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

A Thesis

Presented to

The Judge Advocate General's School, United States Army

The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of either The Judge Advocate General's School, the United States Army, the Department of Defense, or any other government agency.

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44TH JUDGE ADVOCATE OFFICER GRADUATE COURSE

April 1996

**THE UCMJ AND THE NEW JOINTNESS: A PROPOSAL TO
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ABSTRACT: Today, America's real world military operations are almost always performed by joint task forces. Commanders of these joint task forces may face some significant command and control problems because they are unable to enforce their general orders directly against members of all military services. These problems can frustrate unity of command and thereby endanger mission accomplishment. This thesis reviews the history and traditions of service autonomy, analyzes the principles of unity of command and unity of effort, identifies shortcomings in the current system of reciprocal court-martial jurisdiction, and recommends a rule change to give joint task force commanders the power to convene interservice general courts-martial.

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

Major Michael J. Berrigan

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

Admiral William F. ("Bull") Halsey

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).

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

I. Introduction

Today, the armed forces of the United States operate as a team.⁴ When the National Command Authority (NCA)⁵ orders a

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 11 November 1991 edition of JOINT CHIEFS OF STAFF, PUBLICATION 1, JOINT WARFARE OF THE ARMED FORCES OF THE UNITED STATES (11 Nov. 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 10 January 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.

particular Commander-in-Chief (CINC) of a combatant command⁶ to perform a real-world mission, it is extremely likely that

Dep't of Army, Field Manual 100-5, Operations 2-2 (14 June 1993) [hereinafter FM 100-5 Operations].

5

The National Command Authorities (NCA) are the President and Secretary of Defense together or 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.

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) (24 Feb. 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) [as of this writing, there are none in existence] 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

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

These problems of interservice command and control have been around for a very long time.⁸ Historically, much has

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).

⁸ In 1813 Commodore Isaac Chauncey, of the United States Navy wrote to Major General Brown, United States Army, on Lake

been made of the autonomous nature of the various armed services. 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

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.

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.

There are good reasons for this. 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 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

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

¹¹ FITTON, *supra* note 2 at 78 (1990) *quoting* Thucydides.

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 general orders directly against members from other services assigned to his command.

My thesis is that strengthening the military justice authority of JTF commanders by giving them the legal authority to convene interservice general courts-martial (GCMs) will help fill this vacuum in command authority in JTFs. This GCM authority is needed to ensure JTF commanders can enforce their orders by appropriate legal action should it be necessary to do so.

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.

My 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.

Part III of my thesis, after the introduction and problem statement, 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 UCMJ article 22 and 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 Rule for Court-Martial 201¹⁷ to provide commanders of operational JTFs

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).

¹⁶ MANUAL FOR COURTS-MARTIAL, United States, (1984) [hereinafter MCM].

¹⁷ MCM, *supra* note 16, R.C.M. 201.

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.

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

II. The Problem: Lack of UCMJ Authority for JTF Commanders

The problem, in a nutshell, is reconciling the needs of JTF commanders for 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. This simple statement of the problem belies a mass of complexities that swirl beneath the surface. *The bottom line, however, 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 force commander must be specifically authorized by the Secretary of Defense to convene GCMs before he can legally do so.²⁰

This fact suggests a system that is out of order. The disorder stems from the fact that the JTF commander does not have all the tools he needs to enforce discipline in his command. As one scholar has written:

What means are employed to obtain obedience? They are various. There are appeals to pride, sense of

¹⁹ UCMJ art. 22(a)(3) (1988); MCM, *supra* note 16, R.C.M. 201(e)(2)(A).

²⁰ UCMJ art. 22(a)(9) (1988); MCM *supra* note 16, R.C.M. 201(e)(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.

duty, and patriotism. There is the example of others, and there is reward by citations and decorations. There is the habit of deference and obedience. . . . With most men these and like measures, continued over a considerable period of time are sufficient. But the history of warfare teaches that there will be some men, usually few in number, with respect to whom such measures fail. What then? . . . History teaches there must be punishment for disobedience of order or cowardice, and that the punishment must be severe enough and certain enough to deter.²¹

In the end, a commander must always be able to enforce his commands--otherwise he is not "in command."

There is another way of examining the relationship of military justice to command. One prominent student of command has written that the responsibilities of command are commonly divided into two "mutually dependent and by no means entirely distinct" parts--function-related (arranging and coordinating everything an army needs to exist) and output-related (enabling the army to carry out its proper mission).²² Both of these areas of command responsibility, according to Van Creveld, require that the military justice system be in good order.²³

²¹ Colonel Archibald King, *Changes in the Uniform Code of Military Justice Necessary to Make it Workable in Time of War*, 22 FED. BAR JOURNAL 49, 51 (1962); quoted in General William C. Westmoreland and Major General George S. Prugh, *Judges in Command: The Judicialized Uniform Code of Military Justice in Combat*, 3 HARV. J.L. & PUB. POL'Y 1, 46-47 (1980).

²² MARTIN. VAN CREVELD, *COMMAND IN WAR* 6 (1985).

²³ *Id.*

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.²⁴ (emphasis added)

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.*²⁵ (emphasis added)

²⁴ JOINT PUB 0-2, *supra* note 6 at GL-4..

²⁵ *Id.* at III-1.

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

[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."²⁶

Of these levels of authority, only COCOM (combatant command authority) includes the power to convene courts-martial²⁷--and it "cannot be delegated or transferred."²⁸ 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*

²⁶ *Id.* "The other authorities are coordinating authority, ADCON, and direct liaison authorized (DIRLAUTH)."

²⁷ *Id.* at xi. This authority is vested in CINCs by 10 U.S.C. § 164(c)(1)(F) and (c)(1)(G).

²⁸ *Id.*

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.²⁹ 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.³⁰ This primarily occurred, and was always a danger to occur, concerning enforcement of *General Order Number 1*.

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."³¹ 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

²⁹ 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 (11 Dec. 1995) [hereinafter CLAMO Haiti Report].

³⁰ *Id.* at 111.

³¹ *Id.* at 110.

equally."³² 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.³³ This resulted in disparate treatment of members from different services.³⁴ 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.³⁵

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."³⁶ 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

³² *Id.*

³³ *Id.* at note 362.

³⁴ Telephonic interviews with Major General (Ret.) David C. Meade and LTC Warner (SJA for 10th Mountain Division and MG Meade in Haiti) (January 1996).

³⁵ *Id.*

³⁶ *Id.*

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 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 picked up on by the press--where some news accounts reported on our "two armies" in Haiti.³⁷

Brigadier General John D. Altenburg told me he believes the Haiti experience stands for the proposition that there is no cookie-cutter solution to the problem of joint UCMJ jurisdiction. The lesson is we must "tailor UCMJ needs to the mission."³⁸ General Altenburg was the SJA for XVIII Airborne Corps, commanded by Lieutenant General (LTG) Shelton, and as such was the SJA for JTF 180, also commanded by LTG Shelton.

³⁷ Bob Schacochis, *Our Two Armies in Haiti: Green Berets and Infantry*, THE NEW YORK TIMES, Jan. 8, 1995, sec. 4, at 19.

³⁸ Interview with Brigadier General John D. Altenburg, Assistant Judge Advocate General For Military Law and Operations, at the Pentagon (February 9, 1996).

Joint Task Force 180 had been designed to execute a forcible entry into Haiti, if necessary, and the initial American force that entered Haiti in September 1994 fell under this command.³⁹ 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.⁴⁰ General Altenburg believes there are important differences between JTF-180 and JTF-190 that have implications for the issue of joint UCMJ jurisdiction.

Specifically, General Altenburg points to several aspects of JTF-180 that made seeking joint UCMJ jurisdiction inappropriate.⁴¹ First, JTF-180 was designed and prepared for combat operations. In short, it was "too busy" to worry about unique, joint court-martial jurisdiction considerations-- outside of the normal service channels. This was so for a number of reasons. 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

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

appropriate. In addition, if a soldier were to get into trouble 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 action was over.

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 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 what the command relationships were.⁴²

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 and Guantanamo bay, and JTF-120 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

⁴² *Id.*

be part of one JTF one hour and part of another JTF the next hour.⁴³

For the above reasons, General Altenburg never recommended seeking joint UCMJ authority for LTG Shelton as commander of JTF 180--and he would do the same thing today. On the other hand, General Altenburg told me 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 get into trouble. Furthermore, the command was much 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 for the Haiti operations for several reasons. First, as far as can be determined, the JTF Somalia commander, Marine LTG Johnston, was the first, and perhaps only, JTF commander to be empowered by the Secretary of Defense (SECDEF)

⁴³ *Id.*

as a General Court-Martial Convening Authority.⁴⁴ The second reason Somalia is a good contrast with Haiti is that, as we will see in Part IV, the history of the successive American and U.N. JTFs in Somalia, with their convoluted organizational structures, is instructive on the need for, and importance of, unity of command.

According to Brigadier General Walter B. Huffman, who in December 1992 was serving as the Staff Judge Advocate for United States Central Command, both USCINCCENT, General Hoar, and LTG 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.⁴⁵ 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.⁴⁶ While the GCM authority was eventually obtained, it was not simply a matter

⁴⁴ Pursuant to UCMJ art. 22(a)(9) (1988) and MCM, *supra* note 16, R.C.M. 201(e)(2)(B).

⁴⁵ Interview with Brigadier General Walter B. Huffman, Assistant Judge Advocate for Civil Law and Litigation, at the Pentagon (January 31, 1996).

⁴⁶ *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, R.C.M. 201(e)(2)(B).

of routine--as could be readily guessed from the fact that it appeared to be a matter of first impression for both Colonel Huffman and the CJCS Legal Counsel.⁴⁷

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 not insignificant side benefits.⁴⁸ In particular, the ability to convene general courts-martial would have been needed if the United States had decided to try 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

⁴⁷ *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.

⁴⁸ *Id.* General Huffman related that a week or so after GCM authority was delegated to LTG 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 LTG Johnston's JTF that required a GCM authority to take action and LTG 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.

have had to have been convened by the highest ranking American in Somalia--the JTF commander.⁴⁹

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

As even a cursory look at the actual operations in Somalia and Haiti will tend to suggest, there are a potential multitude of different types of JTFs and joint organizations. Variables such as mission, composition, size, and duration account for the myriad possibilities. These different variables must be examined and accounted for if a true picture of the actual military justice authority *needs* of joint force commanders is to be developed. I will briefly discuss each of these variables. It should be kept in mind, however, that in the end, my thesis is only concerned with the needs of JTF commanders--not with all real or potential joint command arrangements.

1. Mission

The missions of joint organizations can vary tremendously. 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, the

⁴⁹ *Id.*

missions of joint organizations are incredibly diverse. This fact 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.

Because of the broad spectrum of missions joint forces may be called upon to perform, the legal framework that undergirds 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.⁵⁰ A legal regime which lays out a joint force commander's military justice authority must sufficiently consider the different situations for and in which a joint force will be employed.

2. Composition.

⁵⁰ 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.

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. The interest of the Air Force, say, in how a joint organization administers military justice is arguably greater in a unit composed of 80% Air Force personnel than in a unit that receives less than 10% 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."⁵¹

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. Because the role of the commander in our system of military justice is so

⁵¹ *Id.*

central, questions about a given commander's attitudes and disciplinary philosophy are often times central in helping to establish the "tenor of command" for a given unit.⁵² This fact, when coupled with historic and well-entrenched service traditions regarding discipline (that may amount to classic stereotypes), helps explain why the armed services become particularly concerned when the issue of reciprocal jurisdiction is raised. Concerns that a commander from a different service will not do a proper job, either because he is likely to be too soft or too hard, have been around for a long time--as we will see in Part III. This service parochialism, born out of service prejudice (some would say service prerogative) is an historical and contemporary fact that must be confronted in the area of reciprocal court-martial jurisdiction.

⁵² 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.

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 an officer much more junior. 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.⁵³

⁵³ See text accompanying notes 24 and 25 *supra.*, 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 (U.S. Army, Ret.) (DAVID HACKWORTH, ABOUT FACE: THE ODYSSEY OF AN AMERICAN WARRIOR 371-72 (1989):

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

The considerations underlying the existence of the different levels of disciplinary and court-martial authority in service channels (summarized 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"⁵⁴ 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

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."

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.

⁵⁴ MCM, *supra* note 16, R.C.M. 306(b).

considerations of due process, virtually require that only commanders of relatively large units have GCM authority.⁵⁵

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.⁵⁶

Some JTFs, like those created to conduct Noncombatant Evacuation Operations (NEOs) may last only a week or so and sometimes only a couple of days.⁵⁷ Other JTFs, like those

⁵⁵ The smallest units to which Art. 22 of the UCMJ grants GCM authority are separate infantry brigades or their equivalents in the other services. UCMJ art. 22 (1988).

⁵⁶ JOINT PUB 0-2, *supra* note 6 at IV-9.

⁵⁷ For example: *Eastern Exit*, the evacuation of 281 noncombatants from the U.S. Embassy in Mogadishu, Somalia lasted from January 2, 1991 to 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.

designed to provide relief or to deny flight might last for months or years.⁵⁸

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 is here today and gone tomorrow.

⁵⁸ *Operation Provide Comfort* began in April 1991 and is ongoing; *Operation Southern Watch* began in August 1992 and is ongoing. *Id.*

III: Factual Background: Traditions of Service Autonomy

Asking a man to be as loyal to the other services as he is to his own is like asking him to be as loyal to his girlfriends as he is to his wife.⁵⁹

General P.X. Kelley, Former Commandant of the Marine Corps

A. Origins and Nature of Service Autonomy

We have been a house divided against ourselves. . . . Certain groups lobby against corrective actions because they impact on service prerogatives. It has always amazed me how military people can expect loyalty from their subordinates, and yet they do not give it to the Secretary of Defense when it comes to issues that impact on service roles and missions.⁶⁰

Lawrence J. Korb, Assistant Secretary of Defense, 1985

The topic of the differences between, and rivalries among, the armed services has been the subject of much analysis, most of it deprecating.⁶¹ The bulk of this criticism

⁵⁹ *What Loyalty Can Mean to the Top Marine*, WASHINGTON POST, July 6, 1986, at A21.

⁶⁰ Lawrence J. Korb, *quoted in* RICHARD HALLORAN, *TO ARM A NATION* 160 (1986); *quoted in* Lieutenant Colonel Robert R. Buckley, *Service Uniqueness - Stumbling Blocks to Jointness* 9 (March 1989) (on file with the Pentagon Library and the U.S. Army War College, Carlisle Barracks, Pennsylvania) [hereinafter Buckley paper].

⁶¹ *See, e.g.,* ARTHUR HADLEY, *THE STRAW GIANT* (1986); A. KANTER, *DEFENSE POLITICS: A BUDGETARY PERSPECTIVE* (1979).

will not be recited here. However, a brief review of the academic work that has been done in the area of service uniqueness and competition among the services is essential for the purposes of my thesis.

Colonel Kenneth Allard has written an excellent book which is 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.⁶²

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)."⁶³ Second, they are built upon "profound historical legac[ies]" and institutional experiences.⁶⁴ Third, they are grounded on

⁶² ALLARD, *supra* note 7 at 6-7.

⁶³ *Id.* at 8.

⁶⁴ *Id.*

different "strategic paradigms" which "represent the ideological component of service autonomy."⁶⁵ 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."⁶⁶

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 considered valid, and therefore, to be taught to new members as the correct way to perceive, think, and feel in relation to those problems.⁶⁷

⁶⁵ *Id.* at 244.

⁶⁶ *Id.* at 9 quoting Arthur T. Hadley, *The Split Military Psyche*, N.Y. TIMES MAG. July 13, 1986, at 26.

⁶⁷ 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) (on file with the Pentagon Library and the Naval Postgraduate School, Monterey, California) [hereinafter Faller Thesis].

These basic assumptions "elicit nearly automatic group responses to external and internal issues of survival."⁶⁸ Because these core assumptions operate at "the most fundamental level of human consciousness,"⁶⁹ 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."⁷⁰ 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."⁷¹

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,⁷² or whether the focus is on the "unique combat environments" in which the services operate,⁷³ the results are remarkably similar.

⁶⁸ Faller thesis, *supra* note 67 at 8; see also Tighe, *supra* note 8 at 7.

⁶⁹ *Id.*

⁷⁰ John Shy, *The American Military Experience: History and Learning*, THE JOURNAL OF INTERDISCIPLINARY HISTORY, vol. I, no. 2, (Winter 1971) at 226; quoted in Faller thesis, *supra* note 67 at 8.

⁷¹ Faller thesis, *supra* note 67 at 9.

⁷² Buckley paper, *supra* note 60 at 15.

⁷³ Raul Henri Alcala, *Guiding Principles for Revolution, Evolution, and Continuity in Military Affairs*, in *WHITHER THE*

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 comes with the defeat of the enemy's army and the occupation of his territory."⁷⁴ 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,"⁷⁵ because it requires the Air Force and the Navy for transportation to the battle and for sustainment.⁷⁶

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

RMA: TWO PERSPECTIVES ON TOMORROW'S ARMY, 21-26 (Strategic Studies Institute, U.S. Army War College, July 22, 1994).

⁷⁴ Buckley, *supra* note 60 at 16.

⁷⁵ *Id.* at 17.

⁷⁶ *Id.*

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.⁷⁷

As a result of this combat environment, the Army has different needs than, say, the Air Force. In the Army, noncommissioned officers (NCOs) must of necessity 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 much 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.⁷⁸

⁷⁷ Alcala, *supra* note 73 at 23-24.

⁷⁸ Interview with Lieutenant Colonel Frederic L. Borch, Criminal Law Division, Office of the Judge Advocate General, Army representative to the Code Committee, at the Pentagon (December 21, 1995).

For the Marines, their focus is on power projection through amphibious operations;⁷⁹ "the immediate enemy center of gravity is any terrain that is vital to a naval campaign."⁸⁰ Because of the Marines' 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.⁸¹

The Marines' operational combat environment "is essentially identical to armies once the force is projected ashore."⁸² 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."⁸³ The Navy "has traditionally been the most independent of the armed

⁷⁹ Buckley, *supra* note 60 at 18.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Alcala, *supra* note 73 at 23.

⁸³ Buckley, *supra* note 60 at 20.

services."⁸⁴ "The fundamental assumption underlying the United States Navy's organizational culture is the belief in naval autonomy."⁸⁵ Because 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.⁸⁶ For this reason, the Navy has often been criticized for its "traditional reluctance to play on the team."⁸⁷

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

⁸⁴ *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).

⁸⁵ Faller, *supra* note 67 at 20.

⁸⁶ *Id.* at 16; Buckley, *supra* note 60 at 20.

⁸⁷ *Id.* at 20.

operating in an environment of low risk which is likely to continue well into the next century.⁸⁸

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 unequalled among Army and Air Force contemporaries."⁸⁹ The isolated nature of duty on board a ship also greatly reduces the opportunities for servicemembers to get into trouble. The Captain of the ship is king; and the Navy's need is for a disciplinary system that supports his authority. Noncommissioned officers have a more secondary role than in the Army and Marines.

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.⁹⁰ "Like the Navy, but to a lesser degree, the Air Force is a self-sufficient service."⁹¹ The concept of "jointness" is not as central to its survival as it is to the Army.

⁸⁸ Alcalá, *supra* note 13 at 24.

⁸⁹ Faller, *supra* note 67 at 15-16.

⁹⁰ Buckley, *supra* note 60 at 22, citing Colonel Dennis Drew, *Joint Operations: The World Looks Different from 10,000 Feet*, AIRPOWER JOURNAL, Fall 1988, at 12.

⁹¹ Buckley, *supra* note 60 at 23.

The operational environment of the Air Force was alluded to above, in contrasting it with that of land combat. It is primarily characterized by short periods of intense risk and then periods of relative comfort.⁹²

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.⁹³

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 color 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

⁹² Alcala, *supra* note 73 at 22.

⁹³ *Id.*

been little rivalry over the core missions:" armies walk, navies sail, and air forces fly.⁹⁴ In the area of 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.⁹⁵ More recently, there has been the battle between the Army and Marines over the low-intensity conflict (LIC) mission.⁹⁶ Other controversies from the more recent roles and missions debate include the Air Force/Army dispute over the 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 concern the Army and Marines have had 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.⁹⁷ Another example is the often times

⁹⁴ Buckley, *supra* note 60 at 10.

⁹⁵ *Id.*, citing, HADLEY, *supra* note 61 at 91.

⁹⁶ *Id.* at 11.

⁹⁷ *Id.*

emotional debate between the Army and the Air Force over close air support.⁹⁸

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."⁹⁹ These scars can strengthen the "unconscious" organizational assumptions that are brought to the table whenever issues like joint UCMJ jurisdiction are debated.

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.*¹⁰⁰

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

⁹⁸ *Id.*

⁹⁹ *Id.* at 12.

¹⁰⁰ Bernard E. Trainor, *Jointness, Service Culture, and the Gulf War*, JOINT FORCE QUARTERLY, Winter 1993-94, at 74.

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.¹⁰¹

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 consequently seems well suited to its heritage of diverse service cultures.¹⁰²

¹⁰¹ Secretary Brown, *quoted in Tighe, supra note 8 at 41.*

¹⁰² ALLARD, *supra note 7 at 247.*

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, which this thesis endorses, 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."¹⁰³

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.¹⁰⁴

Having explored this background of service autonomy, let us now move to take a look at some theoretical principles used to analyze and evaluate military operations.

IV. Theoretical Background: Unity of Command and Unity of Effort

¹⁰³ Seth Cropsey, *The Limits of Jointness*, JOINT FORCE QUARTERLY, Summer 1993 at 78-79.

¹⁰⁴ *Id.* at 78.

*An army should have but one chief; a greater number is detrimental.*¹⁰⁵

Niccolo Machiavelli, Discorsi, xv, 1531

*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.*¹⁰⁶

Air War College Publication, 1952

*"Association," "cooperation" and "coordination" are fine words describing necessary attributes to a successful military body, but history has proved again and again that they are not substitutes for command authority.*¹⁰⁷

Lieutenant Colonel Edward M. Postlethwait, 1949

As the above quotations suggest, most military men throughout history, and most thinkers who have studied military history, believe strongly in the principle called "unity of command." United States Army doctrine treats "Unity of Command" as one of its nine "principles of war."¹⁰⁸ The

¹⁰⁵ Quoted in, JOINT PUB 0-2, supra note 6 at IV-1.

¹⁰⁶ 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).

¹⁰⁷ Edward M. Postlethwait, *Unified Command in Theaters of Operations*, Nov. 1949 MIL. REV. at 30.

¹⁰⁸ FM 100-5, *Operations*, supra note 4 at 2-5. For a thorough academic analysis that traces the origins and evolution of the

principle states that "[f]or every objective, seek unity of command and unity of effort."¹⁰⁹ Joint Pub 3-0, *Doctrine for Joint Operations*, states "the purpose of unity of command is to ensure unity of effort under one responsible commander for every objective."¹¹⁰

At all levels of war, employment of military forces in a manner that masses combat power toward a common objective requires unity of command and unity of effort. Unity of command means that all the forces are under one responsible commander. It requires a single commander *with the requisite authority* to direct all forces in pursuit of a unified purpose.¹¹¹ (emphasis added)

I will return to the relationship and distinction between "unity of command" and "unity of effort" later in this Part. First, however, it is critical to explore the origins and meaning of the principle of unity of command.

A. *Unity of Command*

According to at least one Army educational source, the Army's principles of war have been around since the

"principles of war" see, JOHN I. ALGER, *THE QUEST FOR VICTORY: THE HISTORY OF THE PRINCIPLES OF WAR* (1982)

¹⁰⁹ *Id.*

¹¹⁰ JOINT CHIEFS OF STAFF PUBLICATION 3-0, *DOCTRINE FOR JOINT OPERATIONS*, (1 February 1995) [hereinafter JOINT PUB 3-0].

¹¹¹ *Id.*

publication of an Army training regulation in 1921.¹¹² 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.¹¹³ I believe an explanation of exactly what a "principle of war" is will be useful for the purposes of organization and analytical clarity:

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.¹¹⁴

¹¹² Combined Arms Operations, vol. 1 of 3; Combined Arms and Services Staff School, E716/4 (1988) p. 47.

¹¹³ *Id.*

¹¹⁴ *Id.*

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. Each of these aspects will be discussed in turn.

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 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."¹¹⁵ 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."¹¹⁶

The larger the force and the more varied its units and operating characteristic/s, the more complex were the tasks of logistical support and operational employment. A fundamental tension arose from the

¹¹⁵ ALLARD, *supra* note 7 at 29.

¹¹⁶ *Id.* at 28.

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.¹¹⁷

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."¹¹⁸

It is certainly possible to look far back into history, even into antiquity, to find concrete examples of the application, or lack of application, of the principle of unity of command.¹¹⁹ For the purposes of this thesis, however, the historical analysis of unity of command will be confined to the United States military from World War II to the present.

a. *World War II and Unity of Command*

¹¹⁷ *Id.* at 29.

¹¹⁸ *Id.* at 29-30.

¹¹⁹ E. ALTHAM, *THE PRINCIPLES OF WAR HISTORICALLY ILLUSTRATED* (1914).

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: "[t]he 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."¹²⁰ 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 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),¹²¹ in World War II unity of command meant something less:

the 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.*¹²² (emphasis added)

¹²⁰ Report to Secretary of War quoted in JFQ., Winter 1993-94, Number 3 at inside front cover.

¹²¹ JOINT PUB 0-2, *supra* note 6; see *supra* text accompanying notes 24-26.

¹²² USAF Extension Course Institute, *supra* note 106.

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.¹²³ Colonel Allard points out that the development of air power in the interwar years

. . . would 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 the passage of the National Security Act of 1947 and the establishment of a centralized Department of Defense.¹²⁴

¹²³ ALLARD, *supra* note 7 at 88-122.

¹²⁴ *Id.* at 88-89.

The Joint Board of the Army and Navy, an interservice committee (forerunner of the JCS¹²⁵) whose activities before World War I had been mostly ceremonial in nature, had been reconstituted after World War I.¹²⁶ 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.¹²⁷ 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."¹²⁸ The Joint Board

¹²⁵

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.

¹²⁶ *Id.* at 94.

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.

¹²⁷ *Id.*

¹²⁸ *Id.* at 95.

initially relied on the traditional doctrine of "mutual cooperation:"

which 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 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."¹²⁹

Nevertheless, some progress was made by the Joint Board. By 1927, when it published its *Joint Action of the Army and*

¹²⁹ *Id.*

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.¹³⁰

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."¹³¹ The American commanders in Hawaii have been viewed by historians, at least in part, as victims of flawed command arrangements.¹³²

¹³⁰ *Id.* at 95-96.

¹³¹ *Id.* at 97

¹³²

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

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.¹³³

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. at 97-98.

¹³³ *Id.*

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.

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."¹³⁴

The War Department was reorganized around the concept of unity of command in March 1942.¹³⁵

Although World War II would result in "the sanctification of unity of command as the principle that assured operational

¹³⁴ *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, (November 14, 1941).

¹³⁵ *Id.*

success,"¹³⁶ 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 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.¹³⁷ (emphasis added)

¹³⁶ *Id.* at 111.

¹³⁷ *Id.* at 104.

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.¹³⁸

This system of "unified command" worked much better 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

¹³⁸ JOINT HISTORY OFFICE, OFFICE OF THE CHAIRMAN OF THE JOINT CHIEFS OF STAFF, THE HISTORY OF THE UNIFIED COMMAND PLAN 1946-1993 11 (1995).

Chief, U.S. Army Forces, Pacific (CINCAFPAC), and Commander in Chief, U.S. Pacific Fleet (CINCPAC), respectively.¹³⁹

In addition, there were many other significant inter-service command disputes during World War II. There were disputes between Army commanders and commanders of the then Army Air Force.¹⁴⁰ There were disputes between Naval commanders and Marine commanders.¹⁴¹ There were disputes between Army Air Force, Naval Air and Marine Air commanders.¹⁴² Finally, there were disputes between Army commanders and Marine commanders.

One notorious example of this last conflict, that serves as a particularly useful illustration of my thesis, is the dispute between the Army and the Marine Corps/Navy over Marine

¹³⁹ *Id.*

¹⁴⁰ D. CLAYTON JAMES, A TIME FOR GIANTS 111-12 (1987); ALLARD, *supra* note 7 at 106-07.

¹⁴¹ *Id.* at 112-113:

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.

¹⁴² ALLARD, *supra* note 7 at 105-06.

Lieutenant General Holland M. ("Howlin' Mad") Smith's relief from command of Army Major General Ralph C. Smith during Operation Forager--the battle for Saipan on June 24, 1944. Ralph Smith was in command of the Army's 27th Infantry Division, while Holland Smith was the commander of all ground forces in Operation Forager.¹⁴³

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.¹⁴⁴ 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 Ralph Smith "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."¹⁴⁵ Because there was no improvement the next day, General Holland Smith sought and obtained permission from Vice Admiral Raymond A. Spruance to relieve Ralph Smith of command.¹⁴⁶

¹⁴³ JAMES, *supra* note 140 at 251.

¹⁴⁴ HOLLAND M. SMITH, CORAL AND BRASS 168-70 (1948); *reprinted as* FLEET MARINE FORCE REFERENCE PUBLICATION (FMFRP) 12-37 (1989).

¹⁴⁵ *Id.* at 172.

¹⁴⁶ *Id.* at 172-73. Spruance was Commander, Fifth Fleet.

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.¹⁴⁷

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.¹⁴⁸

By the end of World War II,

[t]he Pearl Harbor disaster and the course of events in the several theaters of war had discredited mutual cooperation as an acceptable method of coordinating joint operations. A few diehards may still have opposed unity of command, but for the

¹⁴⁷ JAMES, *supra* note 140 at 251.

¹⁴⁸ *Id.* at 180.

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.¹⁴⁹

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.¹⁵⁰

Another study of Korean War joint air operations came to a different conclusion. "There were some false starts and

¹⁴⁹ 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).

¹⁵⁰ JAMES A. WINNEFELD & DANA J. JOHNSON, *JOINT AIR OPERATIONS: PURSUIT OF UNITY IN COMMAND AND CONTROL, 1942-1991* 60 (1993).

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."¹⁵¹

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.¹⁵² Summers concludes 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.¹⁵³ 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.¹⁵⁴

¹⁵¹ CARDWELL, *supra* note 106 at 17.

¹⁵² HARRY G. SUMMERS, JR., *ON STRATEGY: THE VIETNAM WAR IN CONTEXT* 87-92 (1981).

¹⁵³ *Id.* at 88.

¹⁵⁴ *Id.* at 91.

d. *Granada and Unity of Command*

Two aspects of the United States intervention in Granada deserve mention. First, the problems the United States military experienced in conducting joint operations in Granada were some of the primary forces that lead to the passage of Goldwater-Nichols in 1986.¹⁵⁵ Second, an experience of then Major General Schwarzkopf in Granada 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 Granada. 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 *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 team balked at the idea

¹⁵⁵ ALLARD, *supra* note 7 at 1-3.

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."¹⁵⁶

e. Desert Storm and Unity of Command

¹⁵⁶ H. NORMAN SCHWARZKOPF, *IT DOESN'T TAKE A HERO* 254 (1992).

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 responsible commander.'"¹⁵⁷ 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.¹⁵⁸

f. Somalia and Unity of Command

Colonel Allard has reviewed the Somalia operations in detail. He emphasizes "there should be no mistaking the fact

¹⁵⁷ HARRY G. SUMMERS, JR., ON STRATEGY II: A CRITICAL ANALYSIS OF THE GULF WAR 241 (1992).

¹⁵⁸ DESERT STORM ASSESSMENT TEAM REPORT, CRIMINAL LAW, 1, Issues 317 and 379 (22 April 1992).

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."¹⁵⁹ 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."¹⁶⁰

2. Nature of the principle of unity of command

As was noted at the beginning of the discussion of unity of command,¹⁶¹ 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.

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*

¹⁵⁹ KENNETH ALLARD, SOMALIA OPERATIONS: LESSONS LEARNED 60 (1995).

¹⁶⁰ *Id.*

¹⁶¹ See text accompanying note 114, *supra*.

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.¹⁶²

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. . . .¹⁶³

President Woodrow Wilson

President Wilson was, no doubt, dead-on accurate. A military force may possess the most perfect command and support systems ever created, but if the leadership is not

¹⁶² 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).

¹⁶³ 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).

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 much 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.¹⁶⁴

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, as discussed above,¹⁶⁵ 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:

¹⁶⁴ Altenburg, *supra* note 38.

¹⁶⁵ See *supra* text accompanying note 21.

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.*¹⁶⁶ (emphasis added)

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 protracted, men can only be persuaded to accept evil things by the lively realization of the fact that greater terrors await their refusal.¹⁶⁷

¹⁶⁶ 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).

¹⁶⁷ WINSTON CHURCHILL, THE RIVER WAR (1899), *quoted in* FITTON, *supra* note 2 at 79.

As we saw above, current definitions of command¹⁶⁸ and unity of command¹⁶⁹ clearly include, indeed are framed by, 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--no matter what we in the military legal profession might like to think. Larger issues of command, leadership and warfighting tend to dominate the analysis of military operations. Nevertheless, it is incumbent upon us 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.

As we are about to see, the principle of unity of command is related to, but different from in important ways, the concept of unity of effort. Operational JTF commanders want, and need, unity of command, not unity of effort. Unity of

¹⁶⁸ See *supra* text accompanying notes 24-28.

¹⁶⁹ See *supra* text accompanying notes 110-111.

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."¹⁷⁰ 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."¹⁷¹ Through this process, "unity of command" becomes "unity of effort" -- the first fundamental of joint warfare.¹⁷²

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:

¹⁷⁰ JOINT PUB 1, *supra* note 4 at vii-viii and III-1.

¹⁷¹ *Id.* at viii.

¹⁷² *Id.*

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.¹⁷³

Unity of effort seems to be aimed at the national level:

"[c]ooperation 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."¹⁷⁴ "The President is responsible for national strategic unity of effort. The Secretary of Defense is responsible for national military unity of effort."¹⁷⁵ 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.*"¹⁷⁶ (emphasis added)

This distinction between the strategic level (unity of effort) and the operational level (unity of command) is supported by recent scholarship. In a recent article

¹⁷³ *Id.* at ix.

¹⁷⁴ *Id.* at III-1--III-2.

¹⁷⁵ JOINT PUB 0-2, *supra* note 6 at vii.

¹⁷⁶ *Id.* at III-9.

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 level, where efforts much broader than those associated with "command" apply.¹⁷⁷

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.¹⁷⁸

The above discussion of unity of effort illustrates the point that unity of effort can easily accommodate the fact of

¹⁷⁷ William T. Johnsen, Douglas V. Johnson II, James O. Kievit, Douglas C. Lovelace, Jr., and Steven Metz, *The Principles of War in the 21st Century: Strategic Considerations*, at 9 (Strategic Studies Institute, U.S. Army War College, Carlisle Barracks, PA).

¹⁷⁸ JOINT PUB 0-3, *supra* note 110 at A-2.

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" discussed above.¹⁷⁹ 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." As was discussed in section III B above, there are benefits that flow from the tradition of service autonomy. I suggest 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 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.

¹⁷⁹ See *supra* text accompanying notes 128-131.

As one former DOD official has written, "[the need for teamwork when combined operations are required is incontestable."¹⁸⁰

V. History of Legal Underpinnings of Joint UCMJ Jurisdiction

As we saw in parts III and IV, 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 on the one hand, and of the organization of DOD, as reflected most recently by the Goldwater-Nichols reorganization act, on the other, 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.¹⁸¹

¹⁸⁰ Cropsy, *supra* note 103 at 77.

¹⁸¹ W.Y. Smith, General, 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 this author).

One author has termed these two separate chains the "employing arm" and the "maintaining arm,"¹⁸² respectively.

This distinction between the employing and the maintaining arms corresponds to what we saw earlier in Van Creveld's distinction between the "output related" and "function-related" responsibilities of command.¹⁸³ The fact that the two arms are "mutually dependent and by no means entirely distinct"¹⁸⁴ 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).

At least one senior retired military officer has suggested¹⁸⁵ 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. This view is supported by the congressional testimony of Admiral King regarding the creation

¹⁸² ARCHIE D. BARRETT, REAPPRAISING DEFENSE ORGANIZATION (1983).

¹⁸³ See *supra* text accompanying notes 22 and 23.

¹⁸⁴ *Id.*

¹⁸⁵ Smith, *supra* note 181 at 2.

of the Department of Defense.¹⁸⁶ 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.¹⁸⁷ Although the Army and Navy would be in open conflict during the unification debate from 1945-1947,¹⁸⁸ 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.

¹⁸⁶ See *infra* text accompanying note 189.

¹⁸⁷ ALLARD, *supra* note 7 at 111.

¹⁸⁸ *Id.* at 111-22.

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

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.¹⁸⁹

General Eisenhower, on the other hand, drew a different conclusion on the need for a single national defense department from 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 sailors and airmen 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

¹⁸⁹ Testimony of Fleet Admiral Ernest J. King, *Senate*, 1945, p. 121; quoted in ALLARD, *supra* note 7 at 115, 277.

single department of the armed forces to govern us all.¹⁹⁰

Congress sided with General Eisenhower, and in 1947 created the Department of Defense by enacting the landmark National Security Act.¹⁹¹ 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.¹⁹²

In 1958 Congress amended DOD's organization by creating the operational chain of command running from the President and Secretary of Defense to the unified and specified commands.¹⁹³ 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,

¹⁹⁰ Testimony of General of the Army Dwight D. Eisenhower, *Senate, 1945*, pp. 361-63; quoted in Allard, *supra* note 7 at 118, 277.

¹⁹¹ The National Security Act, Pub. L. No. 80-253, 61 Stat. 495 (July 26, 1947).

¹⁹² ALLARD, *supra* note 7 at 112.

¹⁹³ 1958 Amendments to the National Security Act of 1947, Pub.L. No. 85-599, 72 Stat. 514 (Aug. 6, 1958).

the powers of the Chairman of the JCS were increased and the powers and size of the military departments were further reduced.¹⁹⁴

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.

As we saw in Part III, there is a long history and tradition of service autonomy in the United States military, principally traceable, at least originally, to the differences between the Army and the Navy. Colonel Allard's analysis of the roots of service autonomy, discussed at length earlier, began with the founding of the Republic. It is certainly

¹⁹⁴ALLARD, *supra* note 7 at 3.

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.

James Snedeker has written that "[c]ourts-martial on land had a fundamentally different origin from those at sea."¹⁹⁵ 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."¹⁹⁶ 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."¹⁹⁷ 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

¹⁹⁵ J. SNEDEKER (BRIGADIER GENERAL, USMC, RET.) A BRIEF HISTORY OF COURTS-MARTIAL 1 (1954).

¹⁹⁶ *Id.*

¹⁹⁷ WILLIAM T. GENEROUS, SWORDS AND SCALES: THE DEVELOPMENT OF THE UNIFORM CODE OF MILITARY JUSTICE 22 (1973).

of justice."¹⁹⁸ 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.¹⁹⁹ 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."²⁰⁰ 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 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.²⁰¹ This was an enormous task because "[t]he Articles of War and the Navy Articles were laid out in completely

¹⁹⁸ *Id.* at 18.

¹⁹⁹ *Id.* at 34-53.

²⁰⁰ *Id.* at 38.

²⁰¹ *Id.*

dissimilar fashions," and "[t]he services had different ideas about any number of aspects of military justice."²⁰²

The legislative history of the UCMJ makes clear 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.²⁰³ 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 reciprocal jurisdiction of courts-martial."²⁰⁴ Professor Morgan went on to explain:

²⁰² *Id.* at 37.

²⁰³ "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 at 1325-149 (1985).*

²⁰⁴ *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*

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.*"²⁰⁵ (emphasis added)

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, on the one hand, and the experienced and much

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 at 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).

²⁰⁵ *Id.*

admired friend of the military, Congressman Carl Vinson, on the other. 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.

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.²⁰⁶

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 was addressing.

One point emerges very clearly 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 was explicit in his

²⁰⁶ *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 at 80 (1985).*

reasons for this view--he believed it was necessary to help protect the command climate of joint commands.

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.²⁰⁷

At this point in the questioning, Professor Morgan turned for help to Mr. Larkin, who, as Professor Morgan explained, "has conferred with the Navy and Army representatives on this particular provision and I think I will ask him whether he can clarify that a little more."²⁰⁸ (The influence of the interests of the services in autonomy is explicitly recognized at this formative stage of the UCMJ). Mr. Larkin's testimony could serve as the perfect contemporary argument for the

²⁰⁷ *Id.* at 613, 81.

²⁰⁸ *Id.*

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 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.*²⁰⁹ (emphasis added)

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.²¹⁰ The most recent of these cases was 1967, with the

²⁰⁹ *Id.* at 614-15, 82-83.

²¹⁰ *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 (U.S.A.F. Board of Review 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 (U.S.A.F. Board of Review 1954); *United States v. Reese*, 14 C.M.R. 499 (U.S. Navy Board of Review 1954); *United States v. Biagini*, 10 C.M.R. 682 (U.S.A.F. Board of Review 1953); *United States v. Mack*, 4 C.M.R. 536 (U.S.A.F. Board of Review 1952); *United States v. Caternolo*, 2 C.M.R. 385 (U.S. Army Board of Review 1952).

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 contains nothing of substance that is not currently covered by RCM 201(e).²¹¹

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

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 specific, 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)²¹² by authorizing "the commanding officer of a unified or specified combatant command" to convene general courts-martial. As seen above, this was a significant break with the past. It was the first time joint force commanders had been given court-martial authority over all services.

²¹¹ MCM, *supra* note 16 at R.C.M. 201(e).

²¹² Goldwater-Nichols, *supra* note 14.

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.²¹³

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.²¹⁴

This new authority of the CINCs was further implemented by Executive Order (EO)²¹⁵ 12586 of March 3, 1987. This EO amended RCM 201 to provide procedures to govern the exercise

²¹³ 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 (30 April 1975) (declassified 20 June 1991, on file with the DOD Freedom of Information Office, 89-FOI-1226, # 265).

²¹⁴ 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.

²¹⁵ MCM, *supra* note 16, R.C.M. 201 (Change #3, 3 March 1987).

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. This remains the situation today.

VI. Current Law and Policy Regarding Reciprocal Jurisdiction

As we saw in the preceding Part, the law governing reciprocal general court-martial jurisdiction is relatively straightforward. It is governed by UCMJ articles 17 and 22 and by RCM 201. There is one interesting twist to RCM 201, however. 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.²¹⁶ 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.

²¹⁶ UCMJ arts. 22-24 (1988) list the levels of command authorized to convene general, special and summary courts-martial, respectively.

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."²¹⁷ 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."²¹⁸

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 described in (A) or (B) exist. However, failure to comply with this policy does not affect an otherwise valid referral.²¹⁹

One commentator has termed RCM 201(e)(3) "an unusual blend of direction and guidance."²²⁰ The reason for this is that the

²¹⁷ MCM, *supra* note 16, R.C.M. 201(e).

²¹⁸ *Id.* at discussion.

²¹⁹ MCM, *supra* note 16, R.C.M. 201(e)(3).

²²⁰ Criminal Law Div. Note, "Interservice" Courts-Martial and Reciprocal Jurisdiction, ARMY LAW., May 1992, at 59.

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.²²¹ Legal research and interviews have disclosed no other cases where this RCM has been invoked.²²²

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."²²³ It is a well-grounded military

²²¹ *Id.* at 58.

²²² Telephonic interview of Mr. Charlie Watkins, Examination and New Trials Division, U.S. Army Legal Services Agency (March 25, 1996). Mr. Watkins was personally involved in reviewing this case out of the Philippines and was not aware of any similar cases either before or after that case.

²²³ JOINT PUB 0-2, *supra* note 6 at Chptr IV, Sect. C, p. IV-18, para. 11.b.

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."²²⁴

VII. Proposed Solution: GCM Authority for JTF Commanders

*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.*²²⁵

General W. Y. Smith, U.S.A.F. (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.*²²⁶

Thomas Jefferson

In this study we have seen two overarching ideals which 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, public perception and perhaps many other

²²⁴ *Id.* at ix.

²²⁵ Smith, *supra* note 171 at 9.

²²⁶ 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.

reasons. 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, if complied with, 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 just such a clash. As we have seen, 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 taught us 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 doing violence to either principle.

I propose an amendment to RCM 201(e) that would authorize commanders of most JTFs to exercise GCM authority over those commands. Specifically, I would insert a new paragraph, RCM 201(e)(2)(B), and renumber the other subparagraphs without deleting any of them. 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.²²⁷

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, of course, 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 makes no 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.

I had examined the possibility of proposing an amendment to article 22 of the UCMJ with language similar to this proposed RCM. That approach would have been consistent with the one taken by Congress in the Goldwater-Nichols legislation. I decided against recommending this course for several reasons. First, legislation would almost certainly be more difficult to obtain than a small change to a RCM. Secondly, the law is already in place to allow for reciprocal

²²⁷ This language is based in part on United States Navy JAGMAN 0101A(1), 0120(A)(1) Designation of Additional Convening Authorities, General Courts-Martial.

court-martial jurisdiction, and a statutory change was simply not needed. Third, reform is almost always more easily accepted when it comes from within, here 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, set out earlier,²²⁸ about the variety of potential missions, and the different force compositions, of JTFs. 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.²²⁹ 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 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.

²²⁸ See text accompanying notes 50-51.

²²⁹ MCM, *supra* note 16, R.C.M.s 306(a), 401(a).

We have developed to the point in our military organization where virtually every "real-world" operation will be joint. This is so almost by definition, as 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. I suggest we have reached the point in our military history suggested by Mr. Larkin in his testimony concerning article 17--the point where it is "practical to provide automatically in advance the jurisdiction to the top commander."²³⁰ To continue 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. As discussed above, 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.²³¹ Furthermore, as a practical matter, joint commanders will almost certainly rely, virtually exclusively, on component command service channels to administer discipline in JTFs. This is just what the CINCs have done for the past ten years, since Goldwater-Nichols became law. This, when coupled with the ability of superior commanders to withhold court-martial authority discussed

²³⁰ See *supra* text accompanying note 195.

²³¹ MCM, *supra* note 16, R.C.M.201(e).

above, 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 27-10²³², 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

*However brilliant an action may be, it ought not to pass for great when it is not the result of a great design.*²³³

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 during that entire history 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

²³² See *supra* note 18.

²³³ LaRochefoucauld, *quoted in* Legere, *supra* note 149 at 1.

contemporary JTF commanders should possess interservice general court-martial authority.

As we have seen, 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 orders will be carried out--regardless of the branches of service involved.