trial, United States v. Vlacovsky and Mayfield, (Special Court-Martial, Navy-Marine Corps Trial Judiciary, Island Judicial Circuit, May 26, 1995).

[102] United States v. Vlacovsky and Mayfield, No. 9500919, at 2 (N.M.Ct.Crim.App. Oct. 25, 1995)(unpublished decision).

[103] Brief for the Government at 3, United States v. Vlacovsky and Mayfield, (Special Court-Martial, Navy-Marine Corps Trial Judiciary, Island Judicial Circuit, May 26, 1995).

[104] *Id.* at 4

[105] *Id.* at 5.

[106] *Id.* at 5.

[107] Mayfield Record, *supra* note 4, at 63, 68.

[108] *Id* at 62, 68.

questions: what would the genetic information be used for, how long would the Navy keep the DNA sample, and could the samples be destroyed when they were discharged. They received no answers to these questions at first.[109] The next day, January 25, 1995, their company commander, Major Fox, had received a copy of the DoD Registry policy.[110] Fox told them that the samples would be kept for 40 years, and they could not have the samples returned or destroyed until then.[111] Mayfield and Vlacovsky refused to obey the written order because they feared that the DNA samples would be used for purposes other than remains identification, because the requirement was not specified in their contract, and because they believed that seizing their blood and tissue samples without their informed consent violated their constitutional right to privacy.[112] Mayfield also explained that once he was discharged from the military, "I should have all my rights returned and none of my body tissue or genetic blueprint held by the government."[113]

On April 16, 1996, the court-martial convicted Mayfield and Vlacovsky of failing to obey a lawful order.[114] The court decided not to give Mayfield and Vlacovsky the maximum permissible punishment authorized for a special court-martial for disobeying an order: forfeiture of two-thirds of their pay per month for up to 6 months, reduction to E-1, a bad conduct discharge, and confinement for six months.[115] Instead, they were sentenced to a reprimand and to be restricted to the base for a week.[116]

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[109] *Id.* at 63, 68.

[110] *Id.* at 69.

[111] *Id.* at 63-64, 69.

[112] *Id.* at 64-65, 69-71; *see also* Defendants' Trial Brief, at 2-11, U.S. v. Vlacovsky and Mayfield, (Special Court-Martial, Navy-Marine Corps Trial Judiciary, Island Judicial Circuit, May 26, 1995)(discussing legal bases for defendants' claims that order violated the Fourth Amendment and informed consent requirements).

[113] Mayfield Record, *supra* note 4, at 70.

[114] *Id.* at 81-82.

[115] *Id.* at 91; 375th Airlift Wing, Staff Judge Advocate, Memorandum, Subject: Recommendation for Action: *United States v. Tsgt. Warren Sinclair*, July 9, 1996 (detailing the maximum punishment for special court-martial conviction of failure to comply with a lawful written order of one's commander).

[116] Mayfield Record, *supra* note 4, at 91.

Air Force Technical Sergeant Warren J. Sinclair, also refused to give a DNA sample to his commanding officer.[117] Sinclair, who is African American, stated that he was not willing to give up his privacy because he feared both racial and genetic discrimination.[118] He also explained that when he enlisted with the Air Force, he had no idea that he would have to give a sample for a DoD Registry, and would not have signed the contract if he had been aware of this requirement.[119] When Lieutenant Colonel Perro requested that Sinclair give a DNA sample, Sinclair responded that he believed the request was in violation of the Fourth Amendment.[120] Sinclair apologized for refusing to comply with the order and requested, unsuccessfully, an alternative to giving a DNA sample, such as a general discharge or removal from mobility.[121] On May 10, 1996, Sergeant Warren J. Sinclair was convicted by a court-martial for failing to obey the lawful written order to provide a DNA profile analysis sample.[122] Sinclair, who had an unblemished 14-year military career, was sentenced to 14 days of hard labor and a two-grade reduction in rank.[123]

After his court-martial, Sinclair wrote a memorandum for convening authorities requesting clemency.[124] He began by stating, "There is one issue that has been overlooked throughout this entire process, the Afro-American experience. The prosecutors' objections prevented me from discussing these issues."[125] Sinclair described the history of racism against African Americans in the United States. He explained that this racism exists today in more covert

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[117] Sinclair Record, *supra* note 2.

[118] *Id.* at 105-07. At Sinclair's special court-martial, Dr. Paul Billings gave expert testimony regarding genetic discrimination and the Air Force's past policy of excluding African Americans who carried the sickle cell gene based on an unfounded fear of the effects of this gene. *Id.* at 91.

[119] *Id.* at 102-03.

[120] *Id.* at 104.

[121] *Id.* at 105.

[122] *Id* at 3.1 (charge sheet), 135.

[123] *Id.* at 138.

[124] *Id.* at Warren J. Sinclair, Memorandum, to Convening Authorities, Subject: Submission of Clemency Matters (June 27, 1996).

[125] *Id.*

and subtle forms, such as employment and housing discrimination, and the burning of 38 African American churches in the past one-and-a-half years. He argued that the military is a microcosm of society, and has similar problems with racism.[126] Sinclair explained that not until the 1980s were African Americans permitted to have careers in the field of Biomedical Equipment Repair.[127] Furthermore, in 1990, Sinclair was the first African American Biomedical Technician stationed at Wright Patterson Air Force Base, Ohio.[128]

Sinclair concluded his memorandum by explaining the connection between the existence of racism, the possible use of genetic information as a tool for race discrimination, and his refusal to give a DNA sample:

> Would we ask the Jews to give their genes to the Germans? No! But we think nothing of asking black people to give their complete genetic blue print to a racist power structure. Until the issue of racism is resolved Afro-Americans should maintain possession of their genetic material. This is a unique opportunity for the armed forces to address a problem that will only intensify if we do not do something to bring healing to our nation. Surely you can understand why it is reasonable for us not to submit.
>
> I have mental scars because of my negative experiences with racist[s] and racism that will not allow me conform to this request at this time. Because the uniqueness of this requirement touches the very essence of each individual, we should allow those who can not conform to depart from the service or be given special status.[129]

Given his perceptions of race relations in the United States and the military, Sinclair feared that genetic discrimination could be used as a veiled form of racism. Genetic discrimination is a risk created by any DNA registry which lacks adequate safeguards to address these risks.

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[126] *Id.*

[127] *Id.*

[128] *Id.*

[129] *Id.*

3. Analysis of the case law.

I agree with the district court's assertion in *Mayfield* that the military has a significant interest in being able to identify human remains. I also agree that people who join the military have a reduced expectation of privacy. This reduced expectation is fostered even before commissioning/enlistment by the thorough physical examination which one must pass in order to be enlisted or commissioned. Nevertheless, before people are commissioned or enlist, the military should warn them verbally and through a clause in the commissioning/enlistment contract that DNA testing will be required.[130] This would allow an individual who fears abuse of the information for discriminatory ends, such as Sinclair, Vlacovsky, or Mayfield, or someone with a stigmatizing genetic disorder, to decide against enlistment or accepting a commission. Unlike civilian employment, once a person enlists or is commissioned, it is difficult to simply leave the military immediately if the employment conditions are not to your liking. Enlistment contracts require several years of duty. As demonstrated by Sinclair's denied request for discharge as an alternative for submitting a DNA sample,[131] if an individual is told to give a tissue sample for DNA analysis after one year, she cannot simply terminate her contract if she does not want her DNA analyzed. Rather, she would have to refuse to give a sample which, given the recent special courts-martial, would probably result in similar action.[132]

In discussing the hypothetical future uses of DNA information, the *Mayfield* court explained that Mayfield and Vlacovsky offered no evidence of such uses. Nevertheless, the court should have required or recommended some type of safeguard. The clause in the 1993 DoD policy (effective at the time of the trial) that allowed for any other use given proper authority is quite broad,[133] and perhaps should have been struck in order to limit future abuses that could be used to discriminate against individuals. While the military is justified in having the information to identify dead bodies, it may not be similarly justified in using

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[130] Technically, the DoD has satisfied the Privacy Act's notice requirement by explaining the DoD Registry in the Federal Registry. 60 Fed. Reg. 31287, 31287-88 (1995). However, few individuals would know to check the Federal Registry before enlisting or accepting a commission. Furthermore, requiring a contractual clause would not place a substantial burden on the DoD.

[131] *See supra* part II.B.2.

[132] Though Mayfield and Vlacovsky were not awarded as serious a sentence as Sinclair, the court could have awarded confinement for six months and a punitive discharge from the service.

[133] Memorandum, Jan. 1993, *supra* note 5.

DNA information for any other purpose the proper authorities deem appropriate.[134] Though the court did not strike down this 1993 policy, the DoD's April 1996 policy provides more limitations on the uses of the DNA information.[135] However, it is always possible that the DoD would revise or amend its regulations and create new policy that allows for additional uses of the DNA information. In evaluating potential uses of genetic information, the DoD must endeavor to ensure that the uses would not lead to unlawful or unethical discrimination. Furthermore, in considering the possibility of genetic discrimination, one must evaluate whether the discrimination could be a veiled form of racism.[136]

The April 1996 memorandum explicitly condones the use of information from the DoD Registry for criminal justice purposes. In 1995, the United States Court of Appeals for the Armed Forces held, in *U.S. v. Youngberg*, that DNA evidence is admissible if presented by an expert with scientific knowledge who will assist the court in interpreting the evidence.[137] This recent case was the first time the court ruled explicitly on the admissibility of DNA evidence at courts-martial. Because DNA can be extremely useful for criminal investigations, this purpose which is now explicit adds to the DoD's compelling interest in collecting and storing DNA samples for identification purposes. However, the DoD must ensure that this use is also limited and that the rights of criminal suspects and defendants are not abused. Furthermore, caution must be exercised to ensure that all tests are scientifically accurate so that an individual is not falsely implicated or exculpated.

C. *DNA fingerprinting in the U.S. criminal justice system.*

In addition to the DoD, numerous federal and state legislatures have demonstrated an interest in using DNA information in criminal

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[134] *See* discussion, part V. *infra*, of which uses of genetic information should be permitted and which should be prohibited.

[135] Memorandum, Apr. 1996, *supra* note 7.

[136] *See* discussion, part II.B.2. *supra*, of Sinclair memorandum, and discussion, part III.A. *infra*, of racism in medicine and medical institutions.

[137] United States v. Youngberg, 43 M.J. 379, 388 (1995).

investigations.[138] Federal and state courts generally accept DNA fingerprints as evidence so long as the laboratory used complies with scientific procedures.[139] The FBI is currently coordinating a national DNA database, the National DNA Index System.[140] Some states have enacted legislation for the creation of DNA databanks aimed at assisting law enforcement and deterring future crimes.[141] Such laws mandate that certain convicted felons provide blood and/or saliva samples for the DNA databanks.[142] A California law specifies that genetic typing analysis of DNA for law enforcement purposes is permissible, though it does not specify what these purposes could be.[143] Testing for hair or eye color, height, predispositions to violent behavior or mental illness could all be consistent with law enforcement purposes. This type of information could be very stigmatizing if safeguards, such as a confidentiality requirement, are not in place. Though such laws do not regulate the DoD registry, they are demonstrative of the types of uses that legislatures and courts have deemed compelling.

Many of these laws have been challenged in federal courts, but have been upheld.[144] In *Jones v. Murray*, the Fourth Circuit held that blood can be

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[138] Approximately 24 states have statutes that permit or require certain convicted offenders to submit to DNA fingerprinting by giving authorities a blood sample, and most courts have ruled that these statutes comply with Fourth Amendment requirements. Yee, *supra* note 14, at 466-67, 474.

[139] Yee, *supra* note 14, at 466-67.

[140] *Id.* at 478; DNA Identification Act of 1994, Pub.L.No. 103-322 (1994) (gave the FBI funding and the authority to establish a the National DNA Index System).

[141] *See, e.g.*, KAN. STAT. ANN. § 21-2511 (1996)(mandating that any person convicted as an adult or adjudicated as a juvenile offender for an unlawful sexual act, murder, incest, or child abuse, submit specimen samples for genetic marker grouping analysis and categorization); VA. CODE ANN. § 19.2-310.2 (1996)(requiring people convicted of a felony offense to submit a blood sample for DNA analysis).

[142] *See*, e.g., KAN. STAT. ANN. § 21-2511 (1996); VA. CODE. ANN. § 19,.2-310.2 1996)

[143] Yee, *supra* note 14, at 482, *citing* CAL. PENAL CODE § 290.2(b) (West Supp. 1995).

[144] *See, e.g.* Jones v. Murray, 962 F.2d 302, 308 (4th Cir. 1992)(upholding the constitutionality of VA. CODE ANN. § 19.2-310.2 (1996)); Ewell v. Murray, 11 F.3d 482, 486 (4th Cir. 1993)(upholding the constitutionality of VA. CODE ANN. § 19.2-310.2 (1996)); Gilbert v. Peters, 55 F.3d 237, 239 (7th Cir. 1995)(upholding the constitutionality of 730 I.L.C.S. 5/5-4-3 (1996)); Ryncarz v. Eikenberry, 824 F. Supp. 1493, 1499 (E.D. Wash. 1993)(upholding the constitutionality of Rev. Code Wash. (ARCW) § 43.43.754 (1996)); Schlicher v. Peters, 103 F.3d 940, 943 (10th Cir. 1996)(upholding the constitutionality of KAN. STAT. ANN § 21-2511 (1996)).

obtained for DNA identification from all convicted felons (violent and nonviolent).[145] The court's rationale focused on the possibility that the convicted felons will commit additional crimes, and the ability to identify them using the DNA fingerprint.[146] While DNA is usually not needed to identify nonviolent felons, the court held that law enforcers can still take samples for DNA testing because in the future, law enforcers might find other uses for this DNA information.[147]

The *Jones* court explained that requiring all convicted felons to submit blood samples for a DNA databank does not violate their Fourth Amendment rights because those in lawful custody of the state lose some or all of their Fourth Amendment protections.[148] As convicted felons are in state custody, probable cause should already have been established, and the Fourth Amendment does not require an additional finding of individual suspicion for the purpose of identifying the individuals.[149] In considering the reasonableness of the specimen requirement, the court decided that the government interest in improved methods of identification of felons, especially in light of high rates of recidivism among felons, outweighed the individual's interest against bodily intrusion.[150]

The holding in *Jones* has been followed by Seventh, Ninth, and Tenth Circuits, which have reviewed similar statutes requiring convicted felons to give blood samples for state law enforcement DNA databanks.[151] These state databanks are similar to the DoD Registry, with regard to its limited use for law

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[145] Jones v. Murray, 962 F.2d at 308.

[146] *Id.* at 302.

[147] *Id.* at 308.

[148] *Id.* at 306.

[149] *Id.* at 306-07.

[150] *Id.* at 307.

[151] Gilbert v. Peters, 55 F.3d 237, 239 (7th Cir. 1995)(upholding the constitutionality of 730 I.L.C.S. 5/5-4-3 (1996)); Ryncarz v. Eikenberry, 824 F. Supp. 1493, 1499 (E.D. Wash. 1993)(upholding the constitutionality of WASH. REV. CODE. (ARCW) § 43.43.754 (1996)); Schlicher v. Peters, 103 F.3d 940, 943 (10th Cir. 1996)(upholding the constitutionality of KAN. STAT. ANN § 21-2511 (1996)).

enforcement.[152] These holdings leave open many possible uses for DNA databanks. If these uses are not subject to safeguards, they could lead to discrimination and dissemination of information in violation of an individual's privacy and confidentiality.

III. AN ETHICAL FRAMEWORK FOR ANALYSIS.

In exploring the implications of DNA fingerprinting in the military I employ an ethical analysis that focuses on power relations and context as they relate to the issues raised by the DNA registry.[153] The DNA registry raises both medical issues (because it involves medical technology and decision making) and employment issues, because it is maintained by and for the military. Both medical and employment issues often involve interactions among people who have unequal power.[154] Thus, moral considerations of medical issues, and how they are dealt with by health care providers and employers, must include evaluation of how power relations may affect the relevant interactions.[155] These power relations affect people's willingness to trust others and to follow the directives of others.[156] Because medical information can be used to discriminate against people because of their genome, HIV status, race, etc., medicine is not merely neutral science; medical professionals and the use of medical information can also take on a political role.[157] As power relations are dependent upon what context a person is in, considerations of context are

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[152] The DoD Registry is not limited to military law enforcement purposes, but could make DNA samples available to any law enforcement agency for the specified uses. As samples can be stored for up to 50 years, a civilian law enforcement agency may even be able to obtain a DNA sample for a civilian suspect who was formerly in the military.

[153] *See* SUSAN SHERWIN, NO LONGER PATIENT: FEMINIST ETHICS & HEALTH CARE (1992)(explaining importance of context and power relations in the ethical analysis of medical issues).

[154] For example, a doctor has more "power" than a patient because the doctor has the information the patient seeks, and patients usually do not have the knowledge needed to evaluate the doctors medical decisions.

[155] SHERWIN, *supra* note 153, at 84.

[156] *Id.* at 83.

[157] *Id.* at 88.

also important.[158] Context is crucial to this Article because many of the issues, and certainly the case law, are specific to the military context. The military is different from other employers because it has its own criminal justice system and serves roles in addition to simply that of an employer. These additional roles include health care provider, provider of life insurance, law enforcement, and community for many service members.

A. *Power Relations.*

There are three major dimensions to the power relations regarding the DoD DNA registry. First, the greater majority of active duty patients in the military are subordinate in rank to their military doctors. In the Navy, doctors are often lieutenants or lieutenant commanders, whom subordinates are trained to take orders from and not question. Furthermore, unlike in many civilian scenarios, active duty members receiving health care services from the military do not have a choice of doctors.

Second, because health care providers have medical knowledge that most people are not familiar with, people often trust them to make, or help them make, their very intimate health care decisions. Patients generally do not know enough to question what they might perceive as neutral medical judgment. Despite attempts to give neutral recommendations, and to comply with informed consent requirements, medical providers might not present a case in neutral terms.[159] This is because people's beliefs are often laden with their values.[160] Because the provider decides how to frame each patient's particular scenario, and which information to explain, the provider has more power over

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[158] Marilyn Friedman , *Care and Context in Moral Reasoning*, *in* EVA F. KITTAY & DIANA T. MEYERS, WOMEN AND MORAL THEORY 203 (1987)(explaining that "contextual detail matters overridingly to matters of justice as well as to matters of care and relationships. . . a rich sense of contextual detail awakens one to the limitations in moral thinking that arise from the *minimalist* moral principles with which we are familiar"), *cited in* SHERWIN, *supra* note 153, at 77.

[159] Tom Beauchamp, *Informed Consent*, *in* MEDICAL ETHICS 173, 178-79, 183 (Robert M. Veatch, ed. 1989)(explaining that when doctors obtain "informed consent" they do not always obtain an informed and autonomous decision by the patient).

[160] This is not to say that a health care provider would give a false diagnosis, or would not give the information required to comply with the informed consent requirement. However, when a patient who has the Sickle Cell trait is considering whether or not to have a child, a doctor or genetic counselor who is very risk-averse, or who would like to eradicate the sickle cell trait, might emphasize the risk of passing the trait on to a child and might emphasize the worst prognosis for the child.

the situation than the patient does. Since DNA fingerprinting involves employers, health care providers and technicians, this subtle power dynamic may exist in the military's efforts to obtain samples for the DoD Registry, especially when the service members requesting the samples cannot answer a donee's questions, but nevertheless the donee must obey the order.[161]

Third, power relations are often created because an issue involves a person with more bargaining power, or a person who has traditionally been oppressed. [162] This type of power relationship was evident when eugenicists attempted to improve the human race by sterilizing people of low income, people of color, criminals, and the "mentally incompetent" without their consent.[163] Another example of abuse of power by medical officials occurred in Macon County, Alabama, when public health officials used African American men to study the effects of untreated syphilis.[164] This Tuskegee syphilis study was especially heinous because the 399 subjects who suffered from syphilis were not treated for this fatal and lengthy disease, even though treatment was available.[165]

A third example of misuse of power involves genetic screening for sickle cell anemia, a genetic disorder which, in the United States, predominantly affects people of African American descent.[166] In the early 1970s, several sickle cell screening programs were mandated by state legislatures. Because there were inadequate provisions for confidentiality of the genetic test results, the screening programs led to stigmatization and discrimination in both insurance and

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[161] This was the scenario for Mayfield and Vlacovsky. Mayfield Record, *supra* note 4, at 63, 68.

[162] *See* Sarah Gill, *Discrimination, Historical Abuse, and the New Norplant Problem,* 16 WOMEN'S RTS. L. REP. 43, 43, 46-47 (1994)(discussing oppression of people of color, women, people of low income, and people with disabilities in medical contexts).

[163] *See* PHILIP R. REILLY, THE SURGICAL SOLUTION: A HISTORY OF INVOLUNTARY STERILIZATION IN THE UNITED STATES, chap. 1 (1991)(discussing programs designed to stop allegedly defective genes from flowing into the nation's gene pool by sterilizing people without their consent). From 1907 through 1960, over 60,000 mentally ill and developmentally disabled people were sterilized without their consent. *Id.* at 2.

[164] Patricia King, *The Past as Prologue, in* GENE MAPPING: USING LAW AND ETHICS AS GUIDES, 94, 96-99 (George J. Annas & Sherman Elias eds., 1992)(discussing various instances of discrimination against African Americans by medical institutions).

[165] JAMES JONES, BAD BLOOD: THE TUSKEGEE SYPHILIS EXPERIMENT 1-6 (2nd ed. 1993).

[166] King, *supra* note 164, at 98.

employment.[167] For example, some reports indicated that people carrying the sickle cell trait would collapse during military training or at high altitudes.[168] As a result, for a few years the United States Air Force Academy denied entrance to people with the trait. [169] The trait reportedly affected people's ability to handle low oxygen situations, such as those present while flying.[170] However, this discrimination against African American pilots ended when the military learned that an additional factor must be present in order for a person to contract the disease that would disable them for flight training and a lawsuit forced the Air Force Academy to change their policy.[171]

The power dynamic between the military (as employer and health care provider) and service members, civilian employers and employees, health and life insurers their insureds must be considered. Because service members, employees and insureds need a job, health care, or insurance, they are vulnerable to the requirements and criteria of those who provide for these needs. If an employer requires that female employees be sterilized, the employees may decide to undergo sterilization.[172] If the military or a health insurer requires an insured to undergo an HIV or DNA test, the service member or insured will undergo the test. The service member has little choice as she will be court-martialed if she refuses to obey a superior's lawful order.

Especially due to the hierarchical structure of the military, power relations exist in the military, and thus are pertinent to the issue of DNA sampling in the military. While a civilian can usually quit a job or find new health insurance if a DNA sample is requested, a service member cannot. The service member cannot separate from the military at any moment of convenience, and is required by military law to obey superiors' orders. Furthermore, the military is an

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[167] King, *supra* note 164, at 98.

[168] Douglas Birch, *Genetic Tests Forecast Onset of Inherited Medical Disorders*, AUSTIN-AMER. STATESMAN, May 20, 1995, at E5.

[169] Dean Chadwin, *The DNA War: How Two Marines Fought the Military's Genetic Roundup*, THE VILLAGE VOICE (Greenwich Village, New York), May 14, 1996.

[170] Chadwin, *supra* note 169.

[171] Sinclair Record, *supra* note 2, at 91, 129; Birch, *supra* note 168; C. Holden, *Air Force Challenged on Sickle Trait Policy*, 211 SCI. 257 (1981).

[172] *See* United Auto Workers v. Johnson Controls, 499 U.S. 187 (1991); Oil, Chemical & Atomic Workers Int'l Union v. American Cyanamid, 741 F.2d 444 (D.C. Cir. 1984).

employer and a health care provider for people, and some of these people are from groups that may have less power, at least traditionally; women, people of color, and people of low income.

B. *Context.*

In this Article, I apply an analytical framework which clarifies how a policy or technique will affect the world we live in by considering the contexts in which issues arise.[173] Considering context helps to uncover hidden assumptions that govern interactions between people, groups, and institutions.[174] A common medical practice may seem benign until one examines it in the context of the people and institutions involved.[175] If one fails to consider the context, one might not recognize that some type of power relationship is playing a large role in the scenario. [176]

If the DoD DNA registry were not considered in context, a person might ignore the bargaining power the military has as one of the largest employers in the United States. A person might also ignore that the military plays numerous roles in peoples' lives: employer, health care provider, law enforcer, lawyer, and community. Because the military plays so many of these roles in a person's life, the potential for and possible consequences of genetic information becoming available are tremendous. As I discuss in part IV, genetic information could become available within the military system through health records, law enforcement records, judicial proceedings, or a community group. This information could lead to adverse service decisions, including the possibility that a person could be discharged because he will be too expensive to provide health care for, or because he <u>might</u> contract a disease which is expensive to treat or may affect his job performance.

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[173] *See* SHERWIN, *supra* note 153.

[174] *See Id.*, at 89.

[175] *See generally* Gill, *supra* note 162 (arguing that legislative bills that propose providing incentives for low income women to use Norplant resemble past eugenic practices because the players and means are similar).

[176] SHERWIN, *supra* note 153, at 82. This viewpoint is illustrated by cosmetic surgery. A more traditional medical ethics analysis might focus on informed consent, confidentiality, and allocation of resources. Such an analysis would fail to uncover a major aspect of cosmetic surgery: people, especially women spending their savings to undergo operations which promise to reduce their flaws as dictated by fashion magazines and advertisers. *Id.* at 91. Considered in this context, one should realize that major issues are the social construction of beauty, are voluntariness.

IV. EXAMINING THE MILITARY CONTEXT.

DNA databanks in the military pose a more serious potential for abuse because of the specific nature of the military dynamic: service members do not face simply an employer, law enforcement agency, or health care provider having access to genetic information. Rather, each component is part of the overall military organization. A civilian employee who has private health insurance and requests genetic testing from her doctor probably does not need to fear that her employer will receive the test results. In contrast, in the military, if one part of the military gains access to genetic information, other parts could conceivably gain access more easily than if separate entities were involved. In this section I will explore the risks of genetic discrimination in the military by focusing on these various roles the military has in service members' lives: employer, health provider, law enforcer, and legal service provider. Because the military plays all of these roles in the lives of its service members and their families, it wields a significant amount of bargaining power.

A. *Military as employer.*

1. The military's right to information.

Employers' access to genetic information about their employees creates a potential for abuse because employers may discriminate against people with certain genetic disorders or predispositions. Employers may do this when a person will be extremely expensive to provide health benefits or services for, or when the person may be at risk of developing a debilitating disease in the near future. For example, an individual in the Air Force revealed that he had a genetic propensity (50% chance) to develop Huntington disease. [177] When he applied for reenlistment, he was asymptomatic. Nevertheless, the Air Force discharged him because of his risk status.[178] This case and the sickle cell cases discussed earlier demonstrate that the military could use genetic information to decide not to enlist or retain people with debilitating illnesses, or with the propensity to develop such illnesses. While some genetic discrimination may be justified--when a person cannot meet the physical requirements due to

[177] Geller, *supra* note 6, at 77.

[178] *Id.*

a genetic disease--one must decide what level of accuracy of the test or probability that the person will develop a disorder is sufficient.[179]

As employment with the military is linked with health benefits,[180] an individual who loses his job as a result of a genetic disorder may also lose his health benefits.[181] This close link between employment and health benefits also provides the military with an avenue for learning about the health of its employees. The military-as-employer's access to medical records is reinforced by the fact that the military requires a level of physical fitness for its service positions--some more than others.[182] This often justifies the military in obtaining information about service members' health status, and in transferring or discharging a member who is unfit to perform his duties.[183] Doctors who work for corporations have a very limited legal obligation to keep employees' medical information away from the employer, and military doctors have almost no such obligation.[184] A commanding officer has access to his service members' medical records, and this access is facilitated by the fact that the military rules of evidence do not recognize a doctor-patient privilege.[185]

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[179] *See infra* part V.A. for further discussion of which types of genetic discrimination may be justifiable.

[180] 10 U.S.C. §1074 (Law.Co.op 1995) (the military provides medical and dental care for service members and certain former members).

[181] An individual who developed a genetic condition while a service member was discharged. He was denied disability benefits because his condition preexisted his military service. Sinclair Record, *supra* note 2, at 92.

[182] The military needs to know whether their soldiers are in good enough physical health to be able to carry out missions. A soldier who cannot perform her job can be a liability to the others in her unit, and can also make a mission fail.

[183] If the employee is forced to retire because of a disability resulting from performing his duty, then the employee will receive retirement benefits. 10 U.S.C. §1204 (Law.Co.Op. 1995).

[184] Elaine Draper, *Social Issues in a Genetic Age, in* SPECIAL SUPPLEMENT: *Genetic Grammar*, 22 HASTINGS CTR. REP. S15 (1992).

[185] Mil. R. Evid. § 501(d) (Manual for Courts-Martial, 1995 ed.).

A number of authorities support the employer's right to know about an employees' health status.[186] A Virginia statute allows an employer to obtain the medical file of an injured employee.[187] The American Occupational Medical Association Code of Ethical Conduct even states that employers are entitled to medical information about an employee if the information is related to their ability to work.[188] This disclosure is often justified by an employer's need to assess a worker's ability to perform a certain function and to promote overall workplace safety.[189]

What is the scope of the military's right to information about a service member's health? Might the military decide to write a new policy which permits the use of samples from the DNA registry to test for diseases? A bill passed by the House of Representatives on May 15, 1996, requires the discharge of all HIV-infected service personnel (HIV testing of all personnel is already required).[190] If such a bill is enacted, perhaps a similar bill could be enacted regarding genetic testing for diseases. The military has a compelling interest in ensuring that service members are physically fit and able to perform their functions. This compelling interest could involve turning away recruits and discharging service members with certain genetic diseases.[191] Such a policy must be carefully scrutinized in order to protect against policies that could unfairly discriminate against people with certain genomes, or that could be a subterfuge for race discrimination.

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[186] Lori B. Andrews & Ami S. Gaeger, *Confidentiality of Genetic Information in the Workplace*, 17 AM. J.L. & MED. 75, 94 (1991); *see also* Barry Brown, *Genetic Testing, Access to Genetic Data, and Discrimination: Conceptual Legislative Models*, 27 SUFFOLK U. L. REV. 1573 (1993).

[187] Andrews, *supra* note 186, at 95.

[188] *Id.* at 95.

[189] *Id.* at 86-88.

[190] Norman Kempster, *House OKs Defense Bill That Calls for Reviving Homosexual Ban*, L.A. TIMES, May 16, 1996, at A11.

[191] The court in *Mayfield* held that because people give up an expectation of privacy by joining the military, and the contract specifies that military laws are subject to change, military personnel will be disciplined if they refuse to give samples for DNA fingerprinting. Mayfield v. Dalton, 901 F. Supp. 300, 303-04 (D. Haw. 1995).

In *Betesh v. United States,* the military conducted a physical examination in considering Betesh for enlistment.[192] Betesh's chest x-ray revealed that he had an abnormal but treatable condition. The military denied Betesh enlistment, but did not inform him of his condition. Instead, they told him to return for re-examination in three months. The court held that the military had a duty to tell Betesh of his condition. This, however, was because the doctor formed a "doctor-patient" relationship with Betesh by telling him to return for a follow up exam in three months. Had no relationship existed, the court might have ruled that the military was only using the information to determine if he was qualified for enlistment, and thus had no duty to inform him of his condition.[193] This case demonstrates the military's established interest in knowing about the health of its members, not only for the sake of the member, but primarily for the military's enlistment and commissioning purposes. Based on this ruling, the military may have a legally justified interest in the outcome of certain genetic tests for hiring purposes.[194]

2. The limits to the employer's right to information.

Numerous laws now exist to prevent employers from denying employment to people who have certain diseases or susceptibilities.[195] While they may not specifically apply to the military,[196] they provide an example of the issues legislators and judges are concerned with. These examples could provide the military policy makers with guidance in this new arena of genetic information. Furthermore, genetic information about people who leave the military to work in civilian jobs may become accessible to their new health insurers, health

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[192] *See* Betesh v. United States, 400 F. Supp. 238 (D.D.C 1974).

[193] Andrews, *supra* note 186, at 89.

[194] Even though the ruling says to the contrary, it seems unethical for a medical examiner to learn that a person has a treatable condition and not inform that person. This issue would be more complicated with genetic testing: if the tests merely show a propensity to develop a disease, or that a person will develop cancer before the age of 40, would the examiner have an ethical duty to disclose such test results? Should the patient have a right to this information?

[195] OR. REV. STAT. § 659.227 (1993); IOWA CODE § 729.6 (1992); WIS. STAT. §§ 111.372; 631.89 (1991); R.I. ch. 171 (1992) 92-H-8182; Cal. Health and Safety Code §§ 150, 151, 555, 309, 341 (West 1990); FLA. STAT. ANN. §§ 385.206 and 488.075 (1993); N.J. STAT. ANN. § 10:5-12a (West 1982); LA. REV. STAT. ANN. § 462:254 (West 1982).

[196] Civilian courts are weary of tampering with the military's authority, especially regarding issues related to personnel matters. Chappell v. Wallace, 462 U.S. 296, 300-01 (1983); Coffman v. State of Michigan, 914 F. Supp. 172, 175 (W.D. Mich. 1995).

providers, and employers. Thus, many service members will eventually be affected by laws pertaining to civilian employment.

Though denying employment to people who merely are susceptible to injury from employment hazards might sound illogical, this has already occurred numerous times with fetal protection policies. Companies such as Johnson Controls and American Cyanamid told women of reproductive age that in order to retain their jobs which exposed them to lead, they would have to be sterilized.[197] These policies existed even though there was only a possibility that a female employee would carry a fetus, and only a possibility that the fetus would be damaged by the mother's exposure to lead. These policies were eventually deemed an illegal form of sex discrimination by the United States Supreme Court.[198] However, other policies that prevent the employment of people with a propensity for injury in the workplace might be legal if they are not forms of illegal discrimination.

Title VII of the Civil Rights Act prevents employers from discriminating against individuals on the basis of race, color, sex, religion, or national origin.[199] As courts have already interpreted Title VII as permitting a cause of action from members of a group, courts might consider a cause of action for discrimination against a group of people with a common "bad gene."[200] A number of states have specifically addressed the risk of employers discriminating against employees on the basis of genetic information. Oregon, Iowa, Wisconsin, and Rhode Island have legislation which prevents or restricts genetic testing by employers and prohibits employers from using susceptibility to genetic diseases in employment decisions.[201] California, Florida, New Jersey, and Louisiana all have legislation that protects people with gene-specific diseases and

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[197] *See* United Auto Workers v. Johnson Controls, 499 U.S. 187 (1991); Oil, Chemical & Atomic Workers Int'l Union v. American Cyanamid, 741 F.2d 444 (D.C. Cir. 1984).

[198] United Auto Workers v. Johnson Controls, 499 U.S. 187 (1991)

[199] 42 U.S.C. § 2000e et seq.

[200] Michael Landau, *Use of Genetic Testing By Employers and Insurance Companies*, 3 DICK. J. ENVTL. L. & POL'Y. 105, 108 (1994).

[201] OR. REV. STAT. § 659.227 (1993), IOWA CODE § 729.6 (1992), WISC. STAT. §§ 111.372, 631.89 (1991), R.I. ch. 171 (1992) 92-H-8182.

hereditary conditions.[202] The New York Civil Rights Law of 1990 forbids an employer from denying equal opportunity for employment or advancement because of a genetic disorder.[203] However, the law excepts situations where the employer can demonstrate that the disorder would clearly prevent the employee from performing his job.[204] The existence of these laws demonstrates the reality of employers obtaining genetic information about their employees and using this information to discriminate against certain people without the justification of a compelling interest.

In 1990, President Bush enacted federal legislation to prevent discrimination against people with disabilities, the Americans with Disabilities Act (ADA).[205] Title I of the ADA prevents employers from discriminating against qualified employees with disabilities. The employer is required to make reasonable modifications to accommodate the employee. Unreasonable accommodations would include those that would cause "undue hardships" to employers.[206] The ADA does not specifically address the case of an employee who is healthy at the time of hiring but a genetic test reveals that in five years she will not be able to perform her job, even with reasonable accommodation.[207] Such a case would involve a conflict between the employer's desire to invest in his workers efficiently, and an individual's need or desire to work. This case is especially complicated in the context of a market where jobs are in high demand.

While the Americans with Disabilities Act of 1990 does not apply to federal government employees, the Rehabilitation Act of 1973, which also prohibits

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[202] CAL. HEALTH AND SAFETY CODE §§ 150, 151, 555, 309, 341 (West 1990), FLA. STAT. ANN. §§ 385.206 and 488.075 (1993), N.J. STAT. ANN. § 10:5-12a (West 1982), LA. REV. STAT. ANN. § 462:254 (West 1982), *as cited in* Landau, *supra* note 200, at 108, fn. 21.

[203] McEwen, *supra* note 9, at 641.

[204] While many jobs do not require physical ability, many military jobs do. Thus any disorder that would hinder a person's physical ability, or that creates a potential for periods of severe illness, might fall under this exception in the military context.

[205] 42 U.S.C. §§12101-12213 (Supp. V 1993). The ADA does not allow medical screening of job applicants, though it does permit medical examinations after an employer makes a conditional employment offer. The same examination must be given to all new employees. Landau, *supra* note 200 at 109.

[206] 42 U.S.C. § 12112(5)(A) (Supp. V 1993), *as cited in* Landau, *supra* note 200, at 109-10.

[207] *Id.*

discrimination against people with disabilities, does.[208] However, courts will rarely interfere with the military's authority, especially regarding personnel matters.[209] Civilian courts are especially reluctant to tamper with the authority of the military to establish physical qualifications because, "[t]he military constitutes a specialized community governed by a separate discipline from that of a civilian."[210]

A Wisconsin law addresses some of the employment issues by prohibiting employers, labor organizations, and agencies from requiring, requesting, or administering genetic tests as a condition of employment.[211] The law also prohibits anyone from selling genetic information to employers, labor organizations, and agencies, and prohibits these entities from terminating an employee due to a genetic test. However, the law allows these entities to test an employee for susceptibility or exposure to toxic substances if the employee requests and consents to the genetic testing.[212] This provision may hinder the law's ability to protect employees as one can imagine many employees having little bargaining power when an employer asks them to request and consent to genetic testing.

The military could conceivably use its DNA registry to identify members who might have health risks or who might develop diseases rendering them no longer physically qualified. While this could be interpreted as unlawful or, at minimum, unethical discrimination against people with disabilities, others might accept that the military has an interest in hiring and promoting only the most physically non-restricted people who are not prone to develop physical disorders. This type of policy might be very efficient; the military would not have to

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[208] 42 U.S.C. § 12111(5)(B); 29 U.S.C.A. §§ 791-94. (Supp. v 1973). *See* Taylor v. Secretary of the Navy, 852 F. Supp. 343, 357 (E.D. Pa. 1994)(Naval shipyard violated the Rehabilitation Act by refusing to provide permanent light duty to a worker suffering from a work-related injury); Wilson v. West, No. 05950309, 1996 W.L. 562779, at 4(E.E.O.C. 1996) (Department of the Army violated the Rehabilitation Act by not promoting a criminal investigator because of his back arthritis and knee injury, even though the investigator did not need accommodation).

[209] Chappell v. Wallace, 462 U.S. 296, 300-01 (1983); Coffman v. State of Michigan, 914 F. Supp. 172, 175 (W.D. Mich. 1995).

[210] *See* Smith v. United States Navy, 573 F. Supp. 1361, 1365-67 (S.D. Fla. 1983)(refusing to challenge the Navy's physical requirements for commissioned Medical Service Corps officers).

[211] McEwen, *supra* note 9, at 640.

[212] *Id.*

provide the more expensive health care services needed by these people and it would not invest expensive training in people who might only be able to perform their jobs for a short period. As Congress continues to limit the military's budget, and as the military has become more sensitive to its use of the limited tax dollar, interest in such policies increases. These types of policies, if left unchecked, could be dangerous, as they could easily lead to unreasonable or unlawful discrimination. One must consider whether efficiency justifies screening out people who might actually be capable of being productive service members with a limited level of accommodation.

B. ***Military as health care provider.***

While most of the potential harms that could result from access to information about an individual's genome tend to fall under the employer category, harms can also occur in other contexts which the military controls. The military provides medical and dental care for its service members and their dependents.[213] As discussed above, this could present problems if the military health providers disclose a member's medical information to the member's superior or anyone with the authority to recruit, evaluate, promote, or terminate her. The DNA registry also raises questions regarding reproductive decision making, the doctor-patient relationship, confidentiality, and the right to information about one's genome.

Problems are raised by this connection between employer and health care provider because the health care providers know that the military requires DNA samples for purposes of identifying dead bodies and criminals. Knowing how accessible patients' DNA samples are, the health providers might want to conduct certain genetic tests in order to better care for a patient.[214] For example, if there is a history of hypertension in a patient's family, the doctor is alerted that the patient might have a certain condition. By conducting a genetic test, the provider might be able to confirm whether or not the patient has the condition. While this benefits the patient who can receive preventive treatment, it could be counter to the interests of a patient who does not want to know what diseases his genome predicts he will suffer from.

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[213] 10 U.S.C. §1074 (Law. Co-op. 1995) (medical and dental care for members and certain former members); 10 U.S.C. §1076 (1995) (medical and dental care for dependents).

[214] Currently, this use of the DNA registry would not comport with DoD policy. However, in the future, the DoD could decide to permit such uses.

This test also might alert the military that this individual will be very expensive to provide health care for, or will not be able to perform his job for more than a few years. In civilian contexts, this type of situation would be further complicated by uncertainty regarding to whom the doctor owes a duty to in a case of conflicting interests.[215] However, in the military context, the doctor has a clear duty to the military and there is no doctor-patient privilege.[216] As the military provides for the health care of its service members and their dependents, they are ever conscious of health care costs. Given the rapid increase in the cost of health care, the military may decide that people with certain genetic disorders are simply too expensive. Such a decision could prompt a policy that requires screening of all DNA samples for certain diseases, and refusing enlistment to individuals with such diseases.[217]

The military, being a health care provider and knowing that genetic information is available, might want to learn if a pregnant woman has any genetic diseases or traits. The military might want this information because it will be paying for the health care of the woman and her newborn. In one notable case, a health maintenance organization told a pregnant woman whose fetus tested positive for the cystic fibrosis gene that it would pay for her to abort the fetus, but would not insure the infant after its birth.[218] While this may be surprising to some, bioethicists have feared such policies for years.[219] Doctors have long attempted to control women's bodies and pregnancy.[220] In the past,

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[215] *See generally* Martha Minnow, *Who's the Patient?*, *in* HEALTH CARE REFORM: MEETING COMMUNITY NEEDS (1993) (discussing conflicting duties of doctors).

[216] Mil. R. Evid. § 501(d) (Manual for Courts-Martial, 1995 ed.).

[217] The American Council of Life Insurance (ACLI) has stated that, like other medical information, genetic information provides insurance companies with more accurate calculation to use for setting insurance premiums. The ACLI maintains that excluding people based on their propensity to develop disease, as demonstrated by genetic tests, is justifiable and "good business" because it limits costs. Michael Pezzella, *Court-Martial Looms for Air Force Sergeant Who Refused to Give DNA*, BIOTECH. NEWSWATCH, May 6, 1996, at 1; Carol Jouzaitis, *Military Faces Dilemma Over Genetic Registry*, CHI. TRIB., Apr. 12, 1996, at 4.

[218] Jouzaitis, *supra* note 217.

[219] *See* Abby Lippman, *Mother Matters: A Fresh Look at Prenatal Genetic Screening*, 5 ISSUES IN REPRODUCTIVE & GENET. ENGINEERING 141 (1992); Benjamin S. Wilford, *Screening Policy for Cystic Fibrosis: The Role of Evidence*, *in Special Supplement*, 25 HASTINGS CTR. REP. S21, S23 (1995).

[220] *See* BARBARA KATZ ROTHMAN, THE TENTATIVE PREGNANCY (1989).

eugenicists attempted to prevent the births of people of color and people with mental disorders.[221] Prenatal genetic screening gives doctors and society the knowledge and ability to tell women which fetuses are worth giving birth to and which are not.[222]

Another aspect of the military-as-health-provider context which merits consideration is its effect on the doctor-patient relationship.[223] Military health providers who treat service members are working as agents of the military when they obtain tissue samples for the DNA registry. To provide good care, health care providers need to develop a pleasant and trusting provider-patient relationship with the members. Requiring the providers to obtain samples in the interest of the military, and with no informed consent procedure, may create hostility within the health provider-patient relationship. Hostility could increase the barrier between the provider and the patient which has already been created by the lack of confidentiality in the relationship. As a result, a member might feel even less comfortable disclosing health problems to a provider for fear that the provider will then turn and pass this information to the military-as-employer.

As medical technology is providing people with more and more information about their current and future health statuses, perhaps the military should consider establishing a requirement of confidentiality and a corresponding legal privilege between health care providers and service members. Regarding the confidentiality of genetic information, the military could look to laws that specifically address this issue. A New York State bill requires that information from genetic testing be kept confidential.[224] The bill specifies that the information is the exclusive property of the individual tested and can only be disclosed with that person's consent. Confidentiality provisions such as this would help to safeguard against possible conflicts of interest caused by the military's role as an employer, health care provider, and insurer.

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[221] *See* Reilly, *supra* note 163, and corresponding text.

[222] This can be especially problematic when it exacerbates discrimination against people with disabilities. *See* Lippman, *supra* note 219; THE HASTINGS CENTER, *supra* note 219.

[223] *See* Howard Brody, *The Physician/Patient Relationship, in* MEDICAL ETHICS 65 (Robert M. Veatch, ed. 1989)(discussing different ethics of patient care and different models of the physician-patient relationship).

[224] S.B. 1191, 215th Gen. Assembly, 1st Reg Sess, 1993 NY Laws, *as cited in* Brown, *supra* note 186, at 7.

The DNA registry also raises the issue of a person's right to information. Once an individual has given a tissue sample to the registry, and knows that numerous genetic tests could be conducted on the sample, perhaps the individual has a right to the information that could be obtained from the tests. If genetic tests become simple and inexpensive, perhaps the person has a right to request that certain tests be conducted. At what point does a person have a right to know about her own genome? Theoretically, this right should exist once knowledge would be useful for disease prevention or treatment, and if prevention or treatment techniques are available to the individual. However, this type of decision would probably be based on the cost effectiveness of the test, the possibility for prevention or treatment of disease as a result of the test, and the lobbying ability of people with certain diseases.

C. *Military as law enforcer and legal service provider.*

The military provides legal services and police who are responsible for enforcing military laws and providing legal advice. Just as civilian law enforcers and lawyers use DNA fingerprints to assist them in investigating and prosecuting criminals, so may military law enforcers and lawyers.[225] Though the DNA registry was initially created for the military-as-employer for the identification of human remains,[226] its use for the military-as-law-enforcer has also been authorized.[227] While the information in the DNA registry could be extremely helpful for law enforcement, it also presents some risks. One risk is that a scientifically inaccurate DNA test could falsely identify an individual as a perpetrator of a crime. Not only could this person be wrongly convicted for a crime, but he might also be wrongly discharged. Another risk is that providing law enforcement with access to the genetic information increases the risk of a breach of confidentiality.

V. CONCLUSION: SUGGESTIONS FOR SAFEGUARDS.

In part IV, I illustrated a variety of possible uses of genetic information in the various military contexts. Some of these uses could be judged as valuable, some could be judged as harmful, but often such value judgments are difficult to make. In concluding this Article, I will attempt to categorize as negative or

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[225] United States v. Youngberg, 43 M.J. 379, 388 (1995).

[226] Memorandum, Dec. 1991, *supra* note 5.

[227] Memorandum, Apr. 1996, *supra* note 7.

positive these actual uses and potential future uses of genetic information. In this conclusion I will also propose legislation that illustrates what safeguards could be used to prevent harmful uses of DNA information. This proposed model statute may address some of the fears expressed by Mayfield, Vlacovsky, and Sinclair which motivated them to risk jeopardizing their careers and their GI Bills in order to withhold their DNA from the registry.

A. *Judging genetic information.*

As I have already discussed, the United States has a history of oppression of different groups of people, and thus the possibility of genetic discrimination is very real. Many people have already experienced genetic discrimination by employers and insurers.[228] The fear of such discrimination has been demonstrated and addressed by the enactment of the various state laws discussed throughout part IV. The Genetic Privacy Act has been proposed because genetic information is more revealing and personal than most other types of information about people.[229] A person's genome can provide information regarding his present and future health, and information about the health of that person's family members.[230] Because DNA samples can be stored for an extended period of time, the sample can provide new and perhaps unanticipated information as more genetic tests become available.[231] For all of these reasons, safeguarding genetic information is especially crucial.

Once safeguards are in place, the DNA registry would fall under what I will label as the positive uses category.[232] The ability to identify human remains and criminals benefits society and is facially[233] neutral. This benefit outweighs the small risks of harm that will still exist once safeguards are in place. The

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[228] Geller, *supra* note 6, at 125.

[229] Fox, *supra* note 48, at 2317.

[230] *Id.*

[231] *Id.*

[232] "Positive uses" are uses of genetic information that are ethically justifiable because they promote a significant interest and have a low risk of being used for unreasonable genetic discrimination.

[233] The purpose of identification is neutral on its face but not neutral if DNA information is used for different purposes, such as only incriminating criminals of a certain race, or while identifying human remains also examining the DNA for diseases that could have been passed to children. These types of uses should be prevented by safeguards.

small risks are (1) that a test might not be scientifically accurate, and (2) even if a thorough plan is implemented to guarantee confidentiality of DNA records, there can still be violations of confidentiality, through unavoidable human error if nothing else.

A second potentially positive use which probably has a wider margin or possibility for harm is the identification of service members who have a disease that makes them prone to seizures, or a similar debilitating effect. Genetic information about such risk-creating diseases could be used to bar members from certain jobs--flying planes, operating heavy machinery--where there exists a rather high possibility that the effects of the disease could cause the service members to severely injure themselves or others.

The margin for harm in this case lies in determining when the effect of the disease is serious enough to warrant limitations on service opportunities. This margin could be minimized if testing for a disease is permitted after an enlistment or commission decision has been made, once the individual is being considered for the specific task that could result in the individual placing human lives in unreasonable danger.[234] The person could then be considered for another active-duty position where fewer lives would be endangered by her condition. The problem with this option is that enlisting or commissioning a person with severe service limitations might render the person non-deployable. During deployment, there are few positions where a member's incapacity would not put others at risk. Enlisting or commissioning non-deployable people would benefit people with disabilities but may be an unappealing option to many in the military. This option could be damaging to morale because it could lead to the creation of a non-deployable class--a class of people who would train and work with deployable members but would never themselves have to face the risks of war.

As suggested above, testing people for genetic diseases in order to screen out people who will incur high medical expenses is a policy the military could eventually decide to adopt as it provides health care to service members. Because the military-as-health-care-provider functions similarly to a health insurance provider, the aforementioned use is parallel to the use of genetic tests by insurance companies who deny coverage to people who will require certain

[234] For example, the military should not be able to test all applicants for a disease that causes a person to have seizures frequently. Intruding on the genetic privacy of the numerous people whose jobs would not be affected by this ailment seems unnecessary. However, once people apply to a specific program such as flight school, where the ailment is highly relevant, testing may be justified.

medical treatments, thereby incurring high costs. These uses fall into my negative category[235] and should be prohibited. This categorization is based on an underlying assumption that all individuals deserve health care. As our health care system is dependent on health insurance (or a large group indemnifying its employees, as the military does), health insurance, or the indemnification group, should distribute risk and thereby enable all people to have access to medical care. Neither insurance companies nor the military should be able to insure/enlist only the healthiest people as a means for securing the highest level of profit or lowest level of cost. While an argument can be made that the insurance companies are businesses and insuring the healthiest people is a wise business decision, the military is not in this type of business, but is in the defense business. The military should select people according to who will be most qualified for their jobs, not according to who will have the cheapest health care needs.

The military may want to test members or recruits for future susceptibility to genetic diseases. Whether this information would be used for saving costs, or for preventing injuries (for example, when a person will develop a propensity to have frequent seizures in five years), it should be prohibited. Only when the person actually has a disease is it pertinent to their ability to perform their duties. Though I sympathize with the argument that the military may not want to invest large amounts of money to train a person to fly planes if she might not be able to fly planes in five years, this presents too high a margin for harm, at this time, because there are too many unanswered questions: Which diseases pose a significant enough threat? What margin of error in testing is acceptable? What level of probability that the person will develop symptoms is high enough? Will a cure or treatment be developed before the person actually develops the symptoms or contracts the disease? Genetic testing is not an exact science. When the tests are perfected, probabilities become certainties, and people have carefully analyzed the ramifications of such a policy, then perhaps the margin for harm in this case would be eliminated.

B. *A Proposal for Legislation.*

The National Institutes of Health's Ethical, Social and Legal Implications division of the Human Genome Project has proposed a federal law to provide

[235] "Negative uses" are uses of genetic information that are not ethically justifiable because they do not promote a significant interest and have a high risk of being used for unreasonable genetic discrimination.

some safeguards for information controlled by federal agencies: the Genetic Privacy Act.[236] This law prohibits analysis of a person's DNA sample without that person's written approval, specifies who can access or collect the data, allows people to order the destruction of their DNA samples and database "entries," and allows people to deny the use of their genes for research.[237]

A number of laws and proposed laws dealing with genetic information recognize genetic information as an individual's property.[238] Though one does not need property rights in order to assert a right to have information be confidential, or to have a contractual right, a property right might be a signal to others that these rights should be respected for genetic information. The property right also strengthens a person's sense of agency with regard to her genetic information. A person who might otherwise feel intimidated when an employer or insurer requests a DNA sample might feel more empowered if she knows that she does have a property right in her genome which gives her, and no one else, agency. Once people respect that individuals have a property right with respect to their genome, individuals can more easily refuse to give genetic material,[239] and insist that any disclosure of genetic information require authorization.[240] The restatement of property states that a person has "rights, privileges, powers, and immunities in relation to others with respect to his genetic information."[241]

Legislation must be enacted that specifically governs the military's use of genetic information. Congressman Joseph Kennedy introduced a bill on January 24, 1996, intended to limit the use of the DoD DNA Registry to identification of human remains.[242] The bill states that in order to use an

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[236] Human Genome Privacy Act, H.R. 2045, 102nd Cong., 1st Sess. (1978).

[237] *Id.*

[238] *See*, e.g., Florida Statute 760.40(2)(a) (1992) as cited in HUGH L. KOERNER, *Criminal Law: 1992 Survey of Florida Law*, 17 NOVA L. REV 189, 106, note 143 (1992); Proposed NY Senate Bill I 1991.

[239] Catherine M. Valerio Barrad, Genetic Information and Property Theory, 87 NW.U.L.REV. 1037, 1059, 1059 (1993)

[240] Fox, *supra* note 48, at 2317.

[241] Barrad, *supra* note 239, at 1058, *citing* RESTATEMENT OF PROPERTY.

[242] H.R. 2873, 104th Cong., 2nd Sess. (1996).

individual's DNA information for other purposes, the DoD must obtain the individual's consent. The bill also requires that a DoD health care professional notify an individual before taking a sample for the registry. This bill addresses two of my major concerns, however, legislation that elaborates on the informed consent and notice requirement would also be helpful.

People do give up many rights, especially privacy rights, when joining the military. However, providing service members with notice about the DNA sampling requirement before they sign a contract and with informed consent at that time and at the time the sample is taken may be within the purview of the rights that service members retain. Notice and informed consent would not in any way hinder the DNA sampling process. It may simplify it because people would not be taken by surprise and thus decide to disobey the order, as Mayfield, Vlacovsky, and Sinclair did.

The following is a draft of a law that I would propose to address the issues raised by the DoD DNA Registry and protect against discriminatory or other oppressive uses of genetic information:

(1) Collection and Destruction of Samples

a. Military personnel must give blood and tissue samples ("samples") for the DoD Registry. Failure to do so constitutes an orders violation and may result in adverse administrative or punitive action.
b. Genetic information about an individual is the property of that individual at all times.
c. Once an individual separates from the military, s/he can order destruction of any DNA information without any adverse actions.

(2) Informed Consent and Notice

a. <u>For those on active duty before the enactment of this legislation</u>:
(i) DNA samples can be obtained for the registry only after the individual has signed an informed consent form which details exactly what the DNA information will be used for, now and in the future.[243]

[243] This is an area that gives me much difficulty, as, in effect, it requires people to give DNA samples even though they entered the military with no notification that this would be a requirement.

(ii) If a vastly different [244] but justifiable future use becomes desirable that was not included in the consent form, a new consent form must be signed before this use can be carried out. A person who chooses not to consent will be addressed according to the degree and legitimacy of the military's interest in this use of genetic information versus the margin for harm posed by the use.
(iii) Informed consent must be obtained from the individual before his/her samples are used for genetic research. An individual can deny the use of his or her samples for genetic research without penalty.

b. For those who entered active duty after the enactment of this legislation:
(i) Samples can be obtained for the DNA registry only if the individual was informed about this requirement BEFORE signing the enlistment contract.[245]
(ii) This informed consent must include discussion of the past, present and possible future uses of genetic information. The consent form must also state exactly what the DNA information will/could be used for.[245]
(iii) If a vastly different future use becomes desirable that was not included in the consent provision of the contract, a new consent form must be signed before this use can be carried out. A person who chooses not to consent will be penalized according to the degree and legitimacy of the military's interest in this use of genetic information versus the margin for harm posed by the use.

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[244] This is intentionally broad in order to allow for the military's broad purview and people's understanding that they give up rights when they join the military. However, certain "vastly different" uses would not fall under this purview, such as screening female personnel for the BRCA1 gene to determine whether they will develop breast cancer. This type of decision should be made by the individual, as not everyone is ready to know that they have an 87% chance of dying from breast cancer in a certain time span. Lerman, *supra* note 10.

[245] At this point, the military should bear the burden of notifying people before they sign their contracts if they expect them to give samples. The military has no compelling reason not to notify people, so at this point if they fail to notify someone, that person should not be penalized for the military's mistake.

[246] Even though people do realize that they give up many individual liberties and privacy rights when they join the military, specifying this loss of privacy in the contract would prevent further lawsuits and would allow people to decide if they would prefer not to join the military for this reason. Perhaps people who know that their family has a history of having a certain genetic disorder will decide that the risks of discrimination are too great.

(iv) Informed consent must be obtained from the individual before his/her samples are used for genetic research. An individual can deny the use of his or her samples for genetic research without penalty.

c. The following should be prohibited:
i) genetic testing for a disease that might or will render the person physically unable to perform her job,[247]
ii) genetic testing for a disease that might or will require expensive medical care, and
iii) genetic testing for future susceptibility to a disease.

d. The following should be permitted:
i) genetic testing that reveals only the information necessary for identification, and is used for (a) identification of human remains or (b) law enforcement purposes. Law enforcement should only have access to DNA information if they have a subpoena, military search authorization, or court order.
ii) genetic testing (which is considered scientifically accurate by the medical community) for a disease which could render a person dangerous to himself/herself and others, and no reasonable accommodation can be made to remove the danger.

(3) Confidentiality

a. As required in the Privacy Act of 1974, 5 U.S.C. § 552a, the confidentiality of genetic information must be protected. People who have access to genetic information must only disclose the information to individuals who are authorized because they require the information to carry out the goals as stated in the consent forms described in sections 2.a. and 2.b..

b. As required in the Privacy Act of 1974, 5 U.S.C. § 552a, breaching confidentiality, or being an accessory to such a breach, may result in criminal liability. The criminal penalty should recognize the degree of possible harm, and the need to deter this behavior. The sentence should include a minimum jail term and permanent criminal record.

[247] This type of requirement is based on the fear of damaging someone's career based on test results which could be wrong. Once genetic tests become more precise, this clause might have to be deleted.

This proposed law is the beginning of a process that can safeguard service members from genetic discrimination. There are many issues remaining which I have not answered in this paper or with this proposed legislation. First, who should be making the decisions? Congress, the DoD, a panel of health professionals or military or political representatives? Second, what should the penalty be for refusing to consent to genetic testing, for identification or other purposes? I have suggested that a person who chooses not to consent should be penalized according to the degree and legitimacy of the military's interest in this use of genetic information versus the margin for harm posed by the use. However, should a person who refuses to give a DNA sample not be allowed employment with the military? These are questions which are important but beyond my goal of demonstrating the need for safeguarding the DoD DNA Registry, and proposing legislation which enacts the safeguards which are needed as we enter this new era of genetic technology.

SEXUAL HARASSMENT IN THE UNITED STATES NAVY: A NEW PAIR OF GLASSES

*Kristin K. Heimark**

I. THE AMERICAN WAY: A PRE-INTRODUCTION.

The Convention on the Elimination of all Forms of Discrimination Against Women[1], per article 7, prohibits discrimination in public life. On reading the article, it may not be immediately apparent that women's exclusion from military service would constitute a violation of the Convention and therefore a violation of the human rights of women. However, as Rebecca Cook observes, "Women have few prospects of equality with men where they

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* *The positions and opinions stated in this article are those of the author and do not represent the views of the United States government, the Department of Defense, or the United States Navy. The author received her LL.M. from the London School of Economics in 1996, and a LL.B (Hons) from the School of Oriental & African Studies, at the University of London, in 1994. Ms. Heimark served in the United States Navy from 1982 to 1991, rising to the rate and rank of Quartermaster First Class. Her duty assignments included serving on board the USS LEXINGTON (AVT 16), and at Fleet Operations Control Center-Europe, London, UK. This article was originally done in partial fulfillment of the requirements for the LL.M. degree at the London School of Economics. This article was edited by LCDR Dave J. Gruber, JAGC, USN.*

[1] The Convention on the Elimination of Discrimination Against Women was adopted by the United Nations General Assembly in December, 1979. It has been ratified by more than 144 countries, but not by the United States. President Carter signed the convention in 1980, but it was not ratified by the Senate prior to Carter's loss in the 1980 presidential election. Presidents Reagan and Bush did not seek Senate ratification. President Clinton's attempts at ratification have proved unsuccessful, with Senate opposition being led by North Carolina Senator Jesse Helms. The convention requires equal rights to work, pay and benefits for women, and safe working conditions. It also prohibits discrimination against women in political activities and would establish a minimum age for marriage. United States Secretary of State Madeline Albright recently commented that "it is long past time for Americans to become party to the Convention and added that she will incorporate the concerns of women into the mainstream of American foreign policy." Sonya Ross, *Albright Will Press for Signing of U.N. Equal Rights Treaty*, ASSOCIATED PRESS WORLDSTREAM, Mar. 12, 1997. *See also* Joan Beck, *Albright's Push to Bring Women's Issues to the Foreign Policy Forefront Applauded*, CHI. TRIB., Mar. 27, 1997, at 31.

are legally excluded from Military careers of advancement."[2] This rings particularly true for American women, and the reason for it lies at the heart of American society. Enshrined in the Constitution is the "Right to Bear Arms"[3] and (white) American men have exercised that right from the American Revolution to the "taming" of the West, to the "winning" of the Cold War and in the protection of the middle class in the current "war" on street crime. The legitimate use of firepower is part of the American ethos, and, rightly or wrongly, it gives to those who are sanctioned by the state to use it virtually instant credibility and authority; and this applies equally to both the active-duty as well as to the retired "warrior." African-American leaders of the past fought, and today's feminists fight, for integration into all areas of the military because they understand that the "long standing connection between military service and full citizenship centers not on uniforms but on weapons."[4] As Kenneth Karst points out, "if eligibility for the warrior class typically has defined the class of people who are seen as qualified to participate fully in the responsibilities of citizenship, surely the explanation rests less on gratitude than on firepower."[5] Until women are accepted into the military's "warrior" class, and into those positions which include control over firepower, they will be, to a large extent, excluded from positions of authority in public life.

The United States' exclusion of women in combat was rescinded by the Secretary of Defense in 1993. The United States Navy has since spent millions of dollars re-fitting ships and shore stations implementing these material changes to uphold the directive. Additionally, the United States Supreme Court, by a 7 to 1 majority, held that Virginia's maintenance of the Virginia Military Institute (VMI), a college exclusively for males, violated the Fourteenth Amendment's Equal Protection Clause.[6] Although these legal breakthroughs should indeed be celebrated, the question remains whether or not these advancements alone will offer substantive change to the lives of American women. Will this change in the law be enough to finally give women true equal opportunities for promotion

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[2] Rebecca Cook, *Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women*, 30 AM. J. INT'L L. 643, 692 (1990).

[3] U.S. CONST. amend. II.

[4] Judith Stiehm, quoted by Kenneth Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 UCLA L. REV. 499, 525 (1991).

[5] *Id.*

[6] United States v. Virginia, 116 S.Ct. 2264 (1996).

within the military and to receive the full benefit of that service upon discharge?

II. INTRODUCTION.

For an institution which has fought no major sea battles for 50 years and can proudly boast not an admiral killed in combat since 1944, the United States Navy must consider the past 18 months the most damaging in living memory. In that time, five members of its top brass have been lost to sex scandals and charges of indecent assault have reached unprecedented levels. Since 1992, the Department of the Navy has logged more than 1,000 new cases of harassment and more than 3,500 charges of indecent assault, from groping to rape, a figure nearly three times the national rate in the United States. Sexual abuse is so embedded in the Navy that it may be impossible to root out.[7]

The theme of this essay is to show that although a change in the combat exclusion policy is the necessary start in ensuring the equal and human rights of women, the Navy must take further action to change the underlying Navy Culture. This "culture" is the de facto barrier that keeps women from being accepted into those positions which include control over firepower. This article will first explore why the United States maintained the combat exclusion, who still demands it, and how as a result, official and non-official policies actually promote the sexual harassment of Navy women. I will further discuss the official reasons for the exclusion and discuss the importance of method in relation to the Navy and gender relations. I will show that the Navy's failure to be aware of its relevance has resulted in a distorted picture of patterns of the abuse of, and discrimination against, women. This myopia has led the Navy to adopt an androcentric[8] definition of norms of what it is to be a "good sailor," and an extremely ineffective "Zero Tolerance" policy.[9]

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[7] Tom Rhodes, *Sex Scandals Sink US Navy's Reputation*, TIMES (LONDON), Feb. 21, 1996, at 8.

[8] Male centered or oriented.

[9] The "Zero Tolerance" of sexual harassment policy means that every individual complaint of sexual harassment will be investigated and that the individuals involved in the "unwanted" sexual attention will be brought to justice. This policy suffers from methodological myopia as it fails to include institutionalized sexual harassment, one of the defining characteristics of Navy Culture, in its scope. The policy was promulgated after the 1991 "Tailhook" convention. Tailhook is an annual "Airdale" (which includes pilots, air navigators, as well as all flight and non-flight crew members) gathering, characterized by drunkenness and raucous behavior, in Las Vegas, Nevada. At the 1991 convention 83 women said they were sexually assaulted. Many were compelled to pass through a

Further, much of the current literature on sexual harassment in the United States Navy, written by Navy officials and academics alike, suffers from the same myopia in that it takes a problem specific focus. The traditional method of examining the exclusion of women from combat; policies and practices related to sexual harassment and assault; the exclusion of gays and lesbians (as it defines what it is to be a man or a woman); and how pregnant women and mothers may serve, has been to examine these as separate, and even unrelated, issues. This focus should be changed to one that makes gender connections among these problem areas and policies - as well as one which examines the role of gender and Navy Culture.[10] In doing so, I hope to show that these issues are not questions of military "practicalities," but of the protection of "men's work" and masculinity.

Finally, I will show that the underlying Navy Culture is a reflection of the military paradigm of the "masculine warrior" and that "just adding women" alone will not eradicate the deeply entrenched "cult of masculinity"[11] that pervades it and which is fiercely defended by those who have received benefit from it. To illustrate this, I will briefly examine experiences of British policewomen and describe some of the day to day battles they face against "Cop

"gauntlet," made up of their peers, juniors and seniors. Despite the lifting of the combat exclusion, very few women are in the "Airdale" community. The "Airdale" community epitomizes the "cult of masculinity" and the idea of the "masculine warrior." The values that Tom Cruise's character, "Maverick," possessed in the film TOP GUN, e.g., macho, excitement, hedonism, exclusivity, are representative of Navy Culture.

[10] Rhonda Copelon states: "Gender based violence [harassment] encompasses forms of violence that perpetuate and exploit the dichotomy between women and men in order to assure the subordination and inferiority of women and everything associated with the feminine. Although women are overwhelmingly the victims - and violence against women is the focus here - gender based violence can be inflicted upon men as well as in . . . violence against men because they are or appear to be gay or feminine." Rhonda Copelon, *Intimate terror: Understanding Domestic Violence as Torture*, as quoted in REBECCA COOK, INTERNATIONAL HUMAN RIGHTS LAW AND WOMEN'S HUMAN RIGHTS 145, (University of Philadelphia Press, 1994). This also applies to harassment against women because they are or appear to be lesbian or masculine. One of the many unfortunate results of the "don't ask, don't tell" policy (which allows homosexuals to remain in the service as long as they remain closeted) is that harassers often "counterclaim" that their accusers are homosexual, a far greater "crime" in the eyes of the military, than sexual harassment.

[11] Karen O. Dunivin, *Military Culture: Change and Continuity*, ARMED FORCES AND SOCIETY, Vol. 20 No. 4, Summer 1994, at p. 531.

Culture,"[12] despite an official Equal Opportunities Policy. I will compare this to the experience of Navy women. For example, although the lifting of the combat ban is a relatively recent event, the experience of the Navy women's counterparts in the British police shows that despite total integration policies which allow women to participate fully at all levels and areas of the police force, women nevertheless find themselves, some 20 years after their ban was lifted, excluded in fact from "real policing." Furthermore, those British policewomen who do manage to break into the equivalent of the warrior class units, (e.g., Criminal Investigation Division (CID) or the Flying Squad), find themselves, like Navy women, subject to intolerable sexual harassment. Thus, in making this comparison, the real effects of the Navy's "Methodological Myopia"[13] will be seen and it will become evident that it will take more than repealing the combat exclusion law to make a substantial difference to the climate of harassment which plagues the lives of U.S. Navy Women.

III. THE IMPORTANCE OF METHOD.

Any analysis on the importance of method in linking problem areas and policies with gender must begin with a brief discussion of androcentrism. As Kathryn Abrams points out:

> Androcentrism is based on the premise that the structure of the society or institution is patriarchal: that is, that all the relevant positions of power are held by men . . . Yet, the more important meaning of androcentrism lies in three additional premises:
>
> 1) those men who hold positions of power describe the world through their own eyes, yet think that they have described the world as it exists in some universal, objective sense;
>
> 2) these men define other people in relation to themselves as either being the same or different; and
>
> 3) those who are classified as different are "otherized" - that is, characterized as being as alien and non-normative as possible - and their

[12] ROBERT REINER, THE POLITICS OF THE POLICE, (Harvester 1992). Coined by Reiner to describe the typical attributes of police culture: machoism, excitement, action, mission, isolation & solidarity, and racial & sexual prejudice.

[13] Andrew Byrnes, *Women, Feminism, and International Human Rights Law - Methodological Myopia, Fundamental Flaws or Meaningful Marginalisation?*, 12 AUSTRALIAN Y.B. INT'LL. 205, 1992.

> value or function is depicted only in relation to the dominant group, rather than as they themselves might see it.
>
> Explanations emphasizing androcentrism thus focus not on the characteristics of the group suffering discrimination - be it straight women, gay men or lesbians - but on the power held by the dominant group and the way it permits them to shape determinative understandings of the world, and the nature and the role of others.[14]

Although androcentrism has been a critical explanatory concept in addressing gender discrimination in the civilian workplace,[15] can this analysis be successfully used in deconstructing United States Navy policies? Perhaps the strongest argument exclusionists can offer in defense of the policies is "these policies have served the military and the nation well, producing sailors who win wars."[16] Exclusionists, mainly retired generals and the occasional former Secretary of the Navy say, at the least, "I have been there and I know"

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[14] Kathryn Abrams, *Gender in the Military*, LAW & CONTEMP. PROBS., Vol. 56, No. 4, 217 at 222. (1995.)

[15] *Id.* at 223.

[16] Dunivin, *supra* note 11, at 541.

(meaning you haven't, so you have no right to speak).[17] At their most shrill, "You can't hack it little girl."[18]

IV. THE "GOOD SAILOR": CAN WOMEN EVER MEASURE UP?

It has not always been the case that Navy officials wanted women excluded from shipboard/combat life. Although women in the United States Navy were not officially assigned to combat roles during WWII, their record of service and commitment was impressive. By the end of the war, the military chiefs as a group decided that it would be in the nation's best interest to provide women with formal military roles.[19] Accordingly, women were granted formal status in the military with the Women's Armed Services Integration Act, 1948.[20] The Act did contain a prohibition against women in combat. However, this legislation was passed, "against the express judgment of the military."[21] Representative Carl Vinson, one of the most vocal members of the Armed Services Committee and a vigorous advocate of the combat exclusion, did not provide any substantive support for his views. However, members who

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[17] Quite Possibly, President Clinton himself accepted this line of reasoning when he offered to military chiefs the "don't ask, don't tell" compromise. If the President had served in the military himself, even for a minimum two year active duty enlistment, he might have been more comfortable, as Commander in Chief of the armed forces, with saying, "I am the Commanding Officer, this is the new policy, either implement it now or you're fired." As a result of his avoidance of military service, he, along with all of the women on his staff, defer opinions about the "practicalities" of military policies to the Chiefs of Staff of the military departments. Hence, the President's and the majority of American women's voices are devalued when it comes to defense policy. Every woman who has had military experience finds the strength of her voice depends upon the type of duty she had. For example, I served as a Quartermaster (navigation petty officer) onboard a seagoing aircraft carrier for two years. This experience gave me enormous "street cred" over the other women, and some men, when I reported to my last shore command. However, as my ship was the USS LEXINGTON (AVT 16), a "non-combatant" carrier, I found I had much less credibility (but more than some of the "other girls") when I reported for temporary duty onboard the USS INDEPENDENCE (CV 62). In their eyes, as the Lexington was not a "combatant," she was not part of "the fleet" and my experience did not measure up to the INDEPENDENCE norm (the *real* Navy). Incidentally, men assigned to the LEXINGTON who came "from the fleet" referred to her disparagingly as the "shit-can Navy."

[18] Eisenhart, *You Can't Hack it Little Girl*, 31 J. SOCIOLOGICAL ISSUES 13, 1975.

[19] Beverly Steinberg, *Women as Warriors*, 66 ST. JOHN'S L. REV. 829, 834, 1992.

[20] June 12, 1948, ch 449, 62 Stat 356.

[21] Steinberg, *supra* note 19, at 834-836.

opposed the combat restriction were unable to muster the votes required to prevent their incorporation into the bill.[22] The Senate accepted the bill without debate.[23]

I include the following excerpt from the Senate Armed Services Committee hearings conducted before the bill was passed. Not only is it relevant in the study of women and the combat exclusion, it perhaps more importantly shows that men are neither invisible nor passive in the process of otherizing women: they take an active role in it. As Silvia Walby states, "We cannot understand the suffrage struggle unless we understand the nature and extent of the opposition to feminist demands by patriarchal forces."[24] Rather than justifying his opposition to women serving on an equal basis with men with the argument that "women can't measure up," Vinson simply stated that a ship is not a 'proper' place for a woman to serve - unless it is a hospital ship. Thus, the following illustrates government interest in protecting the masculinity of combat:

> **Representative Vinson**: Is there anything in the bill that excludes any assignment for sea duty, that prohibits you from assigning a WAVE officer or enlisted WAVE to sea duty?
>
> **Captain Stickney**: No Sir.
>
> **Rep. Vinson**: Do you think it would be quite helpful to the bill to write into the law that they cannot be ordered to sea duty?
>
> **Captain Stickney**: Yes Sir. We do not feel, though, that it was necessary to write that into law, Mr. Vinson.
>
> **Rep. Vinson**: Well, I think that it is a good matter. I think the Congress should take a positive stand on it and not leave it to the discretion of the Secretary. From your remark a while ago, you said that they might be used in communications and recreation work on ships . . . I propose an amendment . . . I think it will strengthen the bill to have it positively understood by Congress that ships are not places to which these women are going to be detailed and nobody has any authority to detail them to serve on

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[22] *Id.*

[23] *Id.*

[24] S. Walby, quoted in FRANCES HEIDENSOHN, WOMEN IN CONTROL? 13 (Oxford University Press, 1992).

> ships . . . I do not think a ship is a proper place for them to serve. Let them serve on shore in the continental United Sates and outside of the United States, but keep them off ships. Of course, they ought to serve on hospital ships.
>
> **Rep. Shafer**: Without objection, the amendment-
>
> **Rep. Bishop**: No; I object to it. I want them to go to sea and get equal rights. I talked to some of them and they do not want to be deprived of equal rights.
>
> **Rep. Vinson**: We will vote on it when we get a quorum. . . .Let's go one step further: why should they be assigned to any kind of aeronautical duty that pertains to flights?[25]
>
> **Captain Hancock**: Mr. Vinson, women in the aviation specialties are performing duties of the ratings in which they are serving that do require flights in aircraft on the same basis it is required for men serving in those same ratings.[26]

The statutory exclusion for naval women in combat was originally codified in Title 10 of the United States Code at section 6015.[27] The Code stated:

> The Secretary of the Navy may prescribe the manner in which women officers, women warrant officers, and enlisted women members of the Regular Navy and Regular Marine Corps shall be trained and qualified for military duty. The Secretary may prescribe the kind of military duty to which such women members may be assigned and the military authority which they may exercise. However, women may not be assigned to duty on vessels or in aircraft that are engaged in combat missions nor may they be assigned to other than temporary duty on

[25] The Navy currently has in commission an aircraft carrier named USS CARL VINSON (CVN 70).

[26] Steinberg, *supra* note 19, at 834-836.

[27] 10 U.S.C. § 6015 (1948).

> vessels of the Navy except hospital ships, transports, and vessels of similar classification not expected to be assigned combat missions.[28]

Although Vinson never offered any substantive reasoning to back up his demand for the exclusion of women from combat, many authors have subsequently debated the pros and cons of the exclusionist arguments. I do not intend to rehearse all of the arguments for and against the exclusion in detail here. Suffice it to say that at the heart of all exclusionist rhetoric is the claim that women interfere with mission readiness. However, what I hope to demonstrate is that what concerns men is not so much "mission readiness," but the protection of their "property" - which is "man's work" and "masculinity." Like Carl Vinson, the military chiefs and the culture are neither invisible nor passive in "otherizing" women: The tactics they use to protect their property are exclusionist rhetoric and sexual harassment. Furthermore, this rhetoric from the military leaders - and the official policies which flow from it - actually promotes the harassment of Navy women. It does so as it sends the message that as women cannot cope with, nor "naturally" belong in, the Navy's core activity (combat), they are second class sailors. As such, women's experiences are devalued. When women try to break into the "man's world" and get the experience they need to be taken seriously by both peers and promotion boards, they come up against a Navy Culture which allows men virtually unlimited license to protect their property.[29] Recent history confirms that Navy men protect their property through the harassment of women. This harassment can manifest itself both by unwanted sexual attention and/or through constant "testing" - that is, making a woman prove that she is up to the job. Hence, because a women's worth as a "real sailor" is not validated, she is valued as a sexualized object first, and as a not fully accepted member of the team, second. The three main themes of exclusionist rhetoric are:

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[28] In 1982, during the Reagan administration, the Army segregated basic training after it had been desegregated in 1978. The Army also decided in 1982 to add 232 occupational specialties to the list of "combat" jobs from which women were excluded. As Kenneth Karst notes, *supra* note 4, at 524, "no one familiar with American labor history will be surprised to learn that the list of men-only specialties added the major building trades: carpenters, masons, electricians and plumbers . . . the Army later reopened 13 of the occupational specialties to women." Although President Clinton's Secretary of Defense rescinded the combat exclusion in 1993 by directing the services to open assignments in combat aircraft and combat ships, past history shows that another Secretary of Defense might just as easily close them as the Reagan administration did in 1982.

[29] Although several senior Navy officers lost their jobs over the Tailhook scandal, none of the accused assailants were convicted at court-martial.

1. Protection of women/Protection from women: Didactic Paternalism?
Karst rightly states that concerns voiced by government officials about women measuring up to (male) standards have little to do with maintaining the combat exclusion.[30] One of the real concerns, hidden behind the rhetoric, is not only the protection of femininity, but the protection of masculinity. James Webb, a former Secretary of the Navy, poses the question in light of the integration of the service academies: "Where in this country can someone go to find out if he is a man?"[31] Instead of mooting these issues, congressional hearings tend to focus on women's biological inability to measure up to the androcentric norm. This inability has been used against women as "proof" of unsuitability for combat. This leap of logic is made without ascertaining whether or not those norms are indeed the job related requirements of combat or whether they are used as justifications for keeping women in traditional roles and as "others."

The concern to protect the femininity of women and, most importantly, the masculinity of men, has specifically manifested itself with arguments concerning the protection of: a) women prisoners of war (POW) (from rape); and b) protection of women from their fellow shipmates (the idea that men can't control themselves - especially when they have been at sea for 6 months).

a) Military women as POWs:
In his article,[32] Major Wayne Dillingham, United States Air Force, asks, "why do we care about American military women becoming prisoners of war any more than we care about American military men being captured? What are our special concerns?" He states that our special concerns are that women are the weaker sex as well as the sex that bears offspring - and that for these and other reasons, women POWs would pose a risk to national security. Dillingham's argument simply is that both female and male POWs are at risk of extreme physical and psychological torture. Hence, women are no more likely to crack under pressure than men. However, because of his "methodological myopia," Dillingham not only fails to address the fact that women POWs would indeed be treated differently by their captors and fellow prisoners - he fails to question the myth that men are the protectors of women. This becomes evident when he

[30] Karst, *supra* note 4, at 536.

[31] James Webb, *Women Can't Fight*, THE WASHINGTONIAN, Nov. 1979, at 144.

[32] Wayne Dillingham, *The Possibility of American Women Becoming Prisoners of War: Justification for Combat Exclusion Rules?*, FED. BAR NEWS AND JOURNAL, May 1990, at 223.

asks, "Will we as a society be capable of accepting that *our women*[33] are being physically and mentally tortured in the most cruel and inhuman ways?"[34]

Given the pervasiveness of domestic violence and the retention of the marital rape "exclusion"[35] in numerous states, the record shows that American men seem less concerned about the protection of "other men's women" than their own. As Jeanne Lieberman writes, "The concept (the myth of man as woman's protector) loses its mystique in the face of the enormous incidence of rape, battering, the portrayal of women in pornographic materials, and, in many countries, the sale of women and little girls."[36] It is insulting that men take the power of decision away from those women who would otherwise accept the risk of becoming a POW considering they probably accept a greater risk of violence by remaining in their own homes.

b) Women in a man's world:

Karst states that the distraction argument is one method exclusionists use to articulate their fear of women encroaching on their territory. Exclusionists state, the distraction of women will: a) cause men to divert their attention from the mission in order to provide more-than-usual protection for their women comrades; b) distract men from their jobs by creating rivalries for the women's favors; and c) undermine the "male bonding" that produced heroism and self sacrifice.[37] Navy officials, making policies under the premise of "protecting

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[33] Emphasis added.

[34] Dillingham, *supra* note 32, at 228.

[35] The marital rape exclusion, or "marital immunity" to rape, is allegedly based on the pronouncement of Sir Mathew Hale in HISTORY OF THE PLEAS OF CROWN , Vol. 1, 629 (1736), where he said: "But the husband cannot be guilty of a rape committed by himself upon his lawful wife, or by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract." In State v. Smith, 85 N.J. 193, 426 A.2d 38 (1981), the Supreme Court of New Jersey held: " . . . this implied consent rationale, besides being offensive to our valued ideals of personal liberty, is not sound where the marriage itself is not irrevocable. If a wife can exercise a legal right to separate from her husband and eventually terminate the marriage 'contract' may she not also revoke a 'term' of that contract, namely, consent to intercourse? Just as a husband has no right to imprison his wife because of her marriage vow to him, he has no right to force sexual relations upon her against her will. If her repeated refusals are a 'breach' of the marriage 'contract', his remedy is in a matrimonial court, not in violent or forceful self-help." The Uniform Code of Military Justice eliminated the marital exclusion as part of the Defense Authorization Act of 1993.

[36] Jeanne Lieberman, *Women in Combat*, FED. BAR NEWS AND JOURNAL, May 1990, at 215-220.

[37] Karst, *supra*, note 4, at 536.

us from them, and them from us,"[38] actually serve to stigmatize and otherize Navy women in the process.[39] In this climate, women are, "not simply constructed as alien and devalued but, more specifically, as sexualized and subordinate."[40] Jeanne Lieberman speaks of the United States Supreme Court's self proclaimed, "attitude of romantic paternalism which, in practical effect, put women, not on a pedestal, but in a cage."[41] However, this attitude seems better characterized as a "didactic paternalism" as the concern isn't so much for "women's safety," but is mainly concerned with women upsetting existing order and the maintenance of the masculinity of "combat."

2. Women are Physically and Psychologically Weaker Than Men.
As Paul Roush points out, "One of the difficulties in the whole combat exclusion discussion is the tendency towards worst casing." [42] "Worst Casing" is a tactic frequently employed by "those who know about these things" which paints the picture that all combat revolves around, "living for months in brutal conditions of jungle mud, plagued by insects and dysentery, carrying a 60 pound pack on

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[38] Former Secretary of the Navy, James Webb, in *Women Can't Fight, supra* note 31, at 282, states that as women progress through the Naval Academy, "inside the harsh, isolated man's world, they lose their sexual identity."

[39] As a young petty officer in the mid 80's, while my ship, the LEXINGTON was in the Philadelphia Naval Shipyard, I was temporarily assigned, along with our (male) Navigator and five other women officers and petty officers, onboard the USS INDEPENDENCE (CV-62) - a combatant aircraft carrier. As the combat exclusion was in force, we were the first women who had been to sea on the INDEPENDENCE. Although I certainly did not expect, nor wished, to stay in Navigation berthing with my new (male) shipmates, the two officers, both of whom were qualified Underway Officer of the Deck, full lieutenants, rated their own staterooms in "Officer's Country" (those spaces on the ship where enlisted personnel are traditionally not allowed). Nevertheless, we were all put in the medical department's Quarantine Room - a sort of long term "sick-bay." When the lieutenants brought this up with our Navigator, he told us that it was part of a compromise with the Commanding Officer of the INDEPENDENCE to allow us to get underway his the ship. He explained that the original plan was to have us under Marine guard, where a Marine armed with an M-16 rifle would stand outside our door to protect us, and that we were to return to quarantine when not working or eating. We thought this a bit of an over-reaction, as we did not need this sort of "protection" onboard LEXINGTON. Our Navigator told us that the Commanding Officer's concern was that "these guys have just made a six month Med Cruise (cruise of the Mediterranean, which does not necessarily imply arduous duty as the ship would have made many visits to "liberty ports"), who knows what they would get up to." Although all of us slept in Quarantine for the duration of our assignment, we were not restricted to it, nor placed under Marine guard.

[40] Catherine MacKinnon, quoted in Abrams, *supra* note 14, at 224.

[41] Lieberman, *supra* note 36, at 220.

[42] Paul E. Roush, *The Exclusionists and Their Message*, 39 NAVAL L. REV. 163 (1990).

long marches punctuated by bayonet fights against enemy soldiers with the build and disposition of Lyle Alzado."[43] In the 1990's, with highly sophisticated developments in the technology of warfare, the scenario of men fighting it out in the trenches with axes is highly unlikely. The only Navy unit which would come close, these days, to the worst case mode is the Navy "Sea Air Land," or SEAL unit.[44] The SEALs are a voluntary unit and women and men should, at the very least, have the opportunity to try out for the team on the basis of a job validated performance.

Exclusionists further claim that a typical woman's size and physical strength are no deterrent to an enemy force. Golightly, in *No Right to Fight*, mocks a woman army sentry because she is only 5'6" tall,[45] yet many decorated male pilots, soldiers and sailors around the world have been "only" 5'6" tall. As Roush points out, "American women are slightly larger than the Viet cong and the North Vietnamese we opposed in the Southeast Asian Conflict."[46] In fact, the M-16 rifle (a lighter weapon than that previously used by the U.S. Army) was taken to Vietnam specifically for use by the South Vietnamese army.[47] Perhaps as Roush observes, "if we could have settled that conflict with a weight lifting contest, the outcome might have been different." Furthermore, "the lighter rifle is only a minor example of a much larger development in combat technology: as time goes on, combat, even putting missiles to one side, relies less and less on muscle power, and more and more on firepower."[48]

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[43] Karst, *supra* note 4, at 531. Mr. Lyle Alzado was an American professional football player.

[44] The SEALs are an elite unit which perform highly secret missions involving, inter alia, reconnaissance, gathering intelligence, and fighting behind enemy lines- alone or as a member of a small team. A British equivalent would be the SAS. Most men who apply for the SEALs are either initially rejected for, or subsequently dropped from training. SEAL training is ostensibly the most physically and psychologically demanding of any in the U.S. armed forces. Currently, the U.S. Navy is attempting to encourage more (male) ethnic minorities to apply as it is, compared with the rest of the Navy organizations, an overwhelmingly white unit. The military's myopia extends to issues of racism as well as sexism as all of the elite units consist, almost exclusively, of white males.

[45] Neil Golightly, *No Right to Fight*, US NAVAL INSTITUTE PROCEEDINGS, Dec. 1987, at 49.

[46] Roush, *supra* note 42, at 164.

[47] *Id.*

[48] Karst, *supra* note 4, at 532.

3) The military is not the place to be conducting "social experiments."
Recently, former Secretary of the Navy John Lehman stated that the Navy's post Tailhook and post U.S. Naval Academy cheating scandal low morale is a direct result of the current climate of political correctness in the White House. (This climate has led to the lifting of the combat exclusion and the "don't ask, don't tell"[49] policy). Lehman's predecessor, James Webb, has also said that the military should not be used "as a test-tube for social experimentation" for the integration of the sexes. However, it should be noted that the "experiment"[50] has already been conducted: women, in both the United States and the United Kingdom, serve on the "front lines," on a daily basis, as police officers. The experience of these officers is that they can and do serve commendably. It is also their experience that, despite equal opportunity policies, they are, like women in the Navy, subject to an enormous amount of institutionalized sexual harassment.

A. A brief look at the history of British policewomen.

Like most of the literature on American women in the military, much of the academic literature about women in the police suffers from a methodological myopia. Instead of asking the "women question" and seeking to make connections between problem areas and policies, most of the literature takes the familiar problem specific, "we can handle it out here" focus, thus giving a distorted picture of patterns of the discrimination and abuse of policewomen by their superiors and fellows. For example, numerous studies have been made based on: evaluating effectiveness of women on street patrol; male officer's attitudes to women colleagues; and there are many descriptions of women officer's traits and characteristics - usually in relation to male officers and the job. This myopic view of women in the police fails to address the ways in which women themselves are left to negotiate the official police organization and its resulting "cop culture" - and why, after almost twenty years of integration, most British policewomen do not choose to make policing a career.

Women police officers were originally hired, in the early 1900's, to provide specialist protection for women and children. They were used to interview female suspects and victims, rescue children, and to patrol and supervise "doubtful public venues." [51] By 1922, small patrols of policewomen were

[49] *See supra* note 7.

[50] Karst, *supra* note 4, at 539.

[51] Heidensohn, *supra* note 24, at 53.

scattered around England, given the title of Constable and powers of arrest. As Heidensohn points out, "police work for women was still defined, and was to remain until well after the Second World War, as a specialist field, mainly confined to moral and sexual matters and inevitably making female officers complicit in the control of their own sex in ways in which men's behavior was not controlled."[52] The process of integrating women into the mainstream of policing in Britain did not begin until the mid 1970's when the specialist women's departments and "apparently the specialist work women had always done with women and juveniles"[53] was abolished.

Like their counterparts in the U.S. Navy, British policewomen also have a history of men who have vigorously opposed their full integration into the force. Similar to their American counterparts, the strongest opposition came from both senior officers and bobbies on the beat. At the heart of their protests against the integration of women was that the duties for which the women had specialized in, and were successful at, were not viewed by the men as "real police work." Real policing, like combat, takes place "on the front lines" and consists of "serious" crime fighting and public order work. Like the combat exclusionists, in order to protect their property (which is man's work and masculinity) they argued that the integration of women would have a detrimental effect on mission readiness. Furthermore, they rehearse many of the same "concerns" about the protection of women that the combat exclusionists offer. For example, in her book, *Women in Control*, Heidensohn recalls a policewoman's account of "a series of debates" which a Woman Police Constable (WPC) had with her colleagues concerning her height, her build, and her ability to successfully cope with "two (aggressive) fifteen stone drunks."[54] However, as a former American police chief points out, "Myth number one is that the police devote the preponderance of their time and resources to combating serious crime."[55] I would venture that myth number two is that a typical male Police Constable (PC) could singularly cope with the aforementioned two fifteen stone drunks.

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[52] *Id.* at 52.

[53] *Id.* at 56.

[54] *Id.* at 138-139.

[55] JAMES F. AHERN, THE POLICE IN TROUBLE: OUR FRIGHTENING CRISIS IN LAW ENFORCEMENT 141 (Hawthorne, NJ, 1972).

B. Cop Culture.

In explaining cop culture, many male writers assume that the culture directly reflects the day to day reality of police experience. Male writers tend to focus on the hard side of policing and the camaraderie that it generates and necessitates. Professor Robert Reiner, a leading authority on policing in the United Kingdom,[56] states "the police officer faces, behind every corner he turns or door-bell he rings, some danger, if not of firearms at least of fists."[57] Reiner's account further describes the drinking, crude jokes, racism and sexual harassment he encountered, and sometimes expected, as he accompanied PCs on patrol while conducting fieldwork. However, as Heidensohn points out, women do figure in studies of cop culture - but only because of the need to account for its macho, racist and exclusive character - the implication being that the police culture is a "natural" reflection of police work. However, Reiner's myopic analysis fails to: a) ask why, when the majority of police work is "service" work, the culture fails to reflect this; and b) analyze the culture from women's perspective. For example, although male writers ask if there exists a female cop culture, the fact remains that women make very little impression on cop culture; instead, they have to adapt to it. Hunt explains:

> Policemen oppose the 'moral woman'. . . .because she represents the exposure of an informal world of policing on which masculine gender is based. In addition her presence signifies the exposure of the 'police myth'. . . .which conceals the demeaning nature of the 'private' occupation and maintains the policeman's public image as a successful crime fighter. Symbolically, then, she reminds him that he can only achieve illusory manhood by denying and repressing the essential feminine dimension of police work which involves social relations, paperwork and housekeeping in the public domain.[58]

The way in which policemen deny and repress the essential feminine dimension of police work - that is, the way they protect their property - is through sexual

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[56] Robert Reiner is Professor of Criminology and Political Science at the London School of Economics. His many publications on the subject of policing include: THE BLUE COATED WORKER (Cambridge University Press, 1978), CHIEF CONSTABLES (Oxford University Press, 1991), and BEYOND LAW AND ORDER (Macmillan, Landon, 1992). He is also Editor of the journal *Policing and Society* and review editor of *The British Journal of Criminology*.

[57] Reiner, *supra* note 12, at 110.

[58] J. Hunt, *The Development of Rapport Through the Negotiation of Gender in Fieldwork Among Police*, 43/4 HUMAN ORGANIZATION 294 (1984).

(and racial) harassment. A recent *Times* headline read, "CID named as worst for sexual harassment." The article stated that generally one in eight women workers were victims of sexual harassment and that, "virtually all women officers attached to the CID had been (sexually) harassed."[59] The question must be asked, are the men who are recruited for jobs in the Navy and Police already sexist and racist when they join, or does the system "make them that way?"

C. Navy Culture/Cop Culture.

Although James Webb would like the military to be preserved as a place where, "in this country someone can go to find out if he is a man."[60] The fact is that women and ethnic minorities generally list the same reasons for joining the Navy and police as white men (e.g., job security, variety of work, prospects, pay). However, there is also evidence of a continuing reluctance on the part of women and ethnic minorities to join either the service or the force. The most frequently mentioned factor that prevents recruitment from these groups is the perceived prejudice from future colleagues; and this perception is validated every step of the way in their careers.

Until quite recently, from their first day inside the Navy, recruits would often learn misogynic cadences, rituals, and jokes. The purpose of these was to promote group solidarity and the otherization of those who cannot belong. Men who are still in training are disparagingly referred to as "ladies" or "sweetheart." Carol Burke, a former Naval Academy instructor, in her 1992 article, *Dames at Sea*, recalls one cadence, a variation of the song, "The Prettiest Girl":

> The ugliest girl I ever did see
> was beating her face up against a tree
> I picked her up; I punched her twice;
> She said, "Oh, Middy[61] you're much too nice."[62]

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[59] *CID named as Worst for Sexual Harassment*, TIMES (LONDON), June 28, 1996.

[60] Webb, *supra* note 31, at 282.

[61] Midshipman.

[62] Carol Burke, *Dames at Sea*, THE NEW REPUBLIC, Aug. 17, 1992, at 18. The practice of using such cadence calls, while perhaps never officially sanctioned, but nevertheless officially "winked at," continued until quite recently. Nevertheless, the point remains valid as the practice has been a key part of many active duty members' socialization into the service.

Burke, unlike many of her colleagues and top Navy brass, had no difficulty in connecting this socialization into the Navy and sexual harassment. She writes, "What happened at the Tailhook reunion was both traditional and criminal. Although a thorough criminal investigation may identify the perpetrators . . . the deep rooted misogynistic traditions that breed such behavior will be harder to uproot."[63] As Abrams points out, " . . . even a 'no-tolerance' policy is not going to produce satisfactory results if those responsible for enforcing it have not come to recognize the ways in which systemic devaluation of women pervades their attitudes and institutions."[64]

While referring to Cop Culture, Simon Holdaway[65] observed that over one half of the police officers on active service who had been interviewed by him said that they had been subject to name calling, which they had accepted as part of the general banter of canteen conversation. In their study of the Metropolitan Police, Holdaway notes Smith & Grey's observations over a period of time how women and Black and Asian PCs were treated by their colleagues: "Overall it is clear that for most people from minority groups being a police officer puts them under considerable strain. They have to take abuse from the public and put up with racist (and sexist) language and jokes from colleagues and are subject to a conflict of loyalties."[66]

In a step beyond the Navy's "Zero Tolerance" policy, and in response to concern about the work experience of women and ethnic minority police officers, the Metropolitan Police organized the Bristol Seminars, in 1990, to discuss the causes of and possible solutions to its current high rates of attrition, especially among Black and Asian officers.[67] The general message of the report was that racism and sexism were of much greater importance to minority officers than to white (male) officers. It was found that these "others" have a different perspective than white (male) officers on the organization. One of the

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[63] *Id.* at 20.

[64] Abrams, *supra* note 14, at 220-221.

[65] SIMON HOLDAWAY, THE RACIALISATION OF BRITISH POLICING (MacMillan, London, 1996). Simon Holdaway is a Reader in Sociology in the Department of Sociology Studies at Sheffield University England. He was a police officer for eleven years before taking up an appointment as Lecturer in Sociology at Sheffield University in 1975.

[66] *Id.* at 142.

[67] For more detailed information on the Bristol Seminars, *see* BRISTOL SEMINARS (Metropolitan Police, 1990).

key findings was the crucial part Cop Culture plays in sustaining race and gender divisions identified by Black and Asian officers. Racist and sexist jokes and banter were said to be rife, and it was noted that supervisory staff rarely intervened to challenge the discrimination and harassment. It was also noted that, as with Navy leaders, there was a lack of confidence in the commitment of senior police officers to change the culture.

Considering the previous discussion of androcentrism, it should not be surprising to note that the Seminars revealed that white (male) police officers suffer from the same methodological myopia as their counterparts in the Navy. Few of them saw that their women, Black, or Asian colleagues had any problems which were different to their own. As Simon Holdaway puts it, "If you aren't at the butt end of prejudice, you can afford to say that you felt that the culture was never racist or sexist. When you stand as a target, your perception is different."[68]

V. CONCLUSION: THE WAY AHEAD.

Although Rebecca Cook is spot on when she states that "women will have few prospects of equality with men where they are legally excluded from military careers or advancement," she does not go far enough. Even where legally included, Navy women must be able to pursue their careers and advancement free from the sexual harassment which currently drives them away. In order for women to do so, Navy Culture must change. For this to occur, two things must happen. Firstly, Holdaway has noted that stereotypical thinking has been identified as a characteristic of rank and file thinking. As Holdaway might put it: "When stereotypes are left unchallenged, when there is no organizational strategy to change this thinking through the implementation of a policy, life will remain difficult for Navy women as their colleagues will regard them differently: not as fellow Sailors, but as women who happen to be in the Navy and therefore otherized."[69] Thus, the rhetoric from the most senior naval officers at the top, down to basic training instructors and to the most junior enlisted must change.

Secondly, Holdaway notes that team membership and stereotypical thinking go hand in hand. Although team membership is crucial to an effective Navy, many women have difficulty in gaining team membership into the "cult of masculinity." As Heidensohn points out, what would she feel that she had gained

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[68] Holdaway, *supra* note 65, at 155.

[69] *Id.* at 157.

by sitting around with the men listening to racist, sexist and abusive language?[70] One possible starting point would be for the Navy to hold its own version of the Bristol Seminars - with the focus on Navy women and their experiences in coping with Navy Culture. For example, the Bristol Seminars were organized into groups of 70. Each group consisted of sub-groups of 14 who discussed issues such as: racial issues, recruitment, training, grievance procedures, discipline, support mechanisms, force policy, career development and public relations. In conducting these seminars on a Navy-wide basis, it may finally become clear to Navy officials that women have a different perspective than men on the organization and for the need of the Navy to be aware of the relevance of gender in promulgating policies.

The Navy's failure to be aware of the importance of gender has resulted in a distorted picture of patterns of the abuse and discrimination against women. The current focus sees sexual harassment as the problem rather that as a symptom of a greater disease of (and with) women in the Navy. The way forward is not to carry on with the present "just add women," but to, as Andrew Byrnes suggests, realize the role that gender may play in a given context and the need to adopt particular responses tailored to that context.[71] Hence, a Navy-wide gender policy statement should be implemented to which Navy women objecting to individual and systemic prejudice, discrimination and harassment can appeal. "Zero Tolerance" and equal opportunities policies currently exist, but the notions of Zero Tolerance and equal opportunities do not encompass the systemic patterns of prejudice, discrimination and harassment found in Navy Culture.[72] Although there may be some fears that a gender policy may be "over legalized" with applicants "taking advantage of the system," the policy would more importantly set the standard of what is and what is not acceptable behavior towards women.

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[70] Heidensohn, *supra* note 24.

[71] Byrnes, *supra* note 13.

[72] The Navy's "current" policy on sexual harassment states: "For sexual harassment to occur, unwelcome sexual behavior must occur or impact on the work environment." Secretary of the Navy Instruction 5300.26B, January 6, 1993, at 40. The instruction only sees the unwelcome sexual behavior of a few bad apples and is blind to the institutional causes of the wider gender based harassment which is characteristic of Navy Culture. Until the culture changes, the sexual harassment which flows from it will continue to remain a pervasive problem.

THE PRIVATIZATION OF A MILITARY INSTALLATION: A MISAPPLICATION OF THE BASE CLOSURE AND REALIGNMENT ACT

*Edwin R. Render**

I. INTRODUCTION.

The Soviet Union's breakup and the termination of the Cold War forced the United States, as well as the rest of the free world, to rethink economic policy and military strategy. When the Cold War ended the phrase "peace dividend" was coined. Clearly, the United States enjoyed excessive military capacity. Many hoped decreasing defense expenditures would result in previously neglected programs receiving adequate funding. Several years before the Soviet Union's breakup, however, knowledgeable people in and out of government knew many military installations should be closed merely because they were unnecessary to the national defense.

Over the years it became painfully obvious closing military operations was no simple task. Presidents from Nixon to Clinton have been accused of having at least one eye on their domestic political interests when making base closure decisions.[1] Military bases significantly impact on the community's economy. Not only are military, civilian, and contractor personnel salaries spent in the community, the government installation itself generates a host of other businesses that sell goods and services. Therefore, local business, political, and labor leaders generally do not want such facilities closed or moved.[2]

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[1] Chris Black and John Aloysius Farrell, *Portsmouth Shipyard Safe, Clinton Says,* BOSTON GLOBE, May 20, 1995, Metro section, at 1; Ann Debroy and Bradley Graham, *Clinton Fumes But OKs Base Closings,* THE COURIER-JOURNAL (Louisville, Kentucky), July 14, 1995, at 1.

[2] For example, between June 1, 1993 and July 18, 1995, the Los Angeles Times carried 433 stories dealing with base closures. These stories are replete with business, labor, and political leaders lamenting the disastrous consequences of base closures.

In analyzing base closure decisions one must also keep in mind the intense competition between public facilities and private defense contractors to perform defense related work. Private contractors keep a watchful eye on government owned installations for work they can do privately.[3] Moreover, government installations compete amongst themselves for defense work.[4]

Three military base closure cycles occurred under the current legislation that expired after the 1995 round. Suprisingly, scholars have written very little about the base closure process.[5] This Article examines in some detail the closure of the Naval Surface Warfare Center, Crane Division Detachment, Louisville, Kentucky [hereinafter referred to as "Naval Ordnance"]. First, this article summarizes some earlier base closure activity. Next, the current legislation and regulations will be summarized. This will be followed by a description of the work completed by Naval Ordnance, an analysis of how the Department of Defense made the closure recommendation for Naval Ordnance, and the responses of Louisville's political and business leadership.[6] Next, the public proceedings before the Base Closure and Realignment Commission and its recommendation to privatize Naval Ordnance will be analyzed. The Article concludes with observations on the process, speculation, about future closures, and some proposals for modifying the process.

From the outset the reader should understand one fundamental difference between this Article and those analyzing public policy issues. Many such articles begin with a fairly straightforward and understandable set of "facts" or a well-defined policy issue. The articles analyze the facts or policy issue from various perspectives or viewpoints followed by conclusions. This Article does

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[3] Public-private competition in ship repair is a good example. Roxana Kopetman, *Workers Doubt Logic Of Closing Naval Shipyard*, L.A. TIMES, Mar. 12, 1993, at B1; Michael Granberry and Edmund Newton, *2 Cities Wage High-Stakes Shipyard Battle Defense: Tactics Escalate as Long Beach Seeks to Save its Facility and San Diego Funds Lobbying Effort to Close it. Thousands of Jobs Depend on Federal Decision*, L.A. TIMES, Apr. 11, 1995, at B3.

[4] Letter from Director of Production, Naval Audit Service to Naval Sea Systems Command Inspector General and Auditor General of the Navy, Appendix 33 at 3 and Appendix 24 at 5. (Mar. 3, 1995)(on file with author).

[5] *See generally*, Benjamin L. Ginsberg, et al, *Waging Peace: A Practical Guide to Base Closures*, 23 PUB. CONTRACT J. 169 (1994). This article describes how base closure recommendations are made, discusses problems in closing and redeveloping bases, and offers some suggestions for challenging a closure decision.

[6] This portion of the paper is based on personal interviews, newspaper accounts and documents contained in the library of the Defense Base Closure and Realignment Commission.

not do that. The "facts" surrounding the closure of Naval Ordnance are very complex. There are many players whose interests often conflict. At times it is difficult to understand the players' goals. This Article's major task is simply to explain who did what to whom, and why, in an understandable fashion. Once the reader understands the players and their interests in this closure action, the public policy issues crystallize. Unless the reader understands what happened, the policy issues remain meaningless.

The fundamental arguments made here are that the Navy violated public law and its own regulations in placing Naval Ordnance on the closure list and that the business and political leadership of Louisville knew this was happening. The Base Closure and Realignment Commission, with the concurrence of Louisville's business and political leadership, recommended Naval Ordnance's privatization - an action not contemplated by the Act. Finally, for reasons having little to do with national defense, neither Congress nor the President was willing to overturn the Commission's action.

II. BACKGROUND.

In 1976, President Ford attempted to close 160 small military installations around the country. Congress became concerned the Department of Defense did not sufficiently account for the surrounding communities' interests when developing its proposals. In drafting the Military Construction Authorization Act of 1977, the House Armed Services Committee promulgated four basic "tenets" it considered important in realigning or closing military bases:

> The committee is concerned that the legislative history be absolutely clear regarding base realignments to be effected in the best interest of the Nation. First, decisions on base realignments are the prerogative of the Chief Executive. Second, the Congress has the responsibility to review base realignment decisions just as it reviews any executive branch program that affects expenditures of funds and impacts on people's lives. Third, the decision to close or reduce a military installation must be based on military necessity with due regard for environmental impact. Military bases cannot be maintained to support other than national defense requirements. Fourth, the entire executive branch, not just the Defense Department, has the ultimate responsibility to mitigate the impact of base realignments to the extent possible. This includes advance economic planning in coordination with local

> officials that begin early in the study cycle as well as assistance during the transition period. Decisions regarding base realignments should be, not only adequately justified, but also accompanied by proposal for economic adjustment.[7]

The ideas found in these four tenets greatly influenced subsequent base closure legislation. Congress ultimately enacted Public Law 95-82.[8] This Act required the Department of Defense to notify Congress prior to closing or realigning any military base which employed more than 300 civilian employees or reducing by 50% or more any base at which there were 1000 civilian employees. The Department of Defense was prohibited from closing such installations until it notified Congress of the "fiscal, local, economic, budgetary, environmental, strategic and operational consequences of such closure or realignment."[9] This Act effectively blocked base closures for a decade.

As the problems associated with the federal budget deficit became more widely recognized and pressures to expand non-defense programs continued, the pressure to halt unneeded military operations increased. However, conventional wisdom in Congress also held that it was political suicide for a congressman publicly to state that a military base in his district was not necessary to the national defense and could be closed. As a result, a rough understanding existed in Congress that "if you do not try to close the base in my district, I will not try to close the base in your district."

In May 1988, Congressman William Roth of Delaware introduced legislation which attempted to minimize political interference with base closures. His bill created a commission appointed by the Secretary of Defense to recommend bases for closure or realignment. In October 1988, Congress passed the initial version of the Base Closure and Realignment Act.[10] This statute established a one-time procedure for closing and realigning unneeded military bases.[11] The

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[7] Military Construction, Pub. L. No. 95-82, 1977 U.S.C.C.A.N. 543.

[8] 10 U.S.C. § 2687.

[9] 10 U.S.C. § 2687(b)(1).

[10] 10 U.S.C. § 2689 note Pub. L. No. 100-526, §§ 200-209, 102 Stat. 2623 (1988) [hereinafter Pub. L. No. 100-526].

[11] Pub. L. No. 100-526 § 201.

Act created a twelve member Commission on base realignment and closure.[12] The Act directed that the Commission submit a report to the Secretary of Defense recommending the closure of unneeded military installations. The Secretary of Defense could either approve or disapprove all the Commission's recommendations.[13] The 1988 Act specifically eliminated the previous requirement for the Secretary of Defense to submit an "impact report."[14] If the Secretary of Defense agreed with the recommendations of the Commission, its report was submitted to the House and Senate Armed Services Committees for review. The Act required a joint resolution for Congress to overturn the Commission's recommendations.[15]

Soon after the legislation was passed, the first Commission was appointed and began recommending bases for closure. On December 30, 1988 the Commission recommended the closure of 86 military installations around the country. It estimated the suggested closures would result in a $700,000,000 per year savings.[16] On January 5, 1989 Secretary of Defense Carlucci assented to the Commission's recommendations.[17] The Department of Defense said the plan potentially affected 25,000 jobs.[18] Sixteen thousand workers would be reassigned and there would be an actual loss of 9,000 jobs when all the bases were closed. However, many employees could transfer to other jobs in the federal government.[19] On April 19, 1989 the House of Representatives rejected a proposal disagreeing with the Commission's recommendation and the

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[12] Pub. L. No. 100-526 § 203(a).

[13] Pub. L. No. 100-526 § 202(a)(1).

[14] Pub. L. No. 100-526 §§ 200-209.

[15] Pub. L. No. 100-526 § 202(b).

[16] Melissa Healy, *Panel Proposes Closing 86 Bases, $700 Million in Yearly Savings Projected,* L.A. TIMES, Dec. 30, 1988, § 1 at 1.

[17] Paul Houston, *Carlucci Supports Military Base Closings, Officials Say,* L.A. TIMES, Jan. 5, 1988, § 1 at 17.

[18] *Id.*

[19] *Id.*

Department of Defense.[20] The vote was 381 to 43.[21] This meant the Senate need not take any action. Thus, the initial round of base closures ended.

The volatility of closing military bases resurfaced in 1990. In January Secretary of Defense Cheney, without the benefit of the authority contained in the 1988 statute, proposed the closure or realignment of more than 200 military bases throughout the United States. Included on the list were the Long Beach Naval Shipyard; Norton Air Force Base; George Air Force Base in San Bernardino County, California; Fort Sheridan, Illinois; and Fort Dix, New Jersey.[22] Congressional Democrats charged that the President was using the base closure threat as a chip in budget battles and veto fights.[23] On January 31, 1990, Congressman Les Aspin said the threat of base closures "put a political gun to the head" of any lawmaker with a targeted base in his district or state.[24] Furthermore, Congressman Aspin maintained the proposed base closures affected four times as many Democratic House districts as Republican districts.[25] Senator Sam Nunn suggested the bipartisan Commission be revived to recommend additional base closures.[26] Initially, Secretary of Defense Cheney and the Bush administration rejected the idea because "[i]t . . . [was] much more complicated . . . because the package of proposed base closures . . . [was] already out there and everybody kn[ew] whose ox . . . [was] about to get gored."[27] However, the Bush administration and the Democratic controlled

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[20] Melissa Healy, *House Vote Spells End for 86 Bases: Closure Clears Last Legislative Hurdle, Foes File Suit*, L.A. TIMES, Apr. 19, 1988, § 1 at 1.

[21] *Id.*

[22] James M. Broder & Melissa Healy, *Cheney Targets Major Bases in State to Close*, L.A. TIMES, Jan. 26, 1990, at A1.

[23] *See* Democratic Study Group, *Special Report: The Great Base Closing Ploy: Creating A Political Tempest to Shield a Bloated Budget* (1990).

[24] Paul Houston, *Democrats Seek Panel to Close Military Bases Politic: The Setup was successful last year in closing 86 Facilities. Bush's list is called an 'intimidation tactic,'* L.A. TIMES, Jan. 31, 1990, at A12.

[25] *Id.*

[26] *Id.*

[27] *Id.*

Congress eventually agreed in the 1990 Defense Authorization Act to reestablish the Defense Base Closure and Realignment Commission.[28]

III. CURRENT LEGISLATION AND REGULATIONS.

The 1990 Act established a modified procedure for making recommendations for base closures and realignments.[29] Section 2903 directed the Secretary of Defense to submit to Congress through the Department of Defense's budget requests for fiscal years 1992, 1994, and 1996 "a force-structure plan for the armed forces based on an assessment by the Secretary of the probable threats to the national security during the six year period beginning with the fiscal year for which the budget request is made . . . ."[30] Congress directed the Secretary of Defense to publish in the Federal Register and transmit to the congressional defense committees the proposed criteria to be used by the Department of Defense in making recommendations for the closure or realignment of installations inside the United States.[31] Congress mandated the Secretary publish the final criteria in the Federal Register and transmit the criteria to congressional defense committees no later than February 15, 1991.[32] The Secretary forwarded (1) military value, (2) return on investment and (3) impacts as the basic criteria.[33] Military value deals fundamentally with the facility's

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[28] 10 U.S.C. §2687.

[29] *Id.*

[30] 10 U.S.C. § 2687 note, Pub. L. No. 101-510 § 2903, 104 Stat. 1808 (1990) (as amended) [hereinafter Pub. L. No. 101-510].

[31] Pub. L. No. 101-510 § 2904(b)(1).

[32] Pub. L. No. 101-510 § 2904(b)(2)(A).

[33] 56 Fed. Reg. 6374-02 (Feb. 15, 1990). The criteria provides:

Military Value (Given overall priority consideration)

1. The current and future mission requirements and the impact on operational readiness of the Department of Defense's total force.
2. The availability and condition of land, facilities, and associated airspace at both the existing and potential receiving locations.
3. The ability to accommodate contingency, mobilization, and future total force requirements at both the existing and potential receiving locations.
4. The cost and manpower implications.

Return on Investment

5. The extent and timing of potential costs and savings, including the number of years beginning with the date of completion of the closure or realignment, for the savings to exceed the costs.

necessity to the nation's defense. Return on investment means the extent and timing of cost savings. "Impacts" refers to the economic impact on the community where a base is located as well as other impacts, such as environmental. More specifically, return on investment refers to the number of years before the government recoups its "one time costs to close." The phrases "one time cost" or "one time cost to close" refer to one time costs, such as clean up or moving expenses for personnel and equipment, which the federal government incurs when it closes or realigns a base. "Annual savings" is the amount of money the government will save each year due to the closure. The phrase "net present value" is the cost or savings resulting from a closure over a 20-year period. The Secretary of the Navy distributed a memorandum on December 8, 1993, which described in detail the Navy's practices and procedures for making base closure recommendations.[34]

The Act directed the Secretary of Defense no later than April 15, 1991, March 15, 1993, and March 1, 1995, to publish a "list of military installations inside the United States that he recommends for closure or realignment on the basis of the force structure plan and the final criteria referred to in subsection (b)(2) that are applicable to the year concerned."[35] The Act also required the Secretary to justify each recommendation.[36]

Section 2902 of the Act created the Defense Base Closure and Realignment Commission, consisting of eight members appointed by the President.[37] The Secretary of Defense submitted his closure recommendations with supporting data to the Commission.[38] After reviewing the Secretary's recommendations,

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Impacts

6. The economic impact on communities.

7. The ability of both the existing and potential receiving communities' infrastructure to support forces, missions, and personnel.

8. The environmental impact.

[34] Secretary of the Navy Notice 11000, Base Closure and Realignment (December 8, 1993) [hereinafter SECNAVNOTE 11000].

[35] Pub. L. No. 101-510 § 2903(b)(2).

[36] Pub. L. No. 101-510 § 2903(c).

[37] Pub. L. No. 101-510 § 2902.

[38] Pub. L. No. 101-510 § 2903(c)(1).

Congress required the Commission to conduct public hearings.[39] After the hearings, the Commission submited a report to the President containing its recommendations based upon its review and analysis of Secretary's recommendations and its own recommendations for closures of military bases.[40] The Act allowed the Commission to make changes to the Secretary's recommendations only if it "determine[d] that the Secretary deviated substantially from the force structure plan and final criteria referred to in subsection (c)(1) . . . ."[41] However, the Commission could make additions to or deletions from the Secretary's proposed closure list.[42] The Commission was required to submit its recommendations to the President by July 1, 1991, 1993, and 1995, respectively.[43] The President reviewed the Commission's recommendations and made a report to Congress by July 15 approving or disapproving all of the Commission's recommendations.[44] Finally, Congress retained the authority to disapprove all of the Commission's recommendations.[45]

IV. NAVAL ORDNANCE AND ITS WORK.

Naval Ordnance was one of the military installations that found itself on the BRAC chopping block in 1995. Naval Ordnance is a 142-acre government owned facility in Louisville, Kentucky which employed about 1800 employees in 1995. It rebuilds the large guns and missile launchers mounted on various types of naval vessels worldwide. These guns and launchers, very complex electro-mechanical assemblies, require careful engineering and precision machining. Rebuilding this equipment is very expensive. However, failure to do the job properly can have serious consequences to the Navy's readiness and create safety hazards to naval personnel.

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[39] Pub. L. No. 2903(d).

[40] Pub. L. No. 101-510 § 2903(d).

[41] Pub. L. No. 101-510 § 2903(d)(2)(B).

[42] Pub. L. No. 101-510 § 2903(d)(2)(D).

[43] Pub. L. No. 101-510 § 2903(d)(2)(A).

[44] Pub. L. No. 101-510 § 2903(e)

[45] *Id.*

Although the workload at Naval Ordnance declined in volume during the five years prior to its closure, the nature of its work remained essential to the national defense effort. Although parts of the work can be completed in many different locations, Naval Ordnance is a unique facility because no other single location in the United States can completely rebuild Navy guns and missile launchers. In order to rebuild these weapons safely and efficiently, it is necessary for substantially all of the work to be completed at one facility having all the required processes and capabilities. The Navy remained unwavering in its position on this point, even after the 1995 round of base closures.[46] The gun repair and missile launcher work done at Naval Ordnance would be done somewhere. The only question is whether it would be done by federal employees at Naval Ordnance or at some other government installation; by a private contractor occupying the Naval Ordnance facility after transfer to the Louisville and Jefferson County Redevelopment Authority; or by a private contractor's facility at another location.

V. HOW CLOSURE RECOMMENDATIONS ARE MADE.

In order to understand how the 1995 base closure process works it is essential to sketch the Department of Defense's and the Navy's organization. The Secretary of Defense is the Department of Defense's chief executive; the Secretary of the Navy reports directly to him. For base closure purposes, there are six layers of management between the Secretary of the Navy and Naval Ordnance. In descending order these entities are: (1) the Base Structure Evaluation Committee [hereinafter BSEC]; (2) the Base Structure Analysis Team [hereinafter BSAT]; (3) the Naval Sea Systems Command; (4) the Naval Surface Warfare Center; (5) the Crane Division; and finally, (6) Naval Ordnance.[47]

In carrying out its statutory responsibilities under the Act and regulations, the Navy assembles data to determine the most cost-effective way for defending the United States in accordance with the force structure plan.[48] The Navy is required to apply the final criteria set out above in making its closure recommendations. The procedure for doing this is for the Base Structure

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[46] The Department of Defense Closure recommendation does not recommend discontinuing the work. *See infra* note 99 for Department of Defense Closure Recommendation. *See also* Secretary of the Navy John Dalton's testimony before the Defense Base Closure and Realignment Commission on March 6, 1995, at 17-18 (copy on file with author).

[47] SECNAVNOTE 11000, *supra* note 34, at 1-4.

[48] *Id.* at 5.

Analysis Team to send "data calls" down through the chain of command to local installations such as Naval Ordnance.[49] Data calls seek cost and workload information for performing specific services or manufacturing specific products. In the case of Naval Ordnance, the data calls sought the cost of repairing guns and missile launchers. Data calls are very detailed and numerous. Many data calls go up and down the chain of command during the closure process.[50] The Act and the Navy's regulations require that these documents and cost figures originate at the local level and require they be certified as "accurate and complete" by each official from the originating official at the local level up through the entire chain of command.[51] When the data are assembled for all the installation's work, they are submitted through the chain of command to the BSAT.

The next step in the process is for BSAT to send down the chain of command a series of documents referred to in the regulations as "scenario data calls," which explore different methods to find the most cost effective way to accomplish the needed work under the basic criteria. The scenarios might ask: What would be the cost if we did a certain function at Naval Ordnance? What would be the cost of transferring all depot level work at Naval Ordnance to the Norfolk Naval Shipyard? What would it cost to do part of the work at Naval Ordnance and part of the work at some other location?

When the scenario data calls are completed at the local level, they too are required to be certified and sent back up the chain of command to the BSAT. They are then processed through a computer simulation model known as the "COBRA model." The COBRA model is simply a computer program which calculates the most cost-effective way of performing the needed work, taking into account the cost of closing the operation and moving the work. Secretary of the Navy Notice 11000 contains detailed instructions on the procedures to be followed at every level in performing the base structure analysis and in arriving at a decision to close or realign a base.[52]

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[49] *Id.* at enclosure (1).

[50] *Id.*

[51] Pub. L. No. 101-510 § 2903(c)(5)(A) and SECNAVNOTE 11000, *supra* note 34, at encl. 2.

[52] *See generally* SECNAVNOTE 11000, *supra* note 34.

VI. THE 1991 AND 1993 DECISIONS.

In order to understand the 1995 decision regarding Naval Ordnance, it is necessary to review some of the facts and circumstances associated with the 1991 and 1993 rounds of base closures. In 1991 the Navy estimated it would cost approximately $200 million to close Naval Ordnance as a government installation and hire a private contractor to perform the same work in the Naval Ordnance facility "while gaining insignificant long term benefits."[53] No one has ever questioned this figure's validity. Shortly before the 1991 round of closures began, a subsidiary of a large defense contractor, FMC, proposed to the Navy that FMC operate Naval Ordnance under a contract with the Navy. The congressman from Louisville opposed this plan.[54] Based on the high cost of hiring a private defense contractor to do the work, Naval Ordnance was not placed on the 1991 closure list. However, the Commission did realign Naval Ordnance by merging it with the Crane Division in Crane, Indiana, basically making it a detachment of Crane.

Naval Ordnance was not originally on the Department of Defense's closure list in 1993. However, FMC, Naval Ordnance's gun repair competitor, induced the Commission to place Naval Ordnance on the closure list. An internal FMC memo dated March 16, 1993 written by James Orr, a high ranking official in that company, states the company's reasons for wanting to acquire the work currently being done at Naval Ordnance.[55] He referred to Naval Ordnance as the "Evil Empire."[56] Orr continued, "It is certainly frustrating and discouraging for Louisville to have totally avoided the DoD list . . . . It is us or them!! The marketplace is not big enough for both of us."[57] This memo also suggests pressuring the Navy as much as possible to close Naval Ordnance. It names Charles Nemfakos, Deputy Undersecretary of the Navy, as the person

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[53] Sheldon Shafer, *Naval Ordnance Survives, But Will Lose up to 600 Jobs*, THE COURIER-JOURNAL (Louisville, Kentucky), Apr. 13, 1991, at A1.

[54] Sheldon Shafer, *Navy Studies Merging Louisville, Indiana Plants*, THE COURIER-JOURNAL (Louisville, Kentucky), Feb. 14, 1991, at B1.

[55] Letter from Jim Orr, FMC Naval Systems Division Minneapolis, to Distribution 2 (Mar. 16, 1993) (on file with author).

[56] *Id.* at 1.

[57] *Id.* at 1, 2.

ultimately having significant influence in recommending Naval Ordnance's closure.[58]

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[58] *Id.* at 1. I have reproduced this memorandum in its entirety to demonstrate the intense competition between the private and public sectors for defense contracts; to illustrate the methods suggested by at least one defense contractor for influencing a closure decision; and, to highlight this attitude given FMC's (later UDLP) role in the 19a95 round of base closures. The Orr memorandum states:

> We have just lost Round 1 of the 1993 Base Closure fight to the Evil Empire a.k.a. NSWC Louisville. The bell for Round 2 has sounded and will end 1 July when the Base Realignment & Closure Commission (BRCC) forwards its recommendations to the President. I am writing this memo to capture some thoughts on Round 1 and suggest a way ahead for Round 2.
> Thoughts: It is certainly frustrating and discouraging for Louisville to have totally avoided the DoD list. Looking at the list and the goings on of the last nine months we can draw some conclusions: 1) the Navy clearly took industrial capacity out of its infrastructure, including Mare Island and Charleston NSY's three Naval Aviation Depots, and several home ports/naval stations (Mobile, Charleston, Staten Island). The fact they did not go deeper (Louisville, Long Beach, Portsmouth) was a matter of degree, and politics. Aspin clearly tinkered with the list . . . the last weeks before release. It is now his list. 2) The Navy clearly took the biggest share of the 1993 list, with 23 of 31 major base closures. This was consistent with the public pronouncements before release. I expect that because they "gave at the office" this time, they will not do very much in 1995. 3) A relatively large dose of politics was applied to the orginal findings of the Base Structure Analysis Team, producing a list that reflected a fair degree of arm-twisting and lobbying. Besides the Louisville Houdini Act, examples include Long Beach and Portsmouth NSY's escape, the only partial realignment of the sub base at New London, the total escape of NUSC New London, and Great Lakes' "victory" over Orlando and San Diego. None of these reflect good solid analysis, but rather good old politics and "the art of the possible."
> Action: Much important work remains to be done over the next three months to have Louisville placed on the BRCC's 1993 list. I expect that this time will be characterized by a little objective fact-finding and a lot of political maneuvering. The BRCC has a history of "tinkering" with the DoD list, which then makes it "their" list (see attachment). Possible actions include the following: 1) What went into the DoD/DoN thought process that kept Louisville totally off the list? We need to get input from Nemfakos, Loftus, and all the other decision-makers who indicated Louisville would be on the list. Their views will provide good perspective. 2) Irrespective of these inputs, and precisely because of the clear and present danger Louisville represents to all of our business at NSD, we need to undertake an aggressive game plan to have Louisville included on the BRCC's July List: a) Understand every step of the BRCC process, with special attention to data calls, hearings, and decision points. b) Provide BRCC staff with data and analysis showing Louisville's redundancy when considered in the context of the industrial base; c) Cultivate at least four commissioners with similar briefings; d) Testify at at least one BRCC field hearing; monitor all proceedings. E) Launch an all-out political assault on Louisville and the Commissioners i) request a GAO investigation (via Grams/Ramsted) into the alleged cost savings realized by the creation of NSWC, especially Louisville and Crane. ii) Instigate a CAG/GAO investigation (via Sabo) into Louisville's competition with the private sector, especially in the International arena. Why is gun and launcher work being directed

In 1993, Charles Nemfakos represented to the Commission that the net present value over 20 years of Naval Ordnance was a cost of $623.3 million.[59] In other words, if Naval Ordnance were closed as a government operation with the work turned over to a private defense contractor, the government would pay $623.3 million more to get the work done than if Naval Ordnance remained a government operation over a 20 year period. He asserted this figure made it uneconomical to close Naval Ordnance.[60] Mr. Nemfakos also said the costs of closing Naval Ordnance and hiring a private contractor to do the same work

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to Louisville when FMC is laying off well over 50% of its manufacturing workforce? iii) Brief every pertinent member of the Minnesota/South Dakota delegations on the situation and request they active assistance. iv) Mobilize expressions of support through organized labor into the BRCC. v) Aid and abet other Congressional delegations faced with closures in their districts; a good example would be South Carolina; prime their delegation to ask why Louisville is getting so much repair and RAMP work while they are going to close the more important Charleston Naval Shipyard. I am sure there are other actions that can be taken: I offer this list up for consideration, enhancement, and implementation.
While this game plan is admittedly a long shot, we have no choice. I expect that Louisville will get much stronger over the next few years, primarily because NAVSEA's downsizing and subsequent spin off of more programmatics to Louisville, not to mention their siphoning off the FMC business. Now is not the time to be bashful. IT IS US OR THEM!! The market place is not big enough to sustain us both. There is no reason to hold back now. The 1995 cycle may represent some future potential, but we could be dead by then.

See also Michael Quinlan, *Competitor's Memo Recommends 'assault' on Ordnance Station*, THE COURIER-JOURNAL (Louisville, Kentucky), May 27, 1993, at B1.

[59] Letter from C.P. Nemfakos, Acting Chairman, Base Evaluation Committee, Department of the Navy, Office of the Secretary to The Honorable James Courter, Chairman, Defense Base Closure and Realignment Commission, 1 (June 8, 1993). The letter states:

> The Defense Base Closure and Realignment Commission has reqeusted COBRA output reports for a scenario which closes NSWC Louisville and transfers all work to GOCO facilities. We are providing COBRA reports and, as appropriate, economic and environmental impact data as attachments to this letter.
>
> The COBRA model costs associated with closing NSWC Louisville and transferring all functions to GOCO facilities are $125.3 million. The model projects a net steady state cost of over $53 million a year, resulting from this scenario. Consequently, the 20 year net present value equals a cost of $623.3 million. These projections do not support a Commission recommendation to close NSWC Louisville, and are not in the best interests of the Department of the Navy.

[60] *Id.*

at Naval Ordnance were $125.3 million.[61] This is some $75 million less than the Navy's 1991 estimate. However, the Navy did not use the COBRA model in 1991, making the figures not directly comparable. Moreover, the figure could be lower since Naval Ordnance did less work in 1993 than in 1991. Also in 1993, local officials from Louisville urged the Commission not to recommend closure of Naval Ordnance.[62] Feeling pressure from defense contractors,[63] the Commission evaluated Naval Ordnance but did not recommend closure.

VII. THE 1995 DECISION.

As early as March 1994 stories appeared in Louisville newspapers suggesting Naval Ordnance was destined to be closed in the 1995 base closure process. Local leaders met with Navy officials on March 16, 1994 and discussed the subject.[64] From the Orr memorandum's content and tone, one can safely assume FMC continued to make its desires known to the Navy and to local officials in Louisville. After the Commission decided not to close Naval Ordnance in 1993, it appears defense contractor representatives went to Louisville officials, the Chamber of Commerce, and the union representing most employees at Naval Ordnance and convinced local political and business leaders that Naval Ordnance would be closed during the 1995 base closures process.[65] Conversations with Navy officials led the Louisville representatives to the same conclusion. Assistant Secretary of the Navy Robin Pirie visited Naval Ordnance on June 9, 1994, meeting with several state and local officials during the visit.[66]

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[61] *Id.*

[62] Compilation of Staff and AP Dispatches, *Ordnance Workers to Honor Mazzoli,* THE COURIER-JOURNAL (Louisville, Kentucky), Sept. 9, 1993, at B3.

[63] Mike Brown, *Defense Contractors Complain that Government Keeps too Much Work,* THE COURIER-JOURNAL (Louisville, Kentucky), June 9, 1993, at B3.

[64] Sheldon Shafer, *States Fire First Round in Campaign to Keep Ordnance Station Open,* THE COURIER-JOURNAL (Louisville, Kentucky), Mar. 16, 1994, at B3.

[65] Although several of the participants in these events were questioned by the author, none was willing to discuss the matter in detail.

[66] Compilation from Staff Dispatches, *Navy Officials Visit Ordnance Plant,* THE COURIER-JOURNAL (Louisville, Kentucky), June 10, 1994, at B4.

On October 19 and 20, 1994, several local officials met with Navy officials in Washington, D.C. The opening line in *The Courier-Journal's* account of the meeting suggests that unless something changed, Naval Ordnance would be closed in 1995.[67] The Louisville delegation met with Charles Nemfakos.[68] Shortly after this meeting, the Louisville group began considering various alternatives.[69] The local politicians and business representatives became convinced the best course of action in the 1995 round would be to urge the Navy to permit the privatization of Naval Ordnance.[70] In attempt to save jobs at Naval Ordnance, this group planned to acquiesce tacitly in Naval Ordnance's closure as a government facility, having the physical property conveyed to the local governments, and allowing defense contractors to use the facilities to do the work previously done by Navy employees.

The foregoing is a summary of the early events in 1994-95, casting the Louisville officials in the most favorable light. However, some Naval Ordnance employees believe FMC pressured the Navy into closing Naval Ordnance. They feel the Navy violated the law and internal regulations by "cooking" the data to justify a closure decision and agreeing to privatization so Louisville politicians would not protest too loudly.[71]

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[67] Sheldon Shafer, *Mazzoil, Other Officials Pitch for Future of Naval Ordnance*, THE COURIER-JOURNAL (Louisville, Kentucky), Oct. 19, 1994, at B2.

[68] *Id.*

[69] Rachel Kamuf, *Naval Ordnance Seeks Private Contract Partner*, BUSINESS FIRST-LOUISVILLE, Nov. 28, 1994 at 23.

[70] It should be noted that the idea of privatization as developed by Louisville officials is different from the way that term has been used in most of the rest of the world. For example, when Great Britain privatized several basic industries in the Tatcher years, it sold the industries to private companies. *See* ASHER, THE POLITICS OF PRIVATISATION (1987); BURK, THE FIRST PRIVATISATION: THE POLITICIANS LOGIC OF PRIVATISATION: LESSONS FROM GREAT BRITAIN AND POLAND (1993); WHITFIELD, MAKING IT PUBLIC: EVIDENCE AND ACTION AGAINST PRIVATISATION (1984); Symposium, *Overview: Perspectives on Privatization and the Public Interest*, VI YALE L. & POL'Y REV. 1 (1988); Peck, *The Privatization of Industry in Historical Perspective*, 16 J.L. & Soc. 129 (1989).

[71] A syndicated column advances this theory in a general way. Jack Anderson, *Suspicious Slip-up Closes Louisville Base*, THE NEWS-ENTERPRISE, Aug. 18, 1995. These views were also expressed by some employees on the day the Commission announced its decision. Rick McDonough, *Many at Naval Ordnance dislike privatization*, THE COURIER-JOURNAL (Louisville, Kentucky), June 23, 1995 at B1.

Initially the employees at Naval Ordnance were not concerned about the above-referenced newspaper stories suggesting Naval Ordnance would be closed, since no change in the type of work being done occurred and since the Navy supported keeping it open in 1993. Although the employees recognized the declining workload, they also knew nothing else of significance had changed. Furthermore, they knew the Navy had not started collecting data when the first stories appeared. Accordingly, the closure in 1995 would again be a 20-year net present cost decision of $500 or $600 million. Again, high closure and relocation costs would preclude a return on investment for the foreseeable future.

When Naval Ordnance submitted its scenario data in late 1994, it represented that the 20 year net present value was zero if Naval Ordnance were closed and the work moved elsewhere.[72] In other words, closing Naval Ordnance would not present a savings over a 25-year period. There would not be a return on investment for the foreseeable future. Naval Ordnance estimated the one time closure costs at $345 million.[73] A possible reason the net present value figure went from a 20 year net present value cost of $623 million in 1993 to zero in 1995, which is actually a savings for the government, was that the volume of work at Naval Ordnance had decreased since 1993. There may be a logical explanation for the difference in the 1993 and 1995 one-time closure cost estimates. The $125.3 million one-time closure cost figure in 1993 was based on a scenario of a private defense contractor performing the same work at Naval Ordnance.[74] The 1995 figure of $345 million was based on a scenario that included moving all of the work to other locations.[75] Since Naval Ordnance was doing work that was not being done anywhere else in the United States, these relocation costs were very high.

Moreover, after Naval Ordnance submitted its data, higher Navy officials changed the amounts without following the procedures contained in the Act and the applicable regulations. These changes and other irregularities are summarized in a report to the Naval Sea Systems Command Inspector General

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[72] *Issues, Naval Surface Warfare Center, Crane Division, Detachment Louisville, Kentucky,* at Exhibit D-4 (copy on file with author).

[73] *Id.*

[74] Letter from C.P. Nemfakos, *supra* note 59.

[75] *Issues, supra* note 72.

and the Auditor General of the Navy on the closure of Naval Ordnance which came several months later.[76]

Before analyzing the Report to the Inspector General, various meetings within the Navy during late 1994 and early 1995 will be analyzed. The records of these meetings make it quite clear that Naval Ordnance was targeted for closure before the Navy started collecting financial and production data from it or from the other installations with which Naval Ordnance was compared. The minutes of BSAT and BSEC meetings, when read in conjunction with Louisville newspapers, also suggest that during the fall of 1994 the Navy effectively got the message to the Louisville business and political leadership that resisting the closure of Naval Ordnance would be futile. It becomes obvious that "privatizing" Naval Ordnance was discussed during these meetings.

VIII. BSAT AND BSEC MEETINGS.

In a meeting of November 15, 1994, the BSEC considered overall strategies or policies in making closure decisions in 1995. One such policy was that "[d]epot level work currently conducted at Technical Centers should be moved to the shipyards to achieve greater productivity efficiencies while reducing excess capacity."[77] Depot level maintenance work is a certified process for tear down, parts replacement, and equipment or systems reassembly. A Navy study indicated three Technical Centers (NUWC Keyport, NSWC Crane and Naval Ordnance) were doing very different amounts of depot level maintenance work. At that time, 3% of Keyport's workload was depot level maintenance, while 8.4% of Crane's.[78] Forty-five percent Naval Ordnance's work was depot level maintenance work.[79] The significance of the amount of "depot level" maintenance work being done at these three locations is that section 2466 of Title 10 prohibits the Department of Defense from hiring outside contractors to perform more than 40% of the depot level maintenance work in any fiscal

[76] *See generally*, Letter from Director of Production, Naval Audit Service *supra* note 4.

[77] Memorandum for the BSEC, Base Structure Analysis Team, Mar. 13, 1995 (copy on file with author).

[78] *Id.*

[79] *Id.*

year.[80] By transferring the Naval Ordnance's depot level maintenance to a shipyard, the Navy could more readily hire a private contractor to perform Naval Ordnance's remaining 55% of the work. The memorandum of this meeting states "in view of the high percentage of depot maintenance level work done at NAWC, Louisville, the BSEC confirmed their previous determination that closure of that activity should be included in the scenario development data calls."[81] Two data calls were issued after this meeting.[82] Naval Ordnance's response to the data calls was submitted on November 2, 1994.[83] Thus, Naval Ordnance was considered for closure before data calls were issued, based on its high amount of depot level maintenance, not on the final criteria published in the Federal Register. On November 16, 1994, the BSAT presented to the BSEC a "Proposed Configuration Analysis" for the Technical Centers.[84] This study provided a basic analysis of the Technical Centers' military value. According to this analysis, Naval Ordnance should not have been recommended for closure.[85] However, based on low military value, the analysis indicated several other Technical Centers should be closed.[86] The data contained in this analysis and its conclusions are nearly identical to the final BRAC-95 report.[87] Notwithstanding its military value, BSEC added Naval Ordnance to the list of Technical Centers to be closed because of "the potential to take shipboard work

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[80] 10 U.S.C. § 2466(a) provides:

> Not more than 40 percent of the funds available in a fiscal year to a military department or a Defense Agency for depot-level maintenance and repair workload may be used to contract for the performance by non-Federal Government personnel of such work for the military department or the Defense Agency. Any such funds that are not used for such a contract shall be used for the performance of depot-level maintenance and repair workload by employees of the Department of Defense.

[81] Memorandum for the BSEC, *Base Structure Analysis Team,* Mar. 13, 1995 (copy on file with author). *See also*, Director of Production, Naval Audit Service, *supra* note 4, Appendix 33 at 3 where Vice Admiral Sargent is quoted as saying, "There was a big push for BSAT and the Navy to minimize costs because the Navy wants to reduce infrastructure."

[82] The data calls referred to bear the numbers "012" and "013."

[83] Letter from Director of Production, Naval Audit Service, *supra* note 4, at Appendix 53.

[84] Memorandum for the BSEC, *supra* note 77.

[85] *Id.*

[86] *Id.*

[87] *Id.* The data also referred to bear the numbers "012" and 013."

out of Louisville."[88] The final Department of Defense recommendation to close Naval Ordnance proposed transferring some of its depot level maintenance work to Crane (another technical center) rather than to a shipyard.[89]

Between December 1994 and March 11, 1995, the date of the Department of Defense's closure recommendation, the Navy excluded about $240 million in one-time closure costs from Naval Ordnance's original submission. Time and space limitations do not permit an analysis of each cost item deleted. However, one substantial item illustrates the overall problem.

Whether the work of Naval Ordnance is transferred to another government installation or to the private sector, a large effort is expended in developing "technical repair standards." The Navy analyzed this issue in 1991 and 1993, concluding the cost of developing these standards would be $81 million if the work were moved to the private sector.[90] In 1995 Naval Ordnance used the same method to complete this cost item which Navy management approved in 1991 and 1993. It put these costs at $124 million. In preparing its cost estimates for the Commission in 1995, however, the Navy completely eliminated this cost. The very same people who developed and approved the estimate in 1991 and 1993 now disagreed with their previous cost estimates.[91] Moreover, officials at Crane and Norfolk thought Naval Ordnance's data was inaccurate.[92]

During a November 17, 1994 BSEC meeting, Charles Nemfakos said, "[t]he amount of excess capacity and the number of activities closed by the [above referenced] model solution reflected the lack of significant technical center closures commensurate with other departmental indicators during BRAC-93."[93]

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[88] Memorandum for the BSEC, *supra* note 77, at 1-2. Mr. Gratton, the executive director of Naval Ordnance, told the Navy's investigator that Vice Admiral Sargent made the statement in a meeting with other officers that BSAT had "preconsidered outcomes." Director of Production, Naval Audit Service, *supra* note 4, Appendix 23 at 2.

[89] *See infra* note 107 for the Department of Defense's closure recommendation.

[90] Letter from Director of Production, *supra* note 4, Appendix 53 at 3a.

[91] Letter from Director of Production, Naval Audit Service, Appendix 32 at 4, Appendix 27 at 2, and Appendix 24 at 6.

[92] *Id.*, at Appendix 53 at 3, and Appendix 34 at 2.

[93] Memorandum for the BSEC, *supra* note 77, at 2.

The foregoing remark implies that more technical centers should have been closed in 1993 than actually were closed.

The Act requires the Department of Defense to consider all military installations "equally without regard to whether the installation had been previously considered or proposed for closure or realignment by the Department."[94] Mr. Nemfakos remark implies that in 1995 the Navy took into account the fact that some facilities, including Naval Ordnance, had been considered for closure in 1993 rather than strictly relying on the data developed for the 1995 round of base closures.

In December 1994, the BSEC made another questionable move. It directed BSAT to combine the data for Naval Ordnance and NAWC Indianapolis.[95] Prior data submissions, the validity of which has not been disputed, stated the return on investment for closing Naval Ordnance as six years or even "never" depending on the figures used.[96] BSEC decided to calculate the combined return on investment of Naval Ordnance and NAWC Indianapolis. NAWC Indianapolis repairs naval avionics equipment, work not functionally related to repairing guns and missile launchers. Because there were other facilities in the United States which could do NAWC Indianapolis' work, the return on investment for Indianapolis was much less than for Naval Ordnance. The Navy calculated the combined return on investment of the two operations as two years.[97] Combining Naval Ordnance and NAWC Indianapolis concealed closure data demonstrating that Naval Ordnance had far higher closure costs and return on investment than Indianapolis.

The reasons for combining Naval Ordnance and Indianapolis do not appear in the BSEC minutes. When the Department of Defense submitted its closure list to the Commission, it did not recommend the closure of any base having a return on investment greater than four years. Had Naval Ordnance not been combined with Indianapolis, its return on investment would have been much more than four years.

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[94] Pub. L. No. 101-510 § 2903(c)(3)(A).

[95] Memorandum for the BSEC, *supra* note 77, at 3.

[96] *Id.*

[97] *Id.* at 4.

At a BSEC meeting on January 13, 1995, Mr. Nemfakos was asked the reasons for the BSEC recommendation closing Naval Ordnance. The report of that meeting states:

> Mr. Nemfakos explained that the Louisville detachment supported fleet combat subsystems (guns and missiles). From a financial point of view, closure of Louisville was attractive. This recommendation would complete the process started in 1991 to take depot work out of the technical centers. Shipboard work would move to the shipyards where it would consume excess capacity and would be close to the fleet. It also allows further economic loading of NSWC, Crane. This action is also in consonance with the JCSG recommendations and has a joint aspect, as their plating work would be done at Watervliet. Finally, there is a good chance that some work may migrate to the private sector.[98]

This quotation suggests several reasons for closing Naval Ordnance that are inconsistent with the Act. First, the Act requires closure recommendations to be based on the final criteria.[99] Mr. Nemfakos' remarks indicate the Navy used the Act to accomplish a long-range goal of moving depot work from technical centers to shipyards rather than applying the final criteria to the individual installations. Second, his remarks also suggest a violation of § 2903 (c)(3)(A) of the Act.[100] Completing "the process as stated in 1991" clearly takes into account the Navy's previous closure and realignment recommendations. Finally, the remark about privatization clearly violates section 2903 (c)(3)(B) of the Act that prohibits the Navy from taking into account "for any purpose any advance conversion planning undertaken by the

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[98] Memorandum for the BSEC, *supra* note 77, at 6.

[99] Pub. L. No. 101-510 § 2903(c)(1) which provides:

> The Secretary may, by no later than April 15, 1991, March 15, 1993, and March 1, 1995, publish in the Federal Register and transmit to the congressional defense committees and the Commission a list of the military installations inside the United States that the Secretary recommends for closure or realignment on the basis of the force-structure plan and the final criteria referred to in subsection (b)(2) that are applicable to the year concerned (emphasis added).

[100] Pub. L. No. 101-510 § 2903(c)(3)(A).

affected community."[101] Mr. Nemfakos' comment about there being a good chance that some of the work may "migrate to the private sector" also reflects the fact that interested defense contractors and representatives from the Louisville area had spoken to Naval officials about privatizing Naval Ordnance.

On March 11, 1995, the Department of Defense recommended closing Naval Ordnance and relocating its work to other locations including the Naval Shipyard at Norfolk and Crane, Indiana.[102] The recommendation states that: (1) Naval Ordnance should close to reduce excess capacity; (2) depot level work should be moved to the Norfolk Naval Shipyard; (3) technical and engineering work should be moved to other locations; and, (4) Close-in-Weapons System depot maintenance work should be moved to Crane.[103] The Department of Defense estimated the total one-time cost to implement the recommendation to close Naval Ordnance and NAWC Indianapolis to be $180 million.[104] It estimated annual recurring savings at $67.8 million.[105] The combined return on investment was two years. Finally, the net present value of costs and savings over 20 years was a savings of $639.9 million.[106] The Department of Defense recommendation did not mention privatizing Naval Ordnance.[107]

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[101] Pub. L. No. 101-510 § 2903 (c)(3)(B).

[102] Department of Defense Closure Recommendation, at Attachment X-8 (copy on file with author).

[103] *Id.*

[104] *Id.*

[105] *Id.*

[106] *Id.*

[107] *Id.* The recommendation, excluding the section on impacts, states:

> Recommendation: Close the Naval Surface Warfare Center, Crane Division Detachment, Louisville, Kentucky. Relocate appropriate functions, personnel, equipment, and support to other naval activities, primarily the Naval Shipyard, Norfolk, Virginia; and the Naval Surface Warfare Center, Port Hueneme, California; and the Naval Surface Warfare Center, Crane, Indiana.
>
> Justification: There is an overall reduction in operational forces and a sharp decline of the DON budget through FY 2001. Specific reductions for technical centers are difficult to determine, because these activities are supported through customer orders. However, the level of forces and the budget are reliable indicators of sharp declines in technical center workload through FY 2001, which leads to a recognition of excess capacity in these activities. This excess and the imbalance in force and resource levels dictate closure/realignment or consolidation of activities wherever practicable. Consistent with the

The differences between Department of Defense's 1993 figures and those found in its closure recommendation are astonishing. In 1993, Mr. Nemfakos told the Commission the one time costs associated with closing Naval Ordnance and transferring the work to other government owned contractor operated facilities were $125 million.[108] The comparable figure in the 1995 Department of Defense recommendation was $104 million.[109] In 1995, Naval Ordnance estimated the one-time closure cost would be approximately $345 million.[110] The most startling difference between the 1993 and 1995 data is that in 1993 Mr. Nemfakos told the Commission that the "20 Year Net Present Value equals a cost of $632.3 million."[111] In 1995 the Department of Defense closure recommendation for both Indianapolis and Naval Ordnance "over 20 years is a savings of $639.9 million."[112] The comparable figure for Naval Ordnance

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Department of the Navy's efforts to remove depot level maintenance workload from technical centers and return it to depot industrial activities, this action consolidates ships' systems [guns] depot and general industrial workload at NSYD Norfolk, which has many of the required facilities in place. The functional distribution of workload in this manner offers an opportunity for cross-servicing part of the gun plating workload to the Watervleit Arsenal in New York. System integration engineering will relocate to NSWC Port Hueneme, with the remainder of the engineering workload and Close-in-Weapons systems (CIWS) depot maintenance functions relocating to NSWC Crane. The closure of this activity not only reduces excess capacity, but relocation of functional workload to activities performing similar work will result in additional efficiencies and economies in the management of those functions.

Return on Investment: The return on investment data below applies to the closure of NSEC Louisville and the closure of NAWC Indianapolis. The total estimated one-time cost to implement these recommendations is $180 million. The net cost of all savings during the implementation period is a cost of $426.8 million. Annual recurring savings after implementation are $67.8 million with a return on investment expected in two years. The net present value of the costs and savings over 20 years is a savings of $639.9 million.

[108] Letter from C.P. Nemfakos, *supra* note 59.

[109] The Department of Defense's recommendation contains cost data for both Naval Ordnance and Indianapolis. Separate data furnished the Commission contains the $105 million figure. *Issues, Naval Surface Warfare Center, Crane Division, Detachment Louisville, Kentucky*, at Exhibit D-4 (on file in the Base Realignment and Closure Commission library).

[110] *Id.*

[111] Letter from C.P. Nemfakos, *supra* note 59.

[112] Department of Defense Closure Recommendation at Attachment X-8 (copy on file with author).

only was a savings of $244 million. The difference in these figures is about $876 million.

Why did the Navy think the estimated one-time closure costs were nearly $240 million less than Naval Ordnance's estimate? This is a key question that has not been answered satisfactorily.[113] Navy officials eliminated several substantial items of cost such as square footage requirements to do the work elsewhere, technical repair standardization costs, and labor cost differentials.

As will be shown in the analysis of the Report to the Inspector General, the Navy violated the Act and its own regulations in collecting and processing this data.

A fundamental inconsistency exists between the reasons for closing Naval Ordnance as stated in the January 13 BSEC meeting and the final Department of Defense recommendation. The BSEC minutes speak of a good chance of privatizing the work at Naval Ordnance because of Louisville's initiatives. Privatizing Naval Ordnance means the work would continue to be done in Louisville but by a private defense contractor. However, the Department of Defense recommendation speaks solely of reducing excess capacity and work consolidation. If there is truly excess gun and missile launcher repair capacity as the Department of Defense recommendation states, it is reasonable to ask if the Navy is dealing honestly with the city of Louisville by suggesting privatization as an alternative to closure. If there is truly excess capacity, why privatize the facility? It should be closed. Clearly high-ranking Navy officials were saying one thing to Louisville's business and political leadership while recommending something else to the Commission.

IX. THE REPORT TO THE INSPECTOR GENERAL AND THE GAO REPORT.

As will be shown in detail, when officials at Naval Ordnance submitted its cost and workload figures, higher echelon officials in the Navy reduced those figures. This occurred at several different management levels. Naval Ordnance submitted figures to the next higher echelon in the chain of command — the Crane Division. Crane submitted data to the Naval Surface Warfare Center, which in turn submitted it to the Naval Sea Systems Command. When the data came back down the chain of command, it had changed significantly. Changing this data dramatically reduced the cost of closing Naval Ordnance and moving

[113] *See supra* note 107.

the work to another location. The officials who made these changes failed to follow the procedures contained in the Act for making such changes.

In early 1995, several employees of Naval Ordnance made anonymous complaints to the Inspector General of the Navy. These employees alleged that Navy officials were violating the Act and the Navy's regulations with impunity. An investigation began. On March 3, 1995, the Director of Production, Naval Audit Service submitted a report to the Naval Sea Systems Command Inspector General and Auditor General of the Navy analyzing these allegations. His report was issued before the Department of Defense publicized its closure list on March 11, 1995. For purposes of analysis, the report grouped these charges of official misconduct under six general headings. The director found the Navy had violated public law or its own regulations regarding five of the groups of allegations and that one allegation was unsubstantiated. The cover letter enclosing the report states:

> We found that NSWC echelons above NSWC, Louisville did not always follow SECNAVNOTE 11000 with regard to documentation of changes to the original data submissions from NSWC, Louisville; and, certain costs reduced from the original submissions were questionable. However, review of the BRAC-95 decision model application to NSWC, Louisville in light of the identified irregularities, disclosed there would be no apparent impact on the BRAC-95 decision.[114]

The general conclusion of the report was:

> We identified internal control weaknesses in the procedures used in the BRAC-95 process as it relates to NSWC Louisville. We found that local team certification officials were not allowed to recertify command final scenario submissions; higher echelon changes were not always returned to the originating command; certain costs submitted by NSWC, Louisville were changed without appropriate justification and supporting documentation; and, there were two instances of appearance of conflict of interest up to the NSWC Headquarters level.[115]

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[114] Letter from Director of Production, Naval Audit Service, *supra* note 4, at 1.

[115] *Id.* at 2.

The first allegation noted that local team certification sheets were not signed because data modified per direction of higher echelon command.[116] The Act provides that the preparer of documents to be submitted to the Commission must certify that all information contained in the documents is "accurate and complete to the best of that person's knowledge and belief."[117] Secretary of the Navy Notice 11000 also requires certification that the data is accurate and complete by both "the individual responsible for generating the information and by the head of the organization in which that individual is employed."[118] The report concluded that "the individuals responsible for recertifying these directive changes refused to do so because they did not agree with them."[119] The report stated that the refusal to sign the documents "did not occur due to pressure from higher commands.[120] This conclusion is questionable. However, the report concluded that "procedures outlined in SECNAVNOTE 11000 were not adhered to by NSWC, Louisville personnel."[121]

The second allegation considered by the Director noted "data sheets changed by higher echelon without identifying them as higher echelon changes."[122] Secretary of the Navy Notice 11000 states that:

> to the extent a higher echelon believes different data are more responsive to a particular data call, such data can be revised after receipt from the subordinate activity and prior to forwarding the final response to BSEC A copy of the revised data call annotating any changes made, shall be sent to the originator of the data, so that subordinates have a complete record of the final certified package.[123]

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[116] *Id.*

[117] Pub. L. No. 101-510 §2903(c)(5)(A).

[118] SECNAVNOTE 11000, *supra* note 27, enclosure (2) at 1.

[119] Letter from the Director of Production, Naval Audit Service, *supra* note 4, enclosure (1) at 2.

[120] *Id.* at 3.

[121] *Id.*

[122] *Id.*

[123] SECNAVNOTE 11000, *supra* note 27, enclosure (2) at 1-2.

The Report states that higher echelon officials made changes in data submissions without notifying Naval Ordnance. Attachments to the report fully substantiate this conclusion. Vice Admiral Sargent stated his staff had 48 hours to "get the information together" as the reason for failing to follow the regulations.[124]

The third substantiated allegation charged that the "ability to provide independent site specific input was eliminated by chain of command."[125] The director noted:

> SECNAVNOTE 11000 states that a certification will be executed both by the individual responsible for generating the information and by the head of the organization in which such individual is employed. This certification includes a statement that ". . . the information contained herein is accurate and complete to the best of my knowledge and belief."[126]

The Report states that the following occurred: "On 22 November 1994, BSAT questioned these nonconcurrences and directed that scenario 012/013 data call response be resubmitted removing a nonoccurrence from NSWC, Louisville."[127] This statement is a polite way of saying that high officials in the Navy violated the Act by removing documents from Naval Ordnance's submissions when they disapproved of the submissions.

The fourth allegation stated:

> "Low-ball" estimates submitted by competing interests and higher echelons will not provide adequate BRAC 95 funding to accomplish relocation of NSWC, Louisville capability, nor sufficient funds and resources to reestablish the programs at the gaining activities.[128]

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[124] Letter from the Director of Production, Naval Audit Service, *supra* note 4, Appendix 33 at 2.

[125] *Id.* at enclosure (1) at 6.

[126] *Id.*

[127] *Id.* and at Appendix 43 at 1.

[128] *Id.* at enclosure (1) at 7.

This allegation was substantiated. The reduction of technical repair standards discussed above was one example of a "low ball" estimate. Without getting into other specific allegations, including matters such as square footage capacity, the equipment requirements, and stabilized wage rate, one can only conclude Navy officials at Crane and Norfolk deleted a large amount of closure costs from Naval Ordnance's original submissions by a process which the report found improper. Attached to the Report to the Inspector General is a detailed analysis and evidence supporting these violations.[129] The Department of Defense may be defrauding taxpayers with these practices. The Department of Defense told the Commission and the public that the government would save millions by closing Naval Ordnance. If higher echelons in the Navy deliberately underestimated the costs of doing the work elsewhere, the federal government may experience no savings.

Finally, the director found a conflict of interest in data compilation between Louisville and its command, NSWC Crane. The director summarized the conflict as follows:

> The NSWC Headquarters BRAC Coordinator for BRAC 95 was the NSWC, Crane BRAC Coordinator for BRAC 93. This individual was still an employee of NSWC, Crane, detailed to NSWC Headquarters for the BRAC 95 process. According to sources during BRAC 93, this individual was actively involved in compiling financial information, including Industrial Process Document costs for a scenario that would have closed NSWC, Louisville and moved all work to private industry. The perception of NSWC, Louisville personnel is that this individual was also actively involved with reducing closure costs of NSWC, Louisville.[130]

The report concluded this official had at least an appearance of a conflict of interest. Statements of officials at Crane and Norfolk fully support this conclusion.

Some of the interviews conducted during this investigation are astonishing. For example, when Vice Admiral Sterner, Commander, Naval Sea Systems Command was interviewed, he admitted knowing that in 1991 the environmental

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[129] *Id.* at Appendix 53.

[130] *Id.* at enclosure (1) at 11.

clean up costs at Naval Ordnance were estimated to be in excess of $200 million."[131] Vice Admiral Sterner said "he was aware of that issue and didn't know why that costs [sic] was excluded from the scenario"[132] in 1995. He also said "the current cost estimates to close Louisville did not address all cost; however, that problem is Navy and possibly DoD wide."[133] He also admitted changing the scenario data submitted by Naval Ordnance.[134]

In April 1995, the General Accounting Office issued a report on the overall BRAC process in 1995.[135] The General Accounting Office, benefitting from the Report to the Inspector General, recommended the Commission "thoroughly examine the basis for exclusions to the cost and savings associated with closure and realignment scenarios such as NSWC, Louisville, NAWC Indianapolis, and NAWC Lakehurst in the technical center's sub-category."[136] The fact the report mentions NAWC Indianapolis and NAWC Lakehurst along with Naval Ordnance indicates the Louisville situation was not totally isolated. As will be seen, the Commission's recommendation to close Naval Ordnance fails to contain any examination of the basis for the exclusions and cost savings as requested by the General Accounting Office.[137]

X. LOCAL POLITICAL RESPONSE TO THE INSPECTOR GENERAL REPORT AND GAO REPORT.

At the time Navy officials tampered with the data submitted by Naval Ordnance, local officials, chamber of commerce representatives, and congressmen from Kentucky had already met with mid and upper level officials in the Navy on several occasions. They had been informed the Navy supported their privatization efforts, but the Department of Defense closure list was not yet public. What happened next is hard to understand.

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[131] *Id.* at Appendix 39 at 3.

[132] *Id.*

[133] *Id.*

[134] *Id.*

[135] General Accounting Office, *Report on BRAC-95 (GAO/NSIAD-95-133 Military Bases), U.S. General Accounting Office, Military Base Analysis of DoD's 1995 Process and Recommendations.*

[136] *Id.* at 109.

[137] The Commission's recommendation is quoted at note 107.

Within a few days after the Report to the Inspector General was issued, the report found its way to the offices of Kentucky Senator Wendell Ford and Representative Mike Ward of Louisville. Senator Ford submitted some questions to the Navy asking whether it was "cooking the books." Secretary of the Navy Dalton said the Navy auditors had "reviewed the work and found it to be appropriate."[138] A representative of the Louisville area Chamber of Commerce commented, "[w]e consider it a very serious issue."[139] However, no one really pressed either the Navy or the Commission on the matter. A story in *The Courier-Journal* of April 26, 1995 summarizes the Report to the Inspector General in some detail.[140] It is not clear why the Louisville representatives failed to make a vigorous response. The Report to the Inspector General and its attachments contain clear evidence of wholesale violations of the Act. What is certain from the remarks of those involved is that they favored privatization of Naval Ordnance. [141] By mid-March local officials also knew Naval Ordnance was being considered as a unit with Indianapolis in calculating the return on investment but they did not seriously question that matter either. Again, one explanation may be the political and business leadership of Louisville did not want to jeopardize Naval Ordnance's possible privatization by questioning these irregularities.[142]

On June 1, 1995, Louisville and Jefferson County signed memoranda of understanding with Hughes Missile Systems Company and United Defense LP, a FMC subsidiary, dealing with Naval Ordnance. On June 2, 1995, Louisville and Jefferson County made an unsolicited proposal to the Secretary of the Navy to establish a Naval Gun Center of Excellence at Naval Ordnance to be operated by Hughes and United Defense LP. The overall plan was quite simple. It was hoped the Department of Defense would recommend the privatization of Naval

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[138] Mike Brown, *Secretary Defends Naval Ordnance Data; Denies Manipulation to Support Closing*, THE COURIER-JOURNAL (Louisville, Kentucky), Mar. 7, 1995, at B2.

[139] *Id.*

[140] Sheldon S. Shafer, *Costs to Shut Station 'Low Balled,' Navy says; Louisville Staff's Estimates Changed,* THE COURIER-JOURNAL (Louisville, Kentucky), Apr. 26, 1995, at A1.

[141] Sheldon Shafer, *Naval Ordnance Seeks Contractor as Partner to Help Keep it Open,* THE COURIER-JOURNAL (Louisville, Kentucky), Dec. 15, 1994, at B1; Sheldon Shafer, *Ordnance Station may have a Chance,* THE COURIER-JOURNAL (Louisville, Kentucy), Mar. 30, 1995, at B1; Rachel Kamuf, *Naval Ordnance Seeks Private Contractor Partner,* THE COURIER-JOURNAL (Louisville, Kentucky), Nov. 28, 1994, section 1 at 3.

[142] Brown, *supra* note 138, at B2.

Ordinance. It was expected the Commission would agree. As expeditiously as possible, the Department of Defense would transfer the Naval Ordnance property to an agency to be created called the "Louisville/Jefferson County Redevelopment Authority."[143] Hughes and UDLP would be hired as contractors to operate the facility under a contract with Louisville and the United States government. They would perform substantially the same work formerly done at the facility. Hopefully, many employees at Naval Ordnance would become contractor employees. Both contractors indicated a desire to do work for customers other than the Navy at the privatized facility.[144]

XI. PROCEEDINGS BEFORE THE COMMISSION.

In testimony before the Commission, Secretary of the Navy Dalton made the same point Mr. Nemfako made on November 15, 1994. He said, "We moved depot and industrial functions from the technical centers and returned these efforts to the Navy industrial activities or made the decision to depend on the private sector."[145]

> An example of this industrial consolidation is our recommended closure of the Naval Surface Warfare Center Crane Detachment, Louisville, Kentucky. This action consolidates ships' weapons systems—primarily guns and associated equipment—with the general industrial workload at Norfolk Naval Shipyard, which already has many of the required facilities.[146]

It is simply impossible to square this testimony with the Department of Defense's recommendation to move Naval Ordnance's "Close-in Weapons Systems depot maintenance functions . . . to NSWC Crane, another Technical

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[143] Ordinance No. 101, Series 101 of the City of Louisville established the local redevelopment authority.

[144] The details of this understanding are spelled out in the two memoranda of understanding and the proposal to the Department of Defense.

[145] Secretary of the Navy John Dalton's testimony before the Defense Base Closure and Realignment Commission on March 6, 1995, at 18 (copy on file with author).

[146] *Id.*

Center.[147] Undersecretary of the Navy Pirie made a similar statement to the Commission.[148]

During the period between March 1995 and June 1995, Louisville representatives testified before the Commission. Although they had access to the Report to the Inspector General, they did not vigorously challenge the data submitted to the Commission by the Department of Defense or its conclusions.[149] They did not demand an explanation of the conclusions contained in the Report to the Inspector General. The public reports make it clear Louisville's congressman and the local chamber of commerce initiated and supported the privatization proposals.[150] Realistically, the congressional and senatorial representatives of Louisville were the only voice of the employees in defending the Naval Ordnance Station to the Navy and the Commission. The employees of Naval Ordnance could not publicly voice their concerns.[151] In 1993 the Kentucky congressmen, along with Navy managers, fought for Naval Ordnance. In 1995 political leaders did not argue forcefully for keeping Naval Ordnance open as a government operation or forcefully protest the above described irregularities. In testimony, the congressional delegation asked to keep the station open, but proposed privatization.[152]

The Commission was fully aware of four major items of cost submitted by Naval Ordnance that the Department of Defense reduced or excluded in making its closure recommendation. These were: (1) $48.6 million to maintain the Navy's preparedness as to the Close-In-Weapons Systems (gun repair work); (2) $29 million for wage rate differentials between Louisville and any other location the work might be done; (3) the exclusion of $151.6 million in closure costs;

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[147] The Department of Defense's recommendation is set out at note 107.

[148] *See* Undersecretary of the Navy Robin Pirie's testimony before the Defense Base Closure and Realignment Commission on March 6, 1995, at 55 (copy on file with author).

[149] *See generally* Transcript of hearings before the Defense Base Closure and Realignment Commission, March, 6, April 12, June 14, and June 22, 1995.

[150] Rick McDonough, *Plan to Privatize, save Naval Ordnance touted,* THE COURIER-JOURNAL (Louisville, Kentucky), Apr. 13, 1995, at B1.

[151] 5 C.F.R. part 2635.

[152] McDonough, *supra* note 150, at B1.

and (4) the exclusion of $74.5 million in "mission costs."[153] Louisville's spokesmen did not demand an explanation for these item's reductions or exclusions and did not protest to the news media.[154]

The Department of Defense estimated there would be a "one time closure cost of $104 million and a return on investment in three years."[155] Further, it estimated its recommendation would result in a 20 year net present value savings of $244 million.[156] The Commission staff estimated a one-time closure cost of $136 million and a return on investment in five years.[157] The Commission's estimate of 20 year net present value was a savings of $169 million.[158] The Commission also noted the concern about the $18 million deletion for technical repair standards.[159] There was no detailed public discussion of this matter. One commissioner seemed to express the sense of the Commission, as well as Louisville's leadership, when he remarked, "everybody is satisfied with where we are.[160] The Commission said very little about the Report to the Inspector General, merely noting "[t]here were some irregularities in some of the documentation, but nothing, as the IG reported, that would affect the BRAC recommendation."[161] The Commission did not "thoroughly examine the basis for exclusions to the cost and savings associated with the closure" on the public record or in its final recommendation as the General Accounting Office suggested.

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[153] *Issues, Naval Surface Warfare Center, Crane Division, Detachment Louisville, Kentucky*, at Exhibit BU-63 (copy on file with author).

[154] *See generally* Transcript of hearings before the Defense Base Closure and Realignment Commission, March 6, April 12, June 14, and June 22, 1995 (copy on file with author).

[155] *Issues, Naval Surface Warfare Center, Crane Division, Detachment Louisville, Kentucky*, at Exhibit D-4 (copy on file with author).

[156] *Id.*

[157] *Id.*

[158] Testimony before the Defense Base Closure and Realignment Commission, June 22, 1995 at 245.

[159] *Id.* at 247.

[160] *Id.*

[161] *Id.*

During the June 22 hearing Commissioner Kling asked Mr. Owsley from the joint cross service team on the subject of privatization, "Do we have any figures [as to] what it [privatization] would save the Navy?" Another individual named Mr. Kerns responded, "No sir, we do not."[162] By vote of 8-0, the Commission voted to close Naval Ordnance, adding language to encourage privatization of functions to the extent practical.[163] It did so after finding the Department of Defense deviated from two of its published criteria.[164]

The Commission's recommendation appears to be questionable. The Commission recommended closing Naval Ordnance even though the Navy's rationale for its recommendation had changed. It knew the Department of Defense took into account factors prohibited by the Act and that the Navy engaged in numerous improprieties in gathering and evaluating the data used to justify its decision to close Naval Ordnance. Moreover it did not explain why the reductions in cost did not affect the Department of Defense's final recommendation. The Commission recommended privatization even though the Department of Defense did not recommend this and the Commission did not know whether privatization would generate cost savings to the government.

On July 14, 1995, the City of Louisville passed an ordinance establishing a "Louisville/Jefferson County Redevelopment Authority," a non-profit corporation for the purpose of "implementing the privatization of the Naval

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[162] *Id.* at 248.

[163] *Id.* at 252-253.

[164] The Commission's final recommendation states:

> Naval Surface Warfare Center, Crane Division Detachment, Louisville, Kentucky
>
> Secretary of Defense Recommendations: Close the Naval Surface Warfare Center, Crane Division Detachment, Louisville, Kentucky. Relocate appropriate functions personnel, equipment, and support together with naval activities, primarily to the Naval Shipyard, Norfolk, Virginia, the Naval Surface Warfare Center, Port Hueneme, California, and the Naval Surface Warfare Center, Crane, Indiana.
>
> Commission action: DoD proposal: Close, but add language to encourage privatization of functions to the extent practical.
>
> Vote: 8-0.

Ordnance Station" and operating the same.[165] The Authority has a board of directors consisting of at least 16 members.[166] The board of directors includes representatives from the local office of Economic Development, the Louisville Chamber of Commerce, Kentucky Economic Development Cabinet, Private Industry Council, an expert in industrial real estate, an expert in banking and a person with experience in environmental consulting.[167] Since creating the Authority, an executive director has been appointed, Frank Jemly, chief spokesman of the Chamber of Commerce in dealing with the Navy in 1994 and early 1995.[168] The city has appropriated funds for the privatization project and the Department of Defense has made a grant to the Authority to begin the privatization effort's implementation. Privatization was expected to be completed by August 1996.[169]

XII. SOME OBSERVATIONS.

A. Advice for employees at a targeted base.

Many employees at Naval Ordnance believe the United States Government made a serious mistake in deciding to close and privatize the station. Based on the Louisville experience, the first lesson for employees at a base targeted for closure is that the complexity of the entire transaction combined with the many conflicting financial and political interests create an atmosphere in which no one can be trusted.

What happened at Naval Ordnance makes it clear that high ranking Navy officials are perfectly willing to deal behind the backs of lower level employees and to violate the law to reach a desired result. Resisting this kind of conduct is not easy since most civilian employees who are in positions to understand

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[165] Ordinance No. 101, Series 1995, City of Louisville; July 25, 1994, Sheldon S. Shafer, *Naval Ordnance Redevelopment Agency Nears Final Approval*, THE COURIER-JOURNAL (Louisville, Kentucky), at D8; Sep. 23, 1995, Sheldon S. Shafer, *Top posts filled for 'private' station*, THE COURIER-JOURNAL (Louisville, Kentucky), at B14; Oct 20, 1995, Sheldon S. Shafer, *Naval Ordnance Station slated to be privatized by next August*, THE COURIER-JOURNAL (Louisville, Kentucky), at D5.

[166] *Id.*

[167] *Id.*

[168] *Id.*

[169] *Id.*

these types of transactions are also high enough in the civil service rating system that criteria for promotion to the next higher job is fairly subjective.[170]

The choices for a union in this situation are most difficult. The decision faced by the union at Naval Ordnance - whether to go along with privatization or forcefully to resist any change - was not an easy choice. The choice was between possibly saving some jobs and risking the plant's complete closure. A union typically will represent only a part of the employees in a plant such as Naval Ordnance. These employees do not necessarily hear about closure plans early on and may not understand bureaucratic in-fighting. There may be serious conflicts within a group of employees represented by a union. Highly skilled employees who can transfer may prefer to see an installation close. They may be able to move to another government installation with little loss of income and no risk of loss of their pension or health care plan. Employees within a year or two of retirement may prefer closure to privatization or transfer to another location.[171] Employees who, for whatever reason, cannot or do not want to transfer to another location may prefer privatization. Adding to the difficulty is the fact that there are no binding assurances the private contractors will hire and retain the present workforce.

In order for the employees at a local installation to respond to conduct such as that involved in the Naval Ordnance case, they must educate the news media. For whatever reason, the news media never became very interested in the details of the Naval Ordnance's closure insofar as official misconduct was concerned or in the details of military necessity questions. *The Courier-Journal* only ran one major story on the Navy's irregularities. Base closures are complicated and detailed. The government has a jargon of its own. What is perfectly clear to a Department of Defense employee may be totally unintelligible to a reporter. An employee representative must take the time to make the reporters understand the issues. Moreover, base closure stories do not lend themselves to effective television coverage beyond spots lamenting the loss of jobs. The reasons guns on naval vessels should be rebuilt at a single location rather than doing part of the work here, part of it there, and reassembling the whole thing at a shipyard, are not very exciting. These facts cannot be explained in a one minute time slot on the evening news.

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[170] *See* 5 C.F.R. parts 412, 430, 530, and 531.

[171] Rick McDonough, *Many at Naval Ordnance Dislike Privatization*, THE COURIER-JOURNAL (Louisville, Kentucky), July 23, 1995, at B1.

Many employees at Naval Ordnance think it was ordered closed because local political leadership did not take a strong stance on keeping it open as a government operation. If the employees think a local politician is selling them "down the river" they should immediately go to that politician's next potential opponent. They or their union should do everything possible to secure the unhelpful politician's defeat in the next election. A federal employee's political activity is restricted.[172] However, these restrictions do not apply to relatives, friends and non-employee union leaders.

Perhaps the reason the local officials did not press the Commission or the news media on the irregularities of the Navy in putting Naval Ordnance on the closure list was their fear the Navy would not support privatization. If the Navy was applying pressure to Louisville's leadership in this way, that is all the more reason for the employees to pressure local officials as much as possible. An employee organization has very little recourse against a middle manager in the Navy. However, its support, or lack of it, may be important to a politician in a local election.

It is important for employees to make a detailed analysis of who gains and who loses by closure and privatization. Employees should be suspicious of anyone called a business or community leader. Such "leaders" do not necessarily represent employee interests. Local chambers of commerce have never been famous in union circles for helping employees. On the day the Commission announced its decision one employee said that he felt "sold down the river."[173] Because the official of the Louisville Chamber of Commerce who was involved in this case from the beginning wound up with an $80,000 job as the executive director of Redevelopment Authority, who is to say the employee is not right? On the merits, the selection may make sense. However, the affected employees may not see it that way. It is too obvious to state that defense contractors who will do this work either for the city and the Department of Defense after privatization stand to profit. The city possibly added a valuable piece of property to its tax rolls. It could collect substantial rental income from the property. Others stand to profit by the privatization decision.

The employees should point out that "privatization" in the Naval Ordnance case is nothing short of the federal government making a gift of a unique multi-million dollar facility to the city of Louisville. Why should the federal

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[172] 5 U.S.C. §7321 *et seq*; 5 C.F.R. part 351.

[173] McDonough, *supra* note 171, at B1.

government give away the facility? Why should Louisville, as opposed to the entire country, be the beneficiary of this gift? The main beneficiary of the gift could be the defense contractors. Why not sell Naval Ordnance with all of its equipment to the contractors at its fair cash value if they are so anxious to do the work? There will not be simple answers to these questions but they should be asked.

The Naval Ordnance employee's public presentations were too self-centered. The employees naturally feared the loss of their jobs. The press focused on this. In every base closure employees are going to be laid off. However, if the installation is of no military value, it should be closed. Every article on base closures asserts the best way to keep a base open is to make a strong argument on the military value of the base. The Navy dramatically decreased the military value of Naval Ordnance. Consider this argument: Naval Ordnance employees attempted to highlight the fact that if technical repair standards are not followed, a defective gun can be installed on a ship, but the press did not get the point. A defective gun can malfunction and cause a serious explosion on board ship. The press never made anything of this point. This kind of an argument might have had broader public appeal than a simple "save our jobs" argument.

In addition to making a "high road" public interest argument, there is also a "low road" approach the employees did not exploit effectively in this case. Many employees refused to make the statutory certifications because they believed the individual documents contained false statements and it is a crime to make a false statement to a federal official in the course of his duties.[174] The statutory certification applied to everyone in the Department of Defense, not just the first line officials who prepared the original documents. If the Report to the Inspector General is accurate, many other people further up the chain of command made false statements when they certified the accuracy of the documents which they knew contained inaccurate and incomplete information. The press never suggested that scores of crimes may have been committed in the process of collecting the data for closing Naval Ordnance. It should be emphasized that many such documents were certified up the chain of command. When one considers the number of improperly handled documents and all of the other contacts among Naval officials during the data collection process, it is not unreasonable to ask whether a conspiracy existed to provide misleading

[174] 10 U.S.C. § 1001.

information to the Commission in violation of section 371 of Title 18.[175] The Report to the Inspector General has an appendix summarizing approximately 40 interviews with knowledgeable individuals. Some of these documents can be interpreted to support a conspiracy theory. I am not suggesting that federal law enforcement authorities would have taken the time and trouble to work up such a case, but people do tend to be more careful if they think they may be engaging in criminal conduct and that they are being watched.

B. Policy issues.

Realistically the Act only dealt with one problem — the dislodgment of the congressional logjam that had prevented base closures for years. It did not remove politics from base closure decisions. In a number of respects the Act either does not deal with other problems related to base closures or it deals with them poorly. One prevailing circumstance is that all the easy base closure decisions have already been made. Although 1995 was the final round of base-closure under existing law, the Commission recommended conducting another round in 2001.[176] The next round will be more difficult. The Act should be amended to deal with the increased difficulties to be encountered in the next round of closures.

The Department of Defense and the Commission cannot be expected to make reasoned base closure decisions within the present statutory time constraints. When one considers the number and magnitude of the decisions being made, as well as the amount of information to be digested by decision-makers, it is unreasonable to expect reasoned decisions between mid November 1994 and July 1995.[177]

The Commission is composed of people knowledgeable of electoral politics and bureaucratic in-fighting. All the Act did was move the political arena from

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[175] 18 U.S.C. 371 provides:

> If two ore more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned for not more than five years, or both.

[176] Chet Bridger, *Bases Closing Faster, Job Help Tightens*, THE FEDERAL TIMES, July 10, 1995, at 1.

[177] SECNAVNOTE 11000, *supra* note 34, at enclosure (1).

the Capitol to the Pentagon. Naval Ordnance's closure and the privatization recommendation were political acts as opposed to acts of an executive agency faithfully applying statutory and regulatory directives.

As a practical matter, the Department of Defense's reasons for putting a base on the closure list, or leaving it off, are as difficult to understand as they ever were. Inconsistencies are present in the Department of Defense's own documents regarding Naval Ordnance. Under present law inclusion on or exclusion from the Department of Defense list is the crucial decision in most cases. There is nothing illegal about congressmen, mayors, and defense contractors pressuring high ranking officials in Department of Defense on the subject of base closures. However, a mechanism should be found for assuring that lobbying prior to making closure recommendations is done in full public view.

The Navy's Inspector General and the Commission were ineffective in curbing the Department of Defense's abuses in the case of Naval Ordnance. The Report to the Inspector General concludes that while some of the allegations were substantiated, there was no apparent impact on the overall BRAC 95 process.[178] The report is an eleven page document. At no place does the report, or its attachments, explain why the many irregularities did not affect the decision to close Naval Ordnance. One is entitled to ask whether removing $240 million in one-time closure costs would not affect the decision. Employees of the Naval Ordnance are fully entitled to call this lack of analysis "sweeping it under the rug." The Commission staff blithely observed "[t]here were some irregularities in some of the documentation, but nothing, as the IG reported, that would affect the BRAC recommendation."[179] In its recommendation the Commission accepted the Report's reasoning without further analysis.

A better mechanism should be made for effective employee input prior to making final recommendations. The Navy managers who made the decision to recommend closure of Naval Ordnance disregarded the data prepared at the local level. Neither Naval Ordnance employee's nor the public have ever been told why the information they provided was inaccurate. The report of the actions of Admiral Sterner indicates arbitrary conduct in the extreme. There should also be some form of guarantee against retribution for employees who disagree with

[178] Letter from Director of Production, Naval Audit Service, *supra* note 4, at 2.

[179] Transcript of hearings before the Defense Base Closure and Realignment Commission, June 22, 1995, at 247.

upper management in these cases. Formal and informal restraints on career employees who speak out publicly on these issues should be removed. The extent of top down decision-making in the case of Naval Ordnance runs directly counter to much that is presently being written about participatory management and employee empowerment.

After the 1995 round of base closures Congress probably breathed a collective sigh of relief, except for the California delegation. Congress was pleased to see as many bases closed as were, notwithstanding some complaints. Congress did not want to repeat the 1995 round of closures. The President expressed displeasure with the Commission, but in the end went along with it. If world events proceed on their present course and defense outlays decrease, competition between the private defense contractors and public facilities will be more intense in the future than it was during the 1995 round. The next round of base closures will involve even more difficult decisions on military necessity issues. It cannot be assumed that the next round of downsizing will come during a period of economic expansion. Given these kinds of circumstances, an improved mechanism should be found for focusing decision-makers' attention and the public's attention on well-defined legislative goals (such as military necessity) rather than on a particular city's or a particular state's economic interests, a defense contractor's need for work, or Department of Defense manager's wishes.

The Act should state more clearly its objectives and should clarify the basis for closing military installations. The published final criteria are extremely general. As written, the Act and final criteria give the Department of Defense great leeway in determining which bases should be recommended for closure. The country's experience with the process shows that the duties of the participants can and must be more clearly defined. Whether one is concerned about ridding the United States of excess or unneeded defense installations or the allocation of defense work between the private and public sectors, the Act must be strengthened to prevent the Department of Defense from pursuing its own independent agenda.

SHIRKING IMPORTANT SERVICE THAT ISN'T: DESERTION UNDER UNITED STATES v. GONZALEZ

Major William K. Lietzau, USMC[*]

I. INTRODUCTION.

Operations DESERT SHIELD and DESERT STORM reintroduced the rarely seen offense of desertion with intent to avoid hazardous duty or to shirk important service. In *United States v. Gonzalez*,[1] the United States Court of Appeals for the Armed Forces (CAAF) first addressed the issue of desertion in intent but not in fact. The CAAF held that neither the accused's medical disqualification, nor the fact that his unit did not deploy during his absence, precluded a conviction for desertion with intent to shirk important service in the Persian Gulf. The *Gonzalez* opinion, in conjunction with the contemporaneous *United States v. Huet-Vaughn*[2] decision, provides practitioners current authority for probing the limits of intent and the definition of "important service" in the desertion context.

II. BACKGROUND.

Gonzalez is best understood when viewed against the backdrop of prior cases and the Manual for Courts-Martial's (MCM's) treatment of the statute. The text of Article 85 of the Uniform Code of Military Justice (UCMJ), as applied by the CAAF, essentially details three theories of criminal liability which are distinct but not necessarily mutually exclusive. All three involve leaving or remaining absent from a unit, organization or place of duty. They differ regarding the specific intent associated with each. These intents are: 1) to remain away permanently; 2) to avoid hazardous duty; and 3) to shirk

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[*] *The positions and opinions stated in this article are those of the author and do not represent the views of the United States government, the Department of Defense, or the United States Navy. The author is an active duty Marine, presently assigned as the Deputy Legal Counsel to the Chairman of the Joint Chiefs of Staff, Washington D.C.*

[1] 42 M.J. 469 (1995).

[2] 43 M.J. 105 (1995).

important service.[3] *Gonzalez* follows the line of cases addressing the last two related forms of desertion and speaks specifically to the intent to shirk important service.[4] As with the UCMJ, the MCM's element breakdown combines intent to avoid hazardous duty and intent to shirk important service.[5] More importantly, the MCM's divides the intent clause into two elements, one involving the nature of the intent and one regarding the nature of the service or duty.[6] As is discussed later, the MCM's parsing of verb and object in the different subparagraphs proves fortuitous when applying *Gonzalez*. The CAAF applies a different standard to each of the two elements.

Prior to *Gonzalez*, most leading cases in the desertion arena originated during the Vietnam and Korean War eras. These cases established, *inter alia*, that hazardous duty and important service are not correlative,[7] and that "important service" consists of service above and beyond ordinary service.[8] Service was deemed important in a variety of contexts ranging from foreign

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[3] UCMJ art. 85 (1988), MCM, United States, pt. IV, para. 9a (1995). The actual text combines scenarios two and three (hazardous duty and important service) with a disjunctive, while providing a third definition of desertion which pertains to an enlistment in a branch of the armed service without disclosure of the fact that regular separation has not taken place regarding a previous enlistment in a branch of the armed service. UCMJ art. 85a(3). This definition is not listed since the CAAF has held the provision to fail to state a separate offense. *See* United States v. Huff, 7 C.M.A. 247, 22 C.M.R. 37 (1956). UCMJ art. 85(b) also discusses a specific situation in which an officer quits his post after tendering a resignation but before acceptance thereof. This unique situation is irrelevant to the issues at hand.

[4] The issue framed for the CAAF involved only intent to shirk important service. The remainder of this practice note addresses this more common specification pattern. The analytical underpinnings, however, are equally useful for cases involving an avoidance of hazardous duty. The only difference lies in the requisite evidence to prove hazardous duty vis-à-vis that related to the importance of service.

[5] MCM, pt. IV, para. 9b(2).

[6] Paragraph 9b(2) lists elements for desertion with intent to avoid hazardous duty or to shirk important service as:

(a) That the accused quit his or her unit, organization, or other place of duty;
(b) That the accused did so with the intent to avoid a certain duty or shirk a certain service;
(c) That the duty to be performed was hazardous or the service important;
(d) That the accused knew that he or she would be required for such duty or service; and
(e) That the accused remained absent until the date alleged.

[7] United States v. Smith, 18 C.M.A. 46, 39 C.M.R. 46 (1968). *See also* United States v. Woode, 19 M.J. 640 (N.M.C.M.R. 1984)(finding violation of rule against disjunctive pleading).

[8] United States v. Boone, 1 C.M.A. 381, 3 C.M.R. 115 (1952).

service near a combat area,[9] to service as an icebreaker cook enroute to an operation in Antarctica.[10]

Under *United States v. Vick*[11] and *United States v. Shull,*[12] intent to shirk important service is a specific intent which a prosecutor must prove existed at the beginning of, or sometime during, an accused's absence. Early desertion cases generally use a subjective test for assessing intent and an objective test for analyzing the character of service or duty.[13] However, Vietnam's progeny dealt primarily with evidentiary issues surrounding intent and factual sufficiency for determining service importance. This 45-year old jurisprudence left two areas somewhat unsettled: 1) the precise interplay between intent and service characterization when the "shirking" or "avoiding" does not actually occur (i.e., the future duty disappears or does not exist); and 2) the ambiguity regarding the relationship between motive and intent left by *United States v. Apple.*[14] The latter, more discreet issue is addressed by *Huet-Vaughn. Gonzalez* purports to resolve the former by confirming the analytical framework for intent analysis and taking a significant step toward delineating the requisite factual margins for a desertion offense.

A. *United States v. Gonzalez: The Case.*

Corporal Enrique Gonzalez, USMC, was one of many reservists called to active duty for Operation Desert Shield. Having a known medical condition, he reported for duty in Miami and was declared fit for duty at a medical examination, contingent upon further testing. His unit was scheduled to deploy to Saudi Arabia after training at Camp Lejeune, North Carolina, where Gonzalez

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[9] United States v. Thun, 36 M.J. 468 (C.M.A. 1993); United States v. Willingham, 2 C.M.A. 590, 10 C.M.R. 88 (1953); United States v. Shull, 1 C.M.A. 177, 2 C.M.R. 83 (1952).

[10] United States v. Merrow, 14 C.M.A. 265, 34 C.M.R. 45 (1963). Other service which has been deemed important includes basic training in preparation for combat duty. United States v. Deller, 3 C.M.A. 409, 12 C.M.R. 165 (1953), and embarkation for potentially hazardous foreign shores. United States v. Willingham, 2 C.M.A. 590, 10 C.M.R. 88 (1953).

[11] 3 C.M.A. 288, 12 C.M.R. 44 (1953).

[12] 1 C.M.A. 177, 2 C.M.R. 83 (1952).

[13] Compare United States v. Taylor, 2 C.M.A. 389, 9 C.M.R. 19 (1953) (subjective) with United States v. McKenzie, 14 C.M.A. 361, 34 C.M.R. 141 (1964) (objective).

[14] 2 C.M.A. 592, 10 C.M.R. 90 (1953).

would receive more testing. Gonzalez never appeared for movement to Camp Lejeune and later surrendered himself to a Marine Corps office in New York City. He simultaneously presented an application for conscientious objector status in which he complained that he was being asked to participate in an "operation which calls for war."[15] When his command subsequently deployed, Gonzalez remained behind, having by that time been found "not physically qualified" for embarkation.[16]

Corporal Gonzalez was tried and convicted of desertion with intent to avoid hazardous duty or to shirk important service and missing movement. The Navy-Marine Corps Court of Military Review (NMCMR) reviewed the case for factual and legal sufficiency. They affirmed the conviction but deleted the avoidance of hazardous duty as a possible desertion intent based on the evidence presented at trial.[17] The NMCMR also made findings that Gonzalez did not, in fact, avoid or shirk hazardous duty or important service as a consequence of his absence, and that his medical disqualification "would have prevented him from embarking with his unit in any event."[18] The CAAF reviewed the case as to the apparent conflict between Gonzalez' conviction and these two factual findings.[19]

A summary of Gonzalez' two-fold argument is that 1) his ultimate medical disqualification rendered the service he would have shirked unimportant, and 2) he did not actually shirk the service because his unit never embarked for the Arabian Peninsula during his absence.[20] Chief Judge Sullivan's opinion answers Gonzalez' contentions in turn. First he reaffirms the CAAF view that important service requires an objective determination of significance to the

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[15] United States v. Gonzalez, 39 M.J. 742 (N.M.C.M.R. 1994), *aff'd*, 42 M.J. 469 (1995). This statement by the accused obviously assisted the trial counsel in establishing the requisite mens rea.

[16] *Id.* at 744-745.

[17] It should be noted that the NMCMR also found disjunctive pleading in this case to be harmless error and amended the specification so as to not reflect hazardous duty. Therefore the only issue before the CAAF regarded intent to shirk important service. Gonzalez, 39 M.J. at 749.

[18] *Id.* at 748.

[19] Gonzalez, 42 M.J. at 471.

[20] *Id.* at 472.

military establishment.[21] He then concludes that the NMCMR factual finding regarding Gonzalez' medical disqualification does *not* require a determination that the expected service was unimportant.[22]

Regarding the fact that service was not actually shirked, the CAAF elected a plain language reading of the statute which is in keeping with previous precedent.[23] The court found the gravamen of the offense to be leaving with a certain *intent*, not that important service (or hazardous duty) actually take place.[24] The MCM's definition of the important service element, however, describes it as service "to be performed."[25] Chief Judge Sullivan answered this concern by both pointing out that MCM explanations are not binding on the court, and by finding the term to only require a reasonable expectation that the service will be performed.[26]

B. ***Discussion and Analysis.***

Gonzalez does not break significant new ground in desertion jurisprudence. It does, however, clarify the appropriate intent and "important service" analysis, and it indirectly sanctions the two-step examination suggested by the MCM's element lists. All four judges concurred in Chief Judge Sullivan's opinion, thereby confirming its stability for the foreseeable future.[27]

The most significant aspect of the *Gonzalez* reasoning is Chief Judge Sullivan's confirmation of the two standards used for evaluating the language, "with intent . . . to shirk important service." In essence, the CAAF has held that the *with intent to shirk* portion is evaluated as a *subjective* question of fact (based on the accused's state of mind,) and the *important service* portion is evaluated as an *objective* question of fact (based on circumstances surrounding

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[21] *Id.* at 472.

[22] *Id.* at 473.

[23] *See* United States v. Apple, 2 C.M.A. 592, 10 C.M.R. 90, 91 (1953).

[24] Gonzalez, 42 M.J. at 474.

[25] MCM, pt. IV, para. 9b(2)(e).

[26] Gonzalez, 42 M.J. at 473.

[27] *Id.* at 474.

the service to be performed).[28] The CAAF decision essentially blesses the MCM's splitting of the statute's intent clause into two elements, each with its own standard for evaluation. The court could have found, for example, that the "shirking of important service" was a single element, subjectively constituent in the *mens rea* component of the crime. Thus, an accused who believed the service shirked was not important would have a defense, and trial counsel would have a more difficult time proving the requisite intent.[29] *Gonzalez'* succinct restatement of the intent analysis used by appellate courts has the greatest practical benefit to counsel.[30]

Gonzalez does much more, however, in that it reveals something of the CAAF desertion "analysis." By extending the limits of desertion analysis to include a conviction grounded in unfulfilled intent, the CAAF shuns a harm-based consequentialist approach to criminal liability in favor of a more culpability-based philosophy.[31] The question remains as to how far the CAAF is willing to go in punishing malicious intent.[32]

The subjective/objective analysis clearly favors the government in that it renders important that information which is easiest to prove and renders irrelevant potentially problematic facts. Regarding *mens rea*, the trial counsel need only demonstrate an accused's knowledge that his absence would result in his missing duty or service. Counsel need not delve into psychological concerns

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[28] *Id.*

[29] Such a holding would carry greater precedential import than that of the Gonzalez opinion since it would require a redrafting of the MCM's elements. Paragraph 9b(2)(b) requires only that a defendant "intend to avoid a certain duty or shirk a certain service." MCM, pt. IV, para. 9b(2)(b).

[30] The "to be performed" language of the MCM's elements list seems to suggest an objective aspect to the duty or service. Gonzalez confirms the subjective nature of the service, despite the MCM's wording. *See id.*, at para. 9b(2)(c).

[31] *See generally* Arnold Loewy, *Culpability, Dangerousness, and Harm: Balancing the Factors On Which Our Criminal Law is Predicated*, 66 N.C.L. REV. 283 (1988) (discussing factors underlying criminal law.)

[32] Arguably the CAAF has not moved very far here. Several Korean War cases upheld avoiding hazardous duty convictions in which an accused had returned prior to a unit departing to engage the enemy. *See* United States v. Squirrell, 2 C.M.A. 146, 7 C.M.R. 22 (1953); United States v. Gameroz, 3 C.M.R. 273 (A.B.R. 1952).

such as the accused's motives[33] or his estimate of the importance of the service.[34] Moreover, since the CAAF has essentially declared desertion to be an instantaneous offense,[35] prosecutors need not be concerned with intervening circumstances such as a unit failing to deploy when scheduled. Two elements, intent to shirk, and importance of service, each carry their own standard for review. This review is confined to a specific moment in history, and factual complexity is greatly mitigated.

Though some analyses are simplified, there is also much *Gonzalez* does not do. While proffering a skeletal framework for intent analysis, *Gonzalez* provides no meat for the bones. The "objective" test for importance of service is no clearer than it was in the 1950's and no more useful than the pithy explanation provided in the MCM, "Whether . . . a service is important depends upon the circumstances of the particular case, and is a question of fact." [36]

More importantly, while *Gonzalez* expands some factual limits of desertion, there are margins not yet tested. Korea and Vietnam clarified the easy case of intent fulfilled through action. *Gonzalez* handles the case of intent to shirk which is unfulfilled due to intervening facts; the crime is complete when intent is formed.[37] One construct lies unresolved, however; that is factual impossibility at the time of the offense. *Gonzalez* is ambiguous regarding factual impossibility due to an inherent characteristic of the accused (e.g., medical disqualification), and does not even speak to the issue of impossibility due to mistaken belief by the accused regarding his future service. The objective test's parameters are still unresolved.

The CAAF clearly ruled that the unit's failure to deploy did nothing to eviscerate *Gonzalez'* requisite intent.[38] However, Corporal Gonzalez also argued that the service he intended to shirk was in fact not important because his medical condition precluded embarkation. Chief Judge Sullivan applied an

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[33] *See generally* United States v. Huet-Vaughn, 43 M.J. 105 (1995)(distinguishing motive and intent and holding that the former is irrelevant to the latter).

[34] *See* United States v. Gonzalez, 42 M.J. 469, 474 (1995).

[35] United States v. Ray, 7 C.M.A. 378, 22 C.M.R. 168 (1956).

[36] MCM, pt. IV, para. 9c(2)(a).

[37] Gonzalez, 42 M.J. at 474.

[38] *Id.*

objective test to the intended deployment and found that Gonzalez' medical disqualification could not *"per se"* characterize that service as unimportant.[39] He later reanalyzed the issue assuming *arguendo* that important service was "more subjective in nature."[40] He opined that factors other than Gonzalez' medical condition might be relevant to the importance and eschewed the presumptuousness of overruling the lower court because of this fact alone. The holding's limitation that the court cannot "as a matter of law" deem the service unimportant, is disquieting because it suggests that the subsequent medical determination *is* relevant to some degree. Likewise, the modifier *"per se"* in the first analysis leaves room for an interpretation that Gonzalez' medical disqualification does play *some* role in characterizing the service, though not enough of a role to require reversal. The court's ambiguous language has unfortunately injected uncertainty into the analysis, as well as the future direction of desertion law.

Logic would dictate no role whatsoever for an accused's medical condition in assessing the importance of "embarkation to the Arabian Peninsula."[41] Its only import would therefore lie in redefining the service that is anticipated. It appears the CAAF objective test leaves room for an accused's physical condition or other idiosyncrasy to affect the "service importance" determination. The defense can capitalize on this ambiguity by arguing the relevance of all facts, including subjective facts, which might have impacted the service to be performed.[42]

Similarly, the case of mistaken belief on the part of the accused is untouched by *Gonzalez*. If an accused absents himself intending to shirk service X, but he in fact was destined for service Y, to which "service" do we apply the objective test regarding importance?[43] This too is fertile ground for defense

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[39] *Id.* at 473.

[40] *Id.*

[41] *Id.*

[42] For example, an accused with a vision problem may not have been able to effectively stand guard, thus lessening the import of his service. A man with a broken hand may not have been able to pull a trigger. In such cases "avoiding hazardous duty" might be charged as a contingency.

[43] Allowing such a defense would be inconsistent with the apparent philosophical basis for this line of cases. Desertion holdings seem to stress the deontological aspects of the offense. This is consistent with the presumed legislative intent of any specific intent crime. Viewed from this philosophical perspective, the objective nature of the important service determination is not an

counsel with the right facts.[44] A culpability-based model, taken to its logical extreme, would focus on the accused's intent, and an objective importance test would only be applied to the service the accused *thought* he was shirking. The defense of mistaken duty would then be defeated. Assuming the propriety of such an analysis at this time, however, would be nothing more than speculation. These may be the margins tested by future cases.

C. *Import to the Practitioner.*

The increased operational tempo of today's military and the fluid nature of its missions militate in favor of an increase in desertion cases similar to *Gonzalez*. *United States v. Gonzalez* provides a useful analytical framework for desertion cases which conveniently fits the slate of elements found in paragraph 9b(2) of the MCM. When assessing evidence for a desertion charge, the practitioner can simply look at the offense as an unauthorized absence with two additional elements. The MCM's second element is specific intent, which should be evaluated subjectively based on circumstances and statements reflecting the accused's state of mind. The MCM's third element is a characterization of the duty which should be evaluated objectively based on the circumstances surrounding the service to be performed. This simple analysis

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incongruous sidestep into a consequentialist philosophy, but a mere recognition of the practical difficulty of proving an accused's belief about the relative importance of a particular service. The objective test effectively eviscerates an accused's ability to proffer a relatively unassailable defense regarding personal views on mission importance. This would also be consistent with the CAAF second holding in *Gonzalez*, that Article 85 prohibits absence without leave with "an intent" to shirk important service, regardless of whether the service is shirked. Under such an understanding, the objective standard would be confined to the importance of the service the accused believes he is shirking, not the importance of the service he would have actually performed. But, if the CAAF view in this area were fully established, Chief Judge Sullivan could have declared there to be *no* relevance in the lower court's factual finding. He did not; he simply refused to reverse an objective decision on the basis of a single fact.

[44] A culpability-based philosophy, taken to its logical extreme, would focus on the accused's intent. The service scrutinized would be that in the accused's mind at the time intent was formed. This would be consistent with the defenses normally available for specific intent offenses, *i.e.*, if an accused had no knowledge he was shirking important service but in fact thought he was shirking some other normal service, he would have a defense. On the other hand, the logical extreme to this rule would be that factual impossibility would not lead to "attempted" desertion, but would yield a completed desertion offense. Thereby, the CAAF would have (and perhaps already has) created a new inchoate offense.

will help trial counsel ferret through complex facts to make charging decisions, and select appropriate evidence for the fact-finder.[45]

The CAAF analysis generally favors the prosecution by simplifying intent elements and streamlining the evidentiary threshold.[46] However, *Gonzalez* does not leave defense counsel without a target. Chief Judge Sullivan's analysis of the import attached to Gonzalez' medical disqualification is such that factual impossibility regarding the ability to engage in certain service can arguably be bootstrapped into the objective test of service importance. The parameters of the objective test are vague at best.[47] While subsequent circumstances are probably irrelevant to importance analysis, idiosyncratic characteristics of the accused may be pertinent. Thus, unique facts may still undermine an otherwise solid desertion charge.

While the CAAF was not entirely clear regarding whose perspective one should use in determining which service will be evaluated for importance, the best course of action is probably to evaluate both elements at the time the intent was formed. The evaluation of the duty or service, then, is a subjective determination grounded in the accused's state of mind. The accused's belief regarding the service he or she would perform if not absent *is* relevant; the accused's opinion of the importance of that service *is not*.[48]

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[45] On a related aside, trial counsel should note the NMCMR finding that the *Gonzalez* prosecutor erred with disjunctive pleading. Avoiding hazardous duty and shirking important service have been held to be separate, but not mutually exclusive, offenses. *Gonzalez*, 39 M.J. at 749.

[46] While not directly addressed by this case, it would appear that the standard for "important service," objectively determined, will usually be easier to meet than that for "hazardous duty." *See, e.g.*, United States v. Smith, 18 C.M.A. 46, 39 C.M.R. 46 (1968)(holding that the mere fact an accused's unit is destined for an area of potential conflict does not prove beyond reasonable doubt that the accused himself would become engaged in hazardous duty). Conversely, note the liberal view of "important service" found in earlier cases. *See supra* notes 7-10.

[47] For example, one line of reasoning might consider factual impossibility as an attempted desertion. *See, e.g.*, United States v. Anzalone, 43 M.J. 322 (1995)(upholding conviction for attempted conspiracy when inability to complete the offense is factual impossibility because other purported conspirator is an undercover government agent).

[48] *See supra* note 35 and 36.

III. CONCLUSION.

United States v. Gonzalez both clarifies and confuses the law of desertion with intent to shirk important service. The CAAF has confirmed the propriety of a subjective analysis of intent to shirk service and an objective analysis of the importance of the service an accused intends to shirk. The *Gonzalez* framework provides some assistance to the practitioner in analyzing desertion issues and complex fact scenarios, but this will not be the last word on the matter. The exact location of desertion's factual parameters is still unknown.

MISSILE INBOUND: The Attack on the STARK in the Persian Gulf
by Jeffrey L. Levinson & Randy L. Edwards
1997 Naval Institute Press

*Captain John P. Marley, USMC**

Shortly after 2100 hours on 17 May 1987, an Exocet anti-ship missile slammed into the guided missile frigate USS STARK (FFG-31). Moments later a second missile struck the crippled warship killing 37 crewmembers and igniting deadly fires throughout the Ship. Launched by an Iraqi F-1 Mirage which ostensibly mistook the STARK for a merchant ship or Iranian warship, this attack not only began an investigation which ended in disciplinary action for several of the Ship's officers, but it also resulted in a review of the "rules of engagement" for U.S. warships during "peacetime" operations.

As a Marine Corps defense lawyer assigned to represent the STARK's executive officer at the subsequent investigation, Randy Edwards' comprehension and explanation of the various factors that led up to, and ultimately caused, the tragic loss of life, is extremely thorough. The actual account of the missile's impact and the events immediately after, are painfully described by surviving witnesses. The ensuing lifesaving and firefighting efforts are told in vivid firsthand detail as the heroes of the STARK fought for their own lives, the lives of shipmates, and the life of the Ship. The authors expertly use interviews, official transcripts, press accounts, and subsequent articles from dozens of sources to produce a detailed, comprehensive study.

The explanation of the technical aspects of the STARK's radar and weapon systems can be appreciated not only by those familiar with U.S. Naval systems, but also by the casual reader. Specifically examined is the SLQ-32 electronic warfare system, which arguably did not alert the Ship to the missile launch, as well as the STARK's "Phalanx" close-in-weapons system, which, as a the Ship's last line of defense, is designed to shoot down incoming anti-ship missiles.

The tactical errors and miscalculations are examined in "real time" and with the benefit of hindsight. The STARK's procedures are fully

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* *Captain John P. Marley, USMC, presently serves as a Military Justice Instructor at the Naval Justice School.*

explored and analyzed; however, the insight into the legal proceedings is where the authors are at their best. The authors, both lawyers, successfully breakdown the entire legal process with great clarity to the non-lawyer reader.

While this book is quick reading (142 pages, including footnotes), with its examination of leadership styles and watchstanding in the combat information center, it is equally valuable as a study of damage control and the story of brave Sailors fighting against out of control fires and blinding smoke in order to save their Ship.

This is not just another story of lessons learned from an avoidable tragedy; because it is also a story of heroism. And in the final analysis it is a testament to those heroes.

SON THANG: An American War Crime
by Gary D. Solis
1997 Naval Institute Press

*Captain John P. Marley, USMC**

"Shoot them! Shoot them all! Kill Them!..." With these words, Lance Corporal Randy Herrod, USMC, the leader of a Marine infantry "killer team" from Company B, 1st Battalion, 7th Marines, began the murder of Vietnamese civilians in the hamlet of Son Thang-4. The date was only three months before and occurred less than 25 miles from where Army Lieutenant William L. Cally ordered his soldiers to open fire on unarmed women and children. The incident at Son Thang-4 would become the Marine Corps' most notorious War Crime.

Son Thang: An American War Crime, by Lieutenant Colonel Gary Solis, USMC (Ret.). Not only carefully documents this incident, but also closely examines the factors leading up to this tragedy. Even a reader unfamiliar with the Marine Corps role in the Vietnam War will understand this story as Colonel Solis brings the reader quickly through the history of the Third Marine Amphibious Force (III MAF) and 7th Marines in particular. Zeroing in on the tactical ground situation which faced 1/7, as well as the personalities within the battalion, Colonel Solis lays the groundwork for several alternative explanations for why Son Thang happened.

The true story itself is compelling and the characters of this real life drama are well developed. The motivating battalion commander killed in combat; the level-headed and professional operations officer who grows suspicious and investigates the crime; a popular and very aggressive company commander; and a group of young, uneducated battle weary Marines with troubled pasts. It is this volitile mixture which sets the scene for the deaths of sixteen women and children and the eventual courts-martial of the participants.

As a former combat veteran and Marine judge advocate, Colonel Solis excels at delivering both the "grunt" perspective and the legal analysis. Issues such as leadership, training, combat fatigue, rules of engagement, and the law of war are all expertly covered by the author. What I found most interesting about this book and perhaps the subject in general, is the ability to come away from this story with different conclusions and lessons learned. Reading this book

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* *Captain John P. Marley, USMC, presently serves as a Military Justice Instructor at the Naval Justice School.*

from the perspective of a Marine attorney who teaches the Law of War to Marines, I see little extenuation or excuse for Lance Corporal Herrod and his "killer team". For me the story is one of an armed "home invasion" and murder. Speaking to a Marine colonel with two combat tours in Vietnam who recently read this book, I hear a much different story, one of "body counts," free fire zones, the blurring of the lines between combatants and non-combatants, and of sympathy for the frustration, anger and fear of young Marines in combat.

Son Thang: An American War Crime, is fast paced, gripping and a great book for discussion with small unit leaders. For non-lawyers, the book covers legal aspects of the military justice system in a clear and understandable fashion. For military attorneys, the investigation and prosecution of a multiple homicide in combat is fascinating, with enough legal issues on self-incrimination and command influence to whet your military justice appetite (military lawyers must read Colonel Solis' other work, *Marines and Military Law in Vietnam: Trial by Fire).*

The issues and problems raised in Colonel Solis' book are timeless, and any military leader or person with an interest in this subject must add this book to their reading list.

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Very respectfully,

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