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RACIAL EXTREMISM IN THE ARMY

A Thesis Presented to The Judge Advocate General's School
United States Army in partial satisfaction of the requirements
for the Degree of Master of Laws (LL.M.) in Military Law

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 governmental agency.

BY MAJOR WALTER M. HUDSON
JUDGE ADVOCATE GENERAL'S CORPS
UNITED STATES ARMY

46TH JUDGE ADVOCATE OFFICER GRADUATE COURSE
APRIL 1998

Racial Extremism in the Army

By Major Walter M. Hudson

ABSTRACT: In this thesis I examine the problem of white supremacist extremism in the Army. I begin by analyzing the phenomenon in general. First, I define extremism in general, and then give a summary history of white racial extremism in the United States, to include focusing on such hate groups as the Ku Klux Klan and the more modern phenomenon of "skinheads." I then discuss the history of white supremacist extremism in the Army, culminating in the December, 1995 murders of two black civilians by soldiers assigned to the 82d Airborne Division at Fort Bragg, North Carolina. I compare and contrast the old and new Army policies on extremism. I defend the new policy as constitutional, based upon a reading of Supreme Court case law, and I analyze the justifications for the Supreme Court's deference to the military in determining its policies. I also look at the potential problems of the extremist policy being overly broad and a form of viewpoint-based discrimination. I propose a methodology to create local policies that will withstand constitutional scrutiny along these lines and lastly give three scenarios utilizing that methodology.

Racial Extremism in the Army:

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RACIAL EXTREMISM IN THE ARMY

MAJOR WALTER M. HUDSON[1]

I. Introduction

In the early morning hours of 7 December 1995, Michael James and Jackie Burden walked down Hall Street in Fayetteville, North Carolina, a neighborhood they knew well. Two men approached them, one of whom had a gun.[2] He pointed the gun close to their heads and fired at least five times.[3]

By the following afternoon, Fayetteville police arrested two 82d Airborne Division soldiers, Private First Class (PFC) James Burmeister II and PFC Malcolm Wright, for the murders.[4] The following day, Fayetteville police arrested a third 82d Airborne soldier, Specialist (SPC) Randy Meadows, and charged him with conspiring to commit the murders. He allegedly drove Burmeister and Meadows to the scene.[5] Michael James and Jackie Burden were black.[6] Burmeister, Wright, and Meadows were white.[7]

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[2] Virginia A. White, *Killings Tied to Racism*, FAYETTEVILLE OBSERVER-TIMES, Dec. 8, 1995, at 1A.

[3] *Id.*

[4] *Id.*

[5] Virginia A. White, *3rd GI Charged in Murder*, FAYETTEVILLE OBSERVER-TIMES, Dec. 9, 1995, at 1A.

[6] *Id.*

[7] *Id.*

After the police arrested the suspects, they searched one of Burmeister's residences in nearby Harnett County.[8] They found, among other things, a Ruger P89 9mm handgun and a book on how to make explosives.[9] They also found various Nazi paraphernalia and white supremacist literature.[10]

The murders were not the typical sort. They were not committed during the course of a robbery. They were not committed during a drug deal gone wrong. They were not motiveless killings by a deranged soldier. Rather, the crimes apparently had a chilling motive; they were committed, or at least primarily motivated, because the victims were black.[11] The suspects were neo-Nazi "skinheads."[12] Burmeister in particular appeared to be a racial extremist who resorted to violence to express his philosophy of white supremacy, race hatred, and race war.[13]

The repercussions were vast and involved many different players. The Secretary of the Army held a press conference. He ordered the creation of a task force to study the subject.[14] National media, from Sam Donaldson to *Esquire* magazine, descended upon Fort Bragg to

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[8] Information Paper, Office of the Staff Judge Advocate, 82d Airborne Division, subject: Background Information on PFC James N. Burmeister, SPC Randy L. Meadows, and PFC Malcolm M. Wright (14 Mar. 1996) [hereinafter Information Paper on Background] (on file with author and at Office of the Staff Judge Advocate, 82d Airborne Division).

[9] *Id.*

[10] *Id.*

[11] William Branigan & Dana Priest, *3 White Soldiers Held in Slaying of Black Couple*, WASH. POST, Dec. 9, 1995, at A1.

[12] Neo-Nazi "skinheads," given their name because of their characteristically shaved heads, are usually loosely affiliated bands of white youths who profess white supremacist beliefs. *See infra* pp. 22-25.

[13] Serge F. Kovaleski, *Soldiers in White Supremacist Uniforms*, WASH. POST, Dec. 11, 1995, at A1.

[14] William Branigan & Dana Priest, *Army Plans to Investigate Extremists Within the Ranks*, WASH. POST, Dec. 13, 1995, at A1.

determine how serious the problem was.[15] Within the 82d Airborne Division and other units at Fort Bragg, commanders ordered investigations to identify extremists, especially neo-Nazi skinheads.[16] The "skinhead" controversy at Fort Bragg dominated the Army media in early 1996.[17]

Due to the above tragedy, the Army created a new extremist policy and has taken steps to implement it. But questions about the policy and its implementation remain. Is the policy constitutional? How can a commander use it, along with other measures, to combat destructive racial extremism in his unit? Answering these questions is the purpose of this article.

The first part of this article provides background information on racial extremism. It first examines a standard definition of extremism, and then the Army's. The article points out the differences between the two definitions and why the Army focuses more on particular types of intolerance in its definition. It next provides background on white supremacy, a form of extremism that has recently caused concern in the military. It examines the more traditional forms of white supremacy–organizations such as the Ku Klux Klan–and examines the neo-Nazi "skinhead" culture associated with Burmeister. The first part of the article concludes with an overview of white supremacist extremism's infiltration into the military.

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[15] Daniel Voll, *A Few Good Nazis*, ESQUIRE, Apr. 1996, at 102-112; Memorandum from Major Rivers Johnson, Public Affairs Officer, 82d Airborne Division, AFVC-PA, to Commander, 82d Airborne Division, Commander, XVIII Airborne Corps, Commander, Forces Command, Secretary of the Army, and Commander, Criminal Investigation Command, subject: ABC Television's "Primetime" News Show (12 Mar. 1996) (on file with author and at Office of the Staff Judge Advocate, 82d Airborne Division).

[16] Memorandum from Lieutenant Colonel David L. Hayden, Staff Judge Advocate, 82d Airborne Division, AFVC-JA, to Commanding General, 82d Airborne Division, subject: Actions Taken by 82d Airborne Division Command and Staff Against Extremism (2 Jul.1996) (on file with author and at Office of the Staff Judge Advocate, 82d Airborne Division) [hereinafter Memorandum on Actions Taken].

[17] *See* Regina Galvin, *Hate in the Army*, ARMY TIMES, Mar. 25, 1996, at 12; Grant Willis, *EEO System: Not Broken, But Not Perfect*, ARMY TIMES, Apr. 1, 1996, at 12; Regina Galvin, *Redemption of a Skinhead*, ARMY TIMES, May 20, 1996, at 12.

The second part of this article examines the Army's old policy on extremism and its background. It contends that the drafters of the old policy relied on language based on concerns other than extremism. Therefore, the old policy could not properly address the current extremist phenomenon. It then examines the Army's new policy, comparing it to the old policy and pointing out the great discretion the new policy gives commanders.

The third part of this article examines the legality of the Army's new extremist policy, especially as applied by commanders. It contends that the policy can be legally defended primarily because of the judicial deference given to the military. This deference has a two-fold basis.

First, the separation of powers in the U.S. Constitution gives authority to the executive (and within it, to the military) and legislative branches to create military policy. The judiciary has little competence in this area. This is particularly true in the field of race relations and racial extremism in the Army. A commander is usually the one person suited to make decisions to control racial extremism in his unit–especially because of the great impact that extremism's violent form of expression–hate crime–has on a unit's good order and discipline.

Second, the military is a separate community, with its own norms and values. The military needs to be separate from society to maintain good order and discipline. This article uses the "institutional/occupational" thesis developed by the sociologist Charles Moskos[18] to explain the

[18] *See* Charles C. Moskos, *From Institution to Occupation: Trends in the Military Organization*, 4 ARMED FORCES & SOC'Y 41 (1977).

notion of the military as a separate community. The article further discusses how the necessity of keeping the military as a "separate community" is especially relevant in the area of race relations.

Both of the above notions justify the judiciary giving great deference to the Army's extremist policy and to commanders' local applications of it. This deference, however, is not unlimited. The fourth part of this article discusses First Amendment concerns. One concern is the possibility that the extremist policy, or local applications of it, violates the First Amendment because it is a form of "viewpoint-based" discrimination.[19] The Supreme Court ruled viewpoint-based discrimination unconstitutional in *R.A.V. v. City of St. Paul, Minnesota.*[20] This article contends that the policy is not unconstitutional generally or in local applications, if a commander can link the rationale for prohibiting certain forms of extremist speech or conduct to the speech or conduct's "secondary effects" on good order and discipline.

The fourth part of the article also discusses another concern–that a commander may issue an order that prohibits extremist speech or conduct that is too vague or tangential to good order and discipline, because such an order could be unlawful. It examines the Supreme Court case *Parker v. Levy*[21] to provide guidance on how to draft an order or policy that is not vague and that has a direct connection to good order and discipline.

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[19] Laws that only prohibit types of speech from a certain viewpoint (e.g., prohibiting speech made by certain political parties or religions) are considered forms of "viewpoint-based" discrimination and are presumptively unlawful. The most important recent case in this area is *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377 (1992).

[20] *Id.*

[21] 417 U.S. 733 (1974).

Lastly, this fourth part proposes a method that allows deference to a commander's need for good order and discipline yet addresses the First Amendment concerns. Legal advisors and commanders can use this method, analogized from the so-called *Relford* factors,[22] when drafting a local extremist policy or when determining whether orders that prohibit extremist speech or conduct are lawful.

The article's final part gives three hypothetical situations. Each scenario presents a specific set of facts that involves soldiers and commanders at the unit level. The article suggests the correct answers to the scenarios, using the method discussed earlier to assist in formulating legal and practically sound policies. This article deals primarily with administrative remedies, and focuses on formulating policies to combat racial extremism.[23]

Commanders and their legal advisors must deal with extremism rationally, but also proactively and decisively. When a command brings a soldier to court-martial for an extremist-related offense, in many ways, it is too late. By this time, a tragic crime may have occurred; the command may be inundated with media coverage, congressional inquiries, and investigators; community relations may be damaged; morale may be lowered by racial tensions and resentment; and combat readiness may have been impeded.[24]

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[22] *See* Relford v. U.S. Disciplinary Commandant, 401 U.S. 355 (1971).

[23] This article does not address promulgating "hate crime laws in the military, the preferral of charges against racial extremists, or court-martial strategies in cases involving racial extremists. It also does not deal with ways to identify racial extremists at the unite level, such as unit tattoo policies.

[24] The effect on unit training at the 82d Airborne Division was widespread. Hundreds of hours were spent on classes, investigations, inspections, responding to media inquiries, taking administrative and disciplinary actions against extremists, sensing sessions, and courts-martial. Memorandum on Actions Taken, *supra* note 16.

Furthermore, while many states have attacked the problem of extremist-type bias crimes through hate crime statutes,[25] and while there has been wide media coverage of bias crimes in the United States, their actual number is extremely small compared to the total number of crimes.[26] The passage of hate crime laws could actually prove to be counterproductive: the decision to charge or not to charge a crime as a bias crime is fraught with extralegal consequences. The outcome of a specifically charged bias crime, in the form of either an acquittal or conviction, has a powerful symbolism that can resonate through the community far more than in other types of crimes.[27]

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[25] Several states have passed some sort of bias crime legislation. Alabama, California, Delaware, Florida, Georgia, Illinois, Iowa, Louisiana, Massachusetts, Mississippi, Montana, Nevada, New Jersey, New York, Ohio, Oklahoma, South Dakota, Tennessee, Texas, Utah, Washington, West Virginia, and Wisconsin have statutes that either prohibit bias crimes or allow the enhancement of penalties if bias was involved. *See* ALA. CODE §13A- 5-13 (1994); CAL. PENAL CODE §422.6 (1998 & West Supp. 1998); DEL. CODE ANN. tit. 11 §1304 (1995); FLA. STAT. ANN. § 775.085 (West 1992); GA. CODE ANN. § 16-11-37 (1996); 720 ILL. COMP. STAT. ANN. 5/122-7.1 (West 1993); IOWA CODE § 729A.1 (1993); LA. REV. STAT. ANN. § 14:107.2 (West Supp. 1998); MASS. GEN. LAWS. ch. 265 §39 (West 1990); MISS. CODE ANN. §99-19-301 (1994); MONT. CODE ANN. §45-5-222 (1996); NEV. REV. STAT. §193.1675 (1997); N.J. STAT. ANN. §2C 44-3 (West 1995); N.Y. PENAL LAW §240.31 (McKinney 1989); OHIO REV. CODE ANN. §2927.12 (Anderson 1996); OKLA. STAT. ANN. tit. 21 §850 (West Supp. 1998); S.D. CODIFIED LAWS §22-19B-1(Michie 1998); TENN. CODE ANN. §39-17-309 (1997); TEX. PENAL CODE ANN. §12.47 (West 1994); UTAH CODE ANN. §76-3-2-3.3 (1995); WASH. REV. CODE ANN. §9A.36.078 (West Supp. 1998); W. VA. CODE §61-6-21 (1997); WIS. STAT. ANN. §939.645 (West 1996). While Maine, Minnesota, and Rhode Island do not have statutes prohibiting bias crimes or enhancing penalties because of bias, they have statutes that require bias crime training and reporting requirements for police. *See* ME. REV. ST. ANN. tit. 25 §2803-B (West Supp. 1997); MINN. STAT. ANN. §626.8451 (West Supp. 1998); R.I. GEN. LAWS §42-28-46 (1993).

[26] Two criminologists assert that the "epidemic" of hate crimes in the United States is largely a product of partisan political groups and the media. Some of the specific problems with this claim are: (1) the relatively small number of "hate crimes" (for example, the authors cite that nationwide in 1991, the first year statistics were reported, there were 4588 reported hate crimes out of 14,872,883 (less than .039%); (2) the conflicting data (for example, the FBI reported 12 hate murders in 1991; Klanwatch reported 27); (3) the extremely spotty reporting efforts (there is no consistent method from state to state for collecting hate crime information); and (4) the reporting methodologies of various collection groups (the Antidefamation League (ADL), for example, reports noncriminal acts of bigotry, such as noncriminal verbal harassment, as well as criminal ones). *See* James B. Jacobs & Jessica S. Henry, *The Social Construction of a Hate Crime Epidemic*, 86 J. CRIM. L. & CRIMINOLOGY 366 (1996).

[27] *See* Mark Fleisher, *Down the Passage Which We Should Not Take: The Folly of Hate Crimes Legislation*, IL. J.L. POL'Y, 27, 28, 34 (1993). Fleisher points out that in a politically or racially charged case, a jury acquittal or a major conviction can carry tremendous symbolism, such as the system is irredeemably racist, or that the jury was prejudiced one way or another. *Id.* at 34.

This article contends that prosecuting extremists, while important, is a secondary goal.[28] Instead, it focuses on administrative, rather than criminal, methods to combat extremism. Therefore, it has a twofold emphasis. First, a commander and legal advisor must proactively identify racial extremism, particularly white supremacist extremism. Thus, it is necessary to discuss the history of white-supremacist extremism. Second, a commander must accomplish this end with reasonable means. This requires an examination of the relevant constitutional and military law.

II. Racial Extremism

A. Differing Definitions

In the *Dictionary of Political Thought*, Roger Scruton defines extremism as:

> 1. Taking a political idea to its limits, regardless of unfortunate repercussions, impracticalities, arguments, and feelings to the contrary, and with the intention not only to confront, but to eliminate opposition.
> 2. Intolerance toward all views other than one's own.

[28] As of March 1998, the Army has court-martialed on soldier for violating revised policy on extremism. In October 1997, Specialist Jeffrey Brigman of the 101st Air Assault Division was convicted at a general court-martial for possessing an explosive device in his barracks room, in violation of local policy and state law, and for distributing extremist literature on post. Brigman had been putting up flyers around post seeking others to join the Clarksville Area Skinheads, a local racist organization. The court-martial found him not guilty of recruiting others to join. He was sentenced to two years confinement and received a bad conduct discharge. Brigman never challenged the constitutionality of the Army's new policy on extremism at trial. Telephone Interview with Major

3. Adoption of means to political ends which show disregard for the life, liberty, and human rights of others.[29]

John George and Laird Wilcox, two of the foremost analysts of right-wing and left-wing extremism, state that this definition reflects a common proposition about extremist behavior: it is more an "issue of style than of content."[30] What the extremist believes is less important than what behavior he exhibits. Rather, extremism can cut across the political spectrum.[31] Most people can hold radical or unorthodox beliefs in a more or less reasonable and rational manner. Extremists present their views in uncompromising, bullying, and often authoritarian ways.[32]

Jonathan Potter, Chief, Military Justice, Office of the Staff Judge Advocate, 101st Air Assault Division and Fort Campbell, Fort Campbell, Ky. (Feb. 27, 1997).

[29] ROGER SCRUTON, DICTIONARY OF POLITICAL THOUGHT 164 (1982).

[30] JOHN GEORGE & LAIRD WILCOX, AMERICAN EXTREMISTS 54 (1996). George is a professor of political science at the University of Central Oklahoma. Wilcox is the founder of the Wilcox Collection on Contemporary Political Movements at the University of Kansas, one of the largest of its kind in the world, which contains hundreds of thousands of documents on all political movements. *Id.* at 6. He is also editor and publisher of annual guides on extremism. *See* LAIRD WILCOX, GUIDE TO THE AMERICAN RIGHT & GUIDE TO THE AMERICAN LEFT (1997).

[31] John George and Laird Wilcox look at extremists as persons psychologically prone to extremism, regardless of political affiliation:

> Both of us have had the feeling many times that the Bircher with whom we were talking could just as easily have been a Communist and vice-versa. It may be merely a question of who "gets to them" first. We tend to view the existence of an extremism-prone personality as a more reasonable hypothesis than attempts to account for the "pathology" of a particular point of view.

GEORGE & WILCOX, *supra* note 30, at 66.

[32] *Id.* at 54. George and Wilcox list twenty-two common traits of extremists. While all people exhibit some of these traits at times, the important distinction is that "[w]ith bona fide extremists, these lapses are not occasional." *Id.* The traits are: (1) character assassination; (2) name calling and labeling; (3) irresponsible sweeping generalizations; (4) inadequate proof for assertions; (5) advocacy of double standards; (6) tendency to view opponents and critics as essentially evil; (7) Manichean worldview; (8) advocacy of some degree of censorship or repression of opponents and/or critics; (9) a tendency to identify themselves in terms of who their enemies are: whom they hate and who hates them; (10) tendency toward argument by intimidation; (11) use of slogans, buzzwords, and thought-stopping clichés; (12) assumption of moral or other superiority over others; (13) doomsday thinking; (14) a belief that doing bad things in the service of a "good" cause is permissible; (15) emphasis on emotional responses, and, correspondingly, less importance to reasoning and logical analysis; (16) hypersensitivity and vigilance; (17) use of supernatural rationale for beliefs and actions; (18) problems tolerating ambiguity and uncertainty; (19) inclination toward "groupthink"; (20) tendency to personalize hostility; (21) a feeling that the "system" is no good unless they win; and (22) tendency to believe in far-reaching conspiracy theories. *Id.* at 56-61.

Army Regulation (AR) 600-20, paragraph 4-12 contains the Army's official definition of extremist organizations and activities:[33]

> [O]nes that advocate racial, gender, or ethnic hatred or intolerance; advocate, create, or engage in illegal discrimination based on race, color, sex, religion, or national origin; advocate the use of force or violence or unlawful means to deprive individuals of their rights under the United States Constitution or the laws of the United States, or any state, by unlawful means.[34]

There is a difference between the Army's definition and Scruton's, as well as George's and Wilcox's elaboration on Scruton's definition. The Army's definition does not focus on style or "taking political ideas to their limits." The regulation focuses on *types* of extremism, with particular attention to types that advocate intolerance towards gender and racial, religious, and ethnic minorities. The regulation thus provides a narrower category of extremism than Scruton, George, and Wilcox. These commentators may help to understand and to explain extremism, but, for the Army, they do not define it.

What, then, does *AR 600-20* not cover, at least by name? The range of extremism–from left to right–that the regulation does not cover is vast.[35] One of the regulation's definitions speaks in general terms about activities or organizations that may advocate the "use of force or violence or

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[33] Message, 201604Z Dec 96, Headquarters, Dep't of Army, DAPE-ZA, subject: Revised Army Policy on Participation in Extremist Organizations or Activities, para. 4-12C.2.A. (20 Dec. 1996) [hereinafter AR 600-20, para. 4-12 (new policy)]. A new Army command policy regulation has not been published. The new Army extremist policy is still only available in the message format.

[34] *Id.*

unlawful means to deprive individuals of their rights . . . ."[36] The regulation, however, does not cover anti-government right-wing extremism, or any purely "political" extremism.[37] This may appear especially odd because right-wing extremism appears sometimes to overlap with white supremacist extremism.[38] This narrow focus on particular types of extremism appears to be a deliberate policy decision by the Department of the Army.[39]

This deliberate limit serves three functions. First, it labels a particular form of extremism. This labeling helps solve the problem of determining the boundaries of extremism. The Army policy does not provide a generalized definition or another approach.[40] It declares a particular type of behavior as extremist: the type that expresses intolerance toward gender, racial, ethnic, and religious groups, and those who advocate violence or unlawful conduct.

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[35] The extremist spectrum includes communist, socialist, environmentalist, homosexual, libertarian, anti-communist, anti-tax, anti gun-control, and so-called "patriot" or anti-government (usually associated with the far right and militias) type extremists. For a complete listing of these groups, *see* WILCOX, *supra* note 30.

[36] AR 600-20, para. 4-12 (new policy), *supra* note 33, para. 4-12C.2.A.

[37] Conceivably, if a right-wing extremist advocates the use of force or violence or unlawful means to deprive others of rights, he could fall under the definition; however, the definition does not list right-wing extremism anti-government extremism.

[38] In an unpublished research paper on right-wing extremism in the Army, Lieutenant Colonel Edwin Anderson contends that both racist and antigovernment extremism should be studied. According to Anderson, the Army should develop a strategy for both types, because they "sometimes, but not always, overlap each other" and because certain racist extremist groups will use antigovernment causes to lure new members to their organizations. Lieutenant Colonel Edwin W. Anderson, Jr., Right Wing Extremism in America and its Implications for the U.S. Army 8 (1996) (unpublished research paper, Air University) (on file with author and Air University Library). Joseph Roy, Director of Klanwatch, a division of the extremist watchdog group the Southern Poverty Law Center (SPLC), testified before a House of Representatives subcommittee that members of the white supremacy movement were migrating to the anti-government "patriot" movements. *Hearing on Extremist Activity in the Military Before the Comm. on National Security of the House of Representatives*, 104th Cong. 7 (1996) (statement of Joseph T. Roy, Sr., Director of Klanwatch, Southern Poverty Law Center) [hereinafter *Hearing on Extremist Activity in the Military*].

[39] Interview with Chaplain (MAJ) Lindsay Arnold, Army Leadership Division, Office of the Deputy Chief of Staff, Personnel (Leadership Division), U.S. Army, in Charlottesville, Va. (Feb. 18, 1997). Chaplain Arnold is overseeing the implementation of the Army's program to combat extremism.

[40] George and Wilcox show three possible approaches: (1) the linear scale/Gallup poll approach that arbitrarily determines that beyond a certain point on a scale is the far right and far left, which serves as the boundary between the political mainstream and extremism; (2) the "popularity contest" approach, in which the popular majority

Second, by focusing on universally vilified forms of prejudice, violence, and illegality, the Army preserves its tradition of political neutrality, a corollary of the doctrine of civilian control of the military.[41] Because the regulation does not prohibit more "political" extremism, the Army avoids designating certain groups or causes (such as, anti-tax groups or environmentalist activists) as extremist. The Army, therefore, places the issue beyond rational political debate. The Army also avoids appearing to favor or disfavor certain issues that may be identified with a certain political party or administration. The Army thus avoids the debate of which "side" it favors on the political spectrum.[42]

Finally, the policy's focus on race and ethnicity highlights the serious extremist problem that currently exists in the military–racial, and in particular white supremacist, extremism. Political views are not necessarily relevant in racial extremism. Far right extremists exist who are not

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decides what is extremist; and (3) the behavioral approach, which they adopt, and which defines extremism in terms of behavioral characteristics. GEORGE & WILCOX, *supra* note 30, at 11.

[41] Major Edwin S. Castle, Political Expression in the Military 11 (1988) (unpublished thesis, The Judge Advocate General's School (TJAGSA)) (on file with TJAGSA library). The list of political activities prohibited for soldiers includes: taking part in partisan political management or campaigns or making public speeches in the course thereof; speaking before a partisan political gathering of any kind to promote a partisan political party or candidate; taking part in any radio, television, or other program or group discussion as an advocate of a partisan political party or candidate; and marching or riding in a partisan political parade. U.S. DEP'T. OF ARMY, ARMY REG. 600-20, ARMY COMMAND POLICY, App. B-2. (30 Mar. 1988).

[42] The political neutrality of the military is a long-standing principle. *See Greer v. Spock*, 424 U.S. 828, at 839 (1976). In *Greer*, a suit was brought to enjoin enforcement of a local army regulation that banned speeches and demonstrations of partisan political nature and prohibited distribution of literature without prior approval of post headquarters. The Court upheld the regulation using the rationale that the regulation did not distinguish among political affiliations and the military authorities did not discriminate against the plaintiffs from speaking based upon their supposed political views:

> [T]he military as such is insulated from both the reality and the appearance of acting as a handmaiden for partisan political causes or candidates. Such a policy is wholly consistent with the American constitutional tradition of a politically neutral military establishment under civilian control. It is a policy that has been reflected in numerous laws and military regulations throughout our history.

424 U.S. 828, at 839 (1976).

admittedly racist.[43] Far-left extremists exist as well, though possessing far better credentials than their far-right counterparts they can often hide their extremist tendencies.[44] Additionally, some racist extremists openly disavow "right" or "left" wing affiliations or refuse to be labeled either way.[45]

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[43] Morris Dees, the lead attorney of the Southern Poverty Law Center, perhaps the most famous "watchdog" organization of extremist organizations, states:

> Not every militia unit has racist or violent tendencies. Some have been formed by people who really believe the units provide a legitimate way to express their anger and frustration with a government that has grown too distant and, in some cases, hostile. These militia members love their country and believe in the Constitution. They aren't haters and they don't associate with haters.

MORRIS DEES & JAMES CORCORAN, GATHERING STORM: AMERICA'S MILITIA THREAT 41 (1996). Dees goes on to say that "the real danger lies beneath the surface." *Id.* Language in the extremist policy that included *per se* militia-type extremists could thus encompass the type mentioned by Dees–non-violent and non-racist types who believe militias and similar organizations provide a legitimate mode of expression for their views on the federal government.

[44] *See* DANIEL PIPES, CONSPIRACY 158-65 (1997). Pipes asserts that scholars have traditionally viewed conspiracy theorizing (by people who are often political extremists as well) as a far right phenomenon rather than a far left one for several reasons, among them:

> (1) the Left has "better credentials" ("[C]onspiracy theorists on the right consist of skinheads, Neo-Nazis, and other Yahoos who express vicious ideas about Jews and batty ones about secret societies . . . . In contrast, leading leftists boast impeccable educational credentials and sometimes direct work experience.");
> (2) the Left's presentation is more sophisticated ("A right-wing conspiratorial anti-Semite cranks out crude tracts with tiny circulation; his leftist equivalent, a writer like Gore Vidal, writes best sellers.");
> (3) the Left has a more prestigious intellectual heritage ("Compare Nazi and communist writings. The former derive from a mishmash of pseudoscience and fanaticism . . . . The latter evolved out of a tradition of high-powered political theory that called on the noblest of sentiments."); and
> (4) the Left's presentation is more subdued ("The Right tends to postulate a vast, historical, all-encompassing conspiracy; the Left usually focuses on a less implausible plot.").

Id.

[45] JAMES RIDGEWAY, BLOOD IN THE FACE 22 (2nd ed. 1995). Some white supremacists openly disavow right-wing connections. One of the newer supremacist groups, the White Aryan Resistance (WAR), states on its web page that it is "strictly racist" and that "healthy ideas" come from "left and right." It appears far more moderate, and even "leftist" in its orientation than older groups such as the Ku Klux Klan. Examples include its positions on homosexuals ("[t]he homosexual population is quite small and not a major threat to Aryan survival"), women ("WAR encourages women to involve themselves to the limits of their abilities to further the interests of the race. Qualified women operate at all levels of WAR . . . ."), abortion ("WAR does not promote force against white women to bear unwanted children"), and the environment (WAR is "well aware of corporate greed and its effect on our delicate environment"). *See* Tom Metzgar, *White Aryan Resistance* (visited Mar. 1, 1998) <http://www.resist.com>. *See also* Burney, *America's Invisible Empire, Knights of the Ku Klux Klan* (visited Mar. 1, 1998) <http://www.airnet.net/niterider/> (the web site of America's Invisible Empire, a Northern Alabama based Ku Klux Klan group, which presents a more "traditional" right-wing view–antiabortion, regardless of race; strongly anti-gay rights).

Despite the dangers of these other forms of extremism, the policy discusses intolerance based on race, ethnicity, religion or gender, which seem to be the most potent now. In particular, white supremacist extremism seems to pose a threat to the military.[46] It has motivated the crimes of soldiers and former soldiers.[47] It cuts into unit cohesion and the military's successful racial integration by advocating racial struggle.[48] There is a call to violent action in some of the white racist groups. For example, the fastest growing white supremacist movement, the National Alliance, openly preaches racial conflict.[49] Its leader, William Pierce, author of the infamous *Turner Diaries*,[50] has stated that the National Alliance would attempt to recruit from within the military.[51]

In contrast, the Director of Klanwatch, the most prominent organization in the United States devoted to monitoring bias crimes, stated to Congress that the great majority of far right "patriot" type extremists were relatively harmless. A relatively small percentage of white supremacists in

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[46] George and Wilcox view most political extremism as non-threatening. They assert that the various persecutions and constitutional violations committed in the name of fighting extremism are a greater threat: "The net effect of domestic extremism has been negligible. The net attempts to exterminate it have been quite telling, a legacy that haunts us to this day." GEORGE & WILCOX, *supra* note 30, at 48.

[47] *See infra* pp. 1-2. Also, Timothy McVeigh, convicted of blowing up the Murrah Federal Building in Oklahoma City, is a former soldier with ties to white supremacist extremism. *Hearing on Extremist Activity in the Military, supra* note 38, at 13 (statement of Joseph T. Roy, Sr., Director of Klanwatch, Southern Poverty Law Center).

[48] *See infra* pp. 25-28.

[49] In testimony before the House of Representatives, the Director of Klanwatch, an organization of the Southern Poverty Law Center that monitors extremists, stated that, in the judgment of the Southern Poverty Law Center, the National Alliance was the most dangerous neo-Nazi group in America today. *Hearing on Extremist Activity in the Military, supra* note 38, at 12 (statement of Joseph T. Roy, Sr., Director of Klanwatch, Southern Poverty Law Center).

[50] *The Turner Diaries* is a novel written by Pierce under the pseudonym Andrew McDonald. It is about a white revolutionary group called The Order that murders and sets off bombs to trigger a race war; the novel ends with a nuclear attack by the United States on Israel. RIDGEWAY, *supra* note 45, at 112. Timothy McVeigh avidly read *The Turner Diaries* while in the Army, and even gave the book to some of his fellow soldiers. *Hearing on Extremist Activity in the Military, supra* note 38, at 13 (statement of Joseph T. Roy, Sr., Director of Klanwatch, Southern Poverty Law Center).

the "patriot" movement were the danger.[52] Far-left extremism, once a potential problem in the Army in the antiwar years of the 1960s and 1970s, has long since faded away. It is, therefore, an improper focus for current extremist policy.[53] The focus is predominately and appropriately on racial extremism.

B. White Supremacist Extremism

1. The Ku Klux Klan and Other Supremacist Organizations

White supremacist extremism is an ideology that the white, and usually more specifically, the Anglo-Saxon "race," is superior. White supremacy has its roots in various prejudices, some

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[51] *Hearing on Extremist Activity in the Military, supra* note 38, at 13 (statement of Joseph T. Roy, Sr., Director of Klanwatch, Southern Poverty Law Center). A former soldier in the 82d Airborne Division posted a National Alliance recruiting billboard outside of Fort Bragg several months before the December 1995 murders. *Id.* at 14.

[52] He testified:

> 90% [of patriot members] are relatively harmless. They are made up of people who are extremely frustrated and angry at the government who are searching for some forum to vent their frustrations. Racism may or may not have anything to do with grinding that ax, so to say. What we're alarmed about is the 10% underbelly that is being infiltrated by current and past members of the white supremacy movements . . . ."

Id. at 36. *See supra* note 43 and accompanying text.

[53] Jerry Anderson, the Equal Opportunity Manager in the Equal Opportunity Office of the Department of Defense wrote:

> The [Department of Defense] policy on prohibited activities and supremacist groups was appended to a policy issuance intended to deal with military personnel who were attempting to form unions, to organize anti-Vietnam war organizations, or publish and distribute 'underground newspapers' which encouraged unions, anti-war protests, and other counter-culture activities popular among young people in the 1960s. It is not a good policy mix to add hate groups to this milieu.

Jerry Anderson, Draft Unpublished Report on Extremism (Dec. 1996) (on file with author).

long-standing.[54] From the Aryan Nations to the Church of Jesus Christ Christian to the National Alliance, the various white racist groups in the United States have common bonds and origins.[55]

The origin of many of these beliefs is the French Revolution.[56] In the chaos of Republican France, royalists looked for an explanation for the fall of the monarchy, a hidden hand that somehow caused the disaster. The "international Jewish conspiracy" emerged as the scapegoat. The source of this mythology was the fraudulent *Protocols of the Elders of Zion*, a nineteenth century fictitious work about a Jewish plan to rule the world.[57] This anti-Semitic mythology crossed the Atlantic in the latter half of the nineteenth century. It joined with postbellum anxieties about ethnic immigrants and blacks and spawned American white supremacism.[58]

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[54] Prior to the rise of the Ku Klux Klan, the most prominent "racial extremist" group in the United States was the so-called "Know-Nothings" (named because when asked about his political affiliations, a member would respond "I know nothing" to keep his associations secret). They were an anti-immigrant (particularly anti-Catholic and anti-Irish) political party that at one point claimed five senators and 43 representatives. The Irish Catholics had their own extremists, the terroristic "Molly Maguires," who murdered law enforcement officials and bombed government buildings throughout the mid-nineteenth century. GEORGE & WILCOX, *supra* note 30, at 20.

[55] Ridgeway has a chart that lists and links the various groups and their key individuals. The original Ku Klux Klan, for example, has splintered into subgroups, to include other Klan organizations (such as the United Klans of America, the Alabama Knights, and California Knights), and David Duke's National Association for the Advancement of White People (NAAWP). The White Aryan Resistance (WAR) has links to both the Klan and neo-Nazi skinheads. Its founder, Tom Metzger, was a member of the California Knights, though most of the members of WAR are more affiliated with skinheads. RIDGEWAY, *supra* note 45, at 32-33.

[56] PIPES, *supra* note 44, at 52-75.

[57] *Id.* at 84-85. RIDGEWAY, *supra* note 45, at 35-50. According to the Creativity Movement, a newer racist organization, the origins of Jewish "depravity" can be traced to the Talmud. Creativity's leader, Reverend Matt Hale, produces a long string of quotes from the Talmud, some incorrect and most taken out of context, which, among other things, appear to sanction the killing of "goyim" (Gentiles) (Hilkkoth Akum X1: "Do not save Goyim in danger of death."; Hilkoth Akum X1: "Show no mercy to the goyim."); pedophilia (Yebhamoth 11b.: "Sexual intercourse with a little girl is permitted if she is three years of age."); lying under oath (Schabouth Hag.6d: "Jews may swear falsely by use of subterfuge wording."); and other heinous activities, to include a belief in ultimate world domination (Simeon Haddarsen, fol. 56-D: "When the Messiah comes, every Jew will have 2800 slaves."). Hale, in typical white supremacist fashion, also reveals aspects of the "Talmudic Conspiracy" in the Jewish control of electronic news and entertainment media, newspapers, and other mass media. *See The Creativity Movement* (visited Mar. 2, 1998) <http://www.rahowa.com>.

[58] RIDGEWAY, *supra* note 45, at 51. Other white supremacist groups with nineteenth century origins include the anti-Semitic Church of Christian Identity and the Church of Jesus Christ, which have small followings in the Pacific Northwest. They are based on a century old idea that the lost tribes of Israel are really English and Anglo-

The most famous American white supremacist group is the Ku Klux Klan.[59] In 1865, ex-Confederate soldiers founded the Ku Klux Klan in Pulaski, Tennessee as a response to what they felt were unjust Reconstruction policies.[60] Eventually, it became a purely racist, anti-immigrant organization and spread throughout the United States.[61] It developed its own symbols, such as white robes and cross burning, similar to other secret societies.[62]

The Ku Klux Klan rose and fell over the years. The organization reached its peak, not during Reconstruction in the South, but during the 1920s, when its estimated strength was some four to five million members throughout the United States.[63] Its influence plummeted shortly afterwards due to internal power struggles and intense investigation by the federal government.[64] Despite the Depression of the 1930s and the Civil Rights movements of the 1950s and 1960s, the Klan never regained any significant power in the United States. Today it has somewhere between 5,000-6,000 professing members.[65]

Americans, and that modern Jews are cursed. DEFENSE EQUAL OPPORTUNITY MANAGEMENT INSTITUTE (DEOMI), DEOMI SPECIAL TOPICS PAMPHLET 94-1, EXTREMIST GROUPS 10, 12 (1994) [hereinafter DEOMI].

[59] RIDGEWAY, *supra* note 45, at 51.

[60] GEORGE & WILCOX, *supra* note 30, at 20-21.

[61] RIDGEWAY, *supra* note 45, at 52.

[62] GEORGE & WILCOX, *supra* note 30, at 21.

[63] DEOMI, *supra* note 58, at 3-4. The Klan so widely permeated the United States that there were more members in Indiana and Ohio than any single Southern state.

[64] *Id.* at 4.

[65] *Id.* at 4-5. The Klan enjoyed a brief resurgence in 1980s due to the popularity of David Duke, who presented a less extreme form of the Klan's philosophy and aligned himself with some traditional conservatives. LOREN CHRISTENSEN, SKINHEAD STREET GANGS 140 (1994). This proved to be short-lived. According to the latest SPLC's intelligence report, however, the Klan, after several years of decline, is starting to resurge. Two Klan groups experienced significant increases in 1996-97: the Indiana based American Knights of the Ku Klux Klan grew from one chapter to twelve in 1996, and Thom Robb's Knights of the Ku Klux Klan grew from two chapters to 17 in fifteen states. *The Year in Hate*, 89 S. L. POVERTY CENTER INTELLIGENCE REPORT 6 (1998). According to the same report, the Klan, which derives much of its symbolism from Britain (such as the ancient Scottish practice of cross-burning), is now gathering recruits in England and Scotland. *The Klan Overseas*, 89 S. L. POVERTY CENTER INTELLIGENCE REPORT 19 (1998).

Other white supremacist groups arose in the twentieth century, usually espousing some allegiance to Nazism. Nazism was originally the form of German fascism that professed, among other ideas, extreme anti-Semitism, the natural superiority of the white "Aryan" race, and the glory of militarism.[66] Though the allies destroyed German Nazism in World War II, its ideologies crossed into postwar America. George Lincoln Rockwell founded the American Nazi Party in 1958.[67] It disintegrated after his assassination in 1966, although some of its members went on to form or to foster other groups.[68]

The 1980s and 1990s were decades of contradiction for white supremacist movements. Former Klansman David Duke, speaking in softer tones but with many of the same ideas, gained a political constituency in the late 1980s, made a strong run for the United States Senate in 1990, and was elected to the Louisiana legislature in 1992.[69] Yet, during the late 1980s, supremacists suffered serious blows. A conspiracy trial in 1988 against fourteen prominent white supremacists brought by the Southern Poverty Law Center effectively curtailed the leadership of the movement.[70] Consequently, many white supremacist groups learned to avoid the trappings of a structured organization, such as membership lists and group property.[71] Other white supremacist groups went on crime sprees that ended with most of the members dead or incarcerated.[72]

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[66] For an overview of 20th century fascist movements, to include Nazism, *see* JOHN WEISS, THE FASCIST TRADITION 9-30 (1967).

[67] DEOMI, *supra* note 58, at 6.

[68] One of his lieutenants, William Pierce, went on to form the National Alliance. Another lieutenant, Matt Koehl, founded the National Socialist White People's Party, renamed as the New Order. *Id.* at 7-8.

[69] Duke ran for a U.S. Senate seat in Louisiana. Although unsuccessful, he received 40% of the popular vote. Three years later, he won a seat in the Louisiana legislature. *Id.* at 10-11.

[70] *Id.* at 11.

[71] Interview with Jerry Anderson, Equal Opportunity Manager, Office of the Secretary of Defense, at The Pentagon, Washington D.C. (Jan. 23, 1998) [hereinafter Anderson Interview].

[72] Two famous examples are the assassinations of George Lincoln Rockwell and Malcolm X. George Lincoln Rockwell, the founder of the American Nazi Party, was assassinated by dissident party member John Partler in

New organizations nevertheless arose during the 1980s and 1990s. One such organization, aimed at attracting young people to the cause of white supremacy, is the White Aryan Resistance (WAR), founded by Tom Metzger and run by him and his son John.[73] Another group is the National Alliance. Founded by William Pierce, author of *The Turner Diaries* and a prominent member of the old American Nazi Party, it has grown "thirty-fold" since 1990.[74] The membership strength of these groups, however, is not as important as their ability to disseminate their messages to their disaffected white audience.[75] In particular, the information explosion on the Internet has vastly increased the availability of extremist information to the public at large.[76] Massive amounts of information and propaganda are available to anyone with an online service.[77]

1967. Later, two of Rockwell's deputies formed their own splinter groups. On the other end of the ideological spectrum, perhaps most famous is the internecine conflict within the Nation of Islam and its splinter groups. Malcolm X left the Nation in 1965 to pursue a more secularist (and non-racist) form of black nationalism and was assassinated shortly afterwards by Nation of Islam disciples. *See* DEOMI, *supra* note 58, at 7, 17-18. Recent examples of violence by organized white supremacists include the crime and murder spree of the hate group called The Order, which based its philosophy on *The Turner Diaries*. The Order robbed armored cars and killed a state trooper and a popular Denver radio host. Members of The Order were eliminated in a gun battle with FBI agents in Washington State in 1984. Two years later, "Order II" (with only four members) launched a similar crime spree in Idaho. They were all captured and incarcerated. CHRISTENSEN, *supra* note 65, at 133-34. George and Wilcox contend that hard-core extremists are not temperamentally suited for mainstream politics, which may explain their tendency to look to violent (and ultimately self-destructive) solutions. GEORGE & WILCOX, *supra* note 30, at 77.

[73] RIDGEWAY, *supra* note 45, at 191.

[74] According to Joseph Roy, the Director of Klanwatch, this is Pierce's estimate. *Hearing on Extremist Activity in the Military*, *supra* note 38, at 13 (statement of Joseph T. Roy, Sr., Director of Klanwatch, Southern Poverty Law Center).

[75] "The Internet was one of the major reasons the militia movement expanded faster than any hate group in history." KENNETH S. STERN, A FORCE UPON THE PLAIN: THE AMERICAN MILITIA MOVEMENT & THE POLITICS OF HATE, 228 (1996), *cited in* PIPES, *supra* note 44, at 199. As an example of how much personal, instantaneous dissemination of information can occur on the Internet, in October, 1994, 20,000 electronic messages were instantly sent over a white professor's internet account spreading white supremacist messages in four states. Camilla Nelson, *Hate Crime on the Internet*, 7 NAT'L ASS'N OF ATTORNEYS GENERAL: CIVIL RIGHTS UPDATES Spring 1997, at 1.

[76] Some of the advantages the internet gives to racial extremists include chat room talk and e-mail communications, which expand racial extremists' sense of community; new encryption technology, which make internet transmissions more secure than ever before, marketing ability to sell hate-group items (from Klan robes to Hitler mugs); as well as an abundance of information on how to build bombs, buy weapons, and learn terrorist/subversive tactics. *See 163 and Counting,* 89 S. L. POVERTY CENTER INTELLIGENCE REP. 25 (1998).

[77] Jerry Anderson has over 200 volumes of extremist information taken solely from the Internet. He also maintains a list of hundreds of extremist websites. Three hundred and forty-three of those websites are devoted primarily to

Events in the 1990's also kept white supremacists in the news. In August 1992, the Federal Bureau of Investigation (FBI) confrontation with Randy Weaver, who had alleged ties to the Aryan Nations, led to the shooting deaths of Weaver's wife and son.[78] Timothy McVeigh, who blew up the Murrah Federal Building in Oklahoma City, had vague ties to the National Alliance and was an avid reader of *The Turner Diaries*.[79] Most significantly for the Army, there were the Fayetteville murders in December 1995 by neo-Nazi skinhead soldiers.[80]

The two constants in white supremacist ideologies are anti-black racism and anti-Semitism. The Ku Klux Klan emphasizes the former and the various neo-Nazi groups the latter.[81] Some differences exist. The Ku Klux Klan asserts that it is a Christian organization, and many of its branches have publicly announced non-violence.[82] New neo-Nazi groups disavow Christianity[83]

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neo-Nazi and/or racist skinhead information. *See* Interview with Jerry Anderson, *supra* note 68; *see also* List Created by Jerry Anderson of Extremist Websites (undated) (on file with author). The Southern Poverty Law Center gave a recent listing of 163 extremist websites. This does not include Holocaust denial sites and militia sites. *163 and Counting*, *supra* note 76, at 24-5.

[78] Gordon Witkin, *The Nightmare of Idaho's Ruby Ridge*, U.S. NEWS & WORLD REP., Sept. 11, 1995, at 42.

[79] *Hearing on Extremist Activity in the Military*, *supra* note 38, at 13. Much of the post-Murrah Federal Building bombing press coverage that tried to link McVeigh, Terry Nichols, and others involved in the bombing to various militia groups turned out to be unfounded. In fact, the FBI's extensive investigation failed to significantly link McVeigh or any of the others involved to any militia group. McVeigh most likely learned about explosives and weapons not from a militia group, but from his Army training. McVeigh entered the Army in 1988. He served as an infantryman, rose to the rank of sergeant, was a gunner on a Bradley Fighting Vehicle, and won a Bronze Star in the Gulf War. GEORGE & WILCOX, *supra* note 30, at 246-48.

[80] *See supra* pp. [redacted].

[81] DEOMI, *supra* note 58, at 2, 6.

[82] *Id.* at 2.

[83] The racist Creativity Movement, "an organization which is dedicated to the dissemination of truth and the pursuit of justice" and headed by Reverend Matt Hale, is openly anti-Christian. In the "FAQ" (frequently asked questions) part of its website, Hale responds to the question: "[Isn't] it part and parcel of your religion to hate the Jews, blacks, and other colored people?": "[I]f you love and want to defend those whom you love - your own family, your own white race, then hate for your enemies comes natural and is inevitable." And responding to the question about Christianity teaching "love and understanding":

> The Christian religion is a good case in point when we talk about liars and hypocrites. Whereas they talk about love, the history of the Christian movement shows that they were as vicious and brutal in savagely hunting down their enemies, labeling them as 'heretics' and burning them at the stake, torturing and killing them, as are the Jewish communists of today.

and advocate race conflict and ultimate solutions such as forcible relocation to solve America's "race problem."[84] Ultimately, however, all these groups have similar themes–hatred of minorities and a feeling that minorities are destroying America.

2. "Skinheads"

Understanding organizations that form the historical basis for racial extremism is helpful. White supremacist extremism, however, exists beyond established structures and organizations. Indeed, the continual ebb and flow of fortune in these organizations have made any attempt at numbering white supremacists or evaluating what threat they pose highly difficult.[85] One reason for this difficulty is that racial extremists often are not "card-carrying" members of formal organizations. Rather, they have loose affiliations with such organizations. They are not members of any organization, but rather associate with like-minded persons in their communities. The neo-Nazi "skinhead" movement is a good example; it is a social phenomenon, not an organization.[86] An understanding of this movement illustrates that white supremacism is more a web of beliefs and associations than a traditional array of formal groups.

See The Creativity Movement (visited Mar. 2, 1998) <http://www.rahowa.com>.

[84] DEOMI, *supra* note 58, at 2; *see* RIDGEWAY, *supra* note 45, at 168-69 (showing a map that illustrates where such "relocations" for minorities would take place).

[85] In 1996, the Director of Klanwatch testified before Congress that he estimated the numbers of white supremacists at 25,000. *Hearing on Extremist Activity in the Military*, *supra* note 38, at 12 (statement of Joseph T. Roy, Sr., Director of Klanwatch, Southern Poverty Law Center). The most recent estimate, however, by the Southern Poverty Law Center is much higher. It stated in its most recent report that the number of hate groups grew dramatically in 1997, up 20% to 474 (127 Klan organization, 100 neo-Nazi groups, 42 skinhead groups, 81 Christian Identity groups, 112 a "hodge-podge of hate-based doctrines and ideologies," and 12 black separatist groups). Christian Identity, a particularly violent group, has apocalyptic leanings, and according to the report, it alone has 50,000 followers in North America. *See The Year in Hate*, *supra* note 65, at 6.

[86] The Southern Poverty Law Center's claims about the strength and ubiquity of white supremacist groups have met with criticism. George and Wilcox dispute their assertions that the KKK and neo-Nazi groups have penetrated the militia groups to any significant degree. GEORGE & WILCOX, *supra* note 30, at 250. Accusations have been made

Neo-Nazi skinheads are loosely knit bands of youths[87] without formal allegiance to white racist organizations such as the Ku Klux Klan.[88] Skinheads generally do not possess any formal organization or hierarchy, at least on a national scale.[89] They did not originate in the United States. Rather, the skinhead movement originated in England in the late 1960s and early 1970s.[90] It is likely that the original skinheads in England were working class successors to "Mods," a youth movement of the early 1960s.[91]

Skinheads began as young working class English who felt threatened by growing waves of immigrants and rising unemployment. They found a different fashion and sound from the hippies of the era. They shaved their heads (hence the name), drank lager instead of smoking marijuana, wore combat boots and leather jackets, affected confrontational attitudes, and espoused a hatred of immigrants, especially the waves of Pakistanis fleeing old British colonies in Africa.[92] Ironically, English skinheads initially identified with black culture: the "ska" music they listened to derived from the West Indies.[93] Given their attitudes towards foreigners and their militarist fashions, the ideas of the skinheads and neo-Nazis became entangled. By the

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that watchdog groups such as the Southern Poverty Law Center "need" the Klan and other groups to keep donations coming in. Phillip Finch, *Can the Klan Ride Again?*, THE NEW REPUBLIC Sept. 5, 1983, at 18, 20-21.

[87] Finch, *supra* note 86, at 22. There are no accurate counts of the number of skinheads, though some rough numbers exist. Monitoring organizations put their numbers at between 10,000 and 20,000 nationally (as of 1994) with approximately ten times the number in passive supporters, putting the total of passive supporters and active members at 200,000. *Id.*

[88] This is not to say that Ku Klux Klan, Posse Comitatus, and various "race churches" do not have a tremendous influence on the younger, often very impressionable and naive skinheads. In turn, the younger skinhead groups often energize these tired formal organizations. Skinheads will often be more openly confrontational and violent than the Klan, which will in turn educate its young "warriors" with literature and activities. CHRISTENSEN, *supra* note 65, at 5, 146.

[89] *Id.* at 22.

[90] *Id.* at 45.

[91] *Id.* at 5.

[92] *Id.* at 5, 146. DEOMI, *supra* note 58, at 8.

[93] RIDGEWAY, *supra* note 45, at 182.

mid-1970s, a virulently racist neo-Nazi skinhead culture that hated Jews, blacks, and other minorities, and sometimes preyed on them, emerged in America and Western Europe.[94]

Both racist and non-racist skinheads appear to dress alike, with differences too subtle for an outsider to tell.[95] One cannot necessarily identify a neo-Nazi skinhead at first glance. Skinheads loosely affiliate with one another and do not follow a common ideology.[96] Rather, there are many subgroups of skinheads. Some claim that they are not racist, though some of these non-racist groups are violent.[97] Neo-Nazi skinheads are probably a minority group within the skinhead culture, and many non-racist skinheads disavow the racists.[98] Yet, there are no clear

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[94] *Id.* It is not difficult to see how Nazi ideas penetrated the skinhead culture. The skinheads originated out of xenophobia and their culture extols a violent, confrontational posture. The tough "street"-look, the shaved head to accentuate one's masculinity, the gang-like mentality, and the constant reference to "working class values" can easily be assimilated into a fascist aesthetic and ideology such as the one promulgated by neo-Nazis. For an examination of the fascist aesthetic and ideology *see* WALTER BENJAMIN, *The Work of Art In An Age of Mechanical Reproduction, in* ILLUMINATIONS 217 (Hannah Arendt, ed., Harry Zohn, trans., Schocken 1969); SUSAN SONTAG, *Fascinating Fascism, in* UNDER THE SIGN OF SATURN 73-105 (Vintage Books 1981); FASCISM, AESTHETICS, & CULTURE (Richard J. Golson, ed., 1992).

[95] Identifying a skinhead usually is not difficult. A publication for police on recognizing signs and symbols of gangs lists the following identification signs:

> (1) White male, 14-24 years of age;
> (2) Shaved head, or very short-trimmed hair;
> (3) Blue or black denim pants, or six pocket fatigues;
> (4) Black or O.D. green flight jackets;
> (5) Suspenders (called "braces");
> (6) Military style boots, steel toed or "Doc Martens" with either red or white laces;
> (7) Tattoos or slogans with neo-Nazi or white supremacist markings (for racist skinheads).

See MARK S. DUNSTON, STREET SIGNS: AN IDENTIFICATION GUIDE OF SYMBOLS OF CRIME & VIOLENCE 49 (1994). While a shaved head is the most distinguishing characteristic, it is not required. The point of a shaved head is to give the person a menacing look. But as Christensen points out: "[O]n some skins, the absence of hair will make weak eyes appear weaker and a skinny neck scrawnier . . . ." so it is not a definitive indicator one is a skinhead. CHRISTENSEN, *supra* note 65, at 26.

[96] CHRISTENSEN, *supra* note 65, at 25.

[97] RIDGEWAY, *supra* note 45, at 51.

[97] This includes the SHARPS (for Skinheads Against Racial Prejudice) who exhibit more of a gang style rivalry with neo-Nazi skinheads. SHARPs made alliances with left-wing and gay rights activist groups on the Pacific Coast in the late 1980s and early 1990s, who welcomed them into their ranks and used them as security for their demonstrations and marches. The activists soon concluded, after a SHARP smashed a young girl in the head with a hammer because he thought she was Nazi, that they were a "violent street gang." CHRISTENSEN, *supra* note 65, at 60.

[98] GEORGE & WILCOX, *supra* note 30, at 347.

boundaries within the culture, for racist and antiracist skinheads have been known to switch back and forth.[99]

The decline in organized groups such as the Ku Klux Klan is important in understanding the distinction between those groups and loosely confederated groups such as neo-Nazi skinheads. Formal organized hate groups in the United States often self-destruct. Their members kill each other in power struggles and various coups d'etat, or get themselves killed or captured in shoot-outs with law enforcement.[100] Federal legislation and private law suits drive them underground.[101] Skinheads, without any national hierarchy or organization, exist for the most part on their own, bonding together locally.[102] There is no skinhead "organization" to break by suit or law enforcement, just a vague set of ideas and lifestyle choices. This may explain, in part, why they surfaced at Fort Bragg in 1995-1996.

3. White Supremacist Extremism in the Military

White supremacists have a natural attraction to the military. They often see themselves as warriors, superbly fit and well-trained in survivalist techniques and weapons and poised for the

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[99] CHRISTENSEN, *supra* note 65, at 4, 30. Christensen, a Portland, Oregon police officer was the leader of a skinhead task force (Portland has been called the "Skinhead capital of the United States"). Regarding the fluid nature of the skinheads, he writes: "In rewriting this text, I found I had used a large number of qualifying adjectives, such as *most, some, and many*, to describe how skinheads think and act. Thinking I had used them too often, I tried to delete many of them, but I could not." *Id.* at 5.

[100] *See supra* note 71.

[101] *See supra* p. 18.

[102] CHRISTENSEN, *supra* note 65, at 22.

ultimate conflict with various races.[103] Military virtues such as fitness, proficiency with weapons and tactics, physical courage, and camaraderie fit comfortably with a white supremacist ethos.[104] Soldiers who are strongly drawn to military virtues might, if led down a stray path, learn to extol not just military virtues, but supremacist ones.[105]

White supremacist extremism appeared intermittently in the military before the Fayetteville murders in December 1995. There were reports of only insignificant extremist activity in the Army for that year.[106] In a survey conducted of seventy-seven installations, both in the continental United States and outside of it, forty-three indicated that there had been no extremist activity.[107] Of the installations that reported extremist activity, only four reported hate/bias-based crimes. Of these four, only two appeared to be racially motivated.[108] At the Department

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[103] The image of white supremacists as "racial warriors" appears often in white supremacist publications. Two widely known acronyms in white supremacy are WAR (White Aryan Resistance, the neo-Nazi group) and RAHOWA (Racial Holy War) which is the rallying cry for the Creativity Movement. JESSE DANIELS, WHITE LIES: RACE, CLASS, GENDER, & SEXUALITY IN WHITE SUPREMACIST DISCOURSE 35-37 (1997).

[104] At meetings of the Aryan Nations Congress, the famous German marching song of the storm troopers, the "Horst Wessel Lied," is its anthem. Its lyrics emphasizing both military camaraderie ("The flags high! The ranks tightly closed!") and gruesome anti-Semitism ("When the Jew's blood spurts from the knife!"). RAPHAEL S. EZEKIEL, THE RACIST MIND 38 (1995).

[105] McVeigh, up to the point that he washed out of Special Forces training and left the Army in disgust, had been an excellent soldier who made sergeant in three years. GEORGE & WILCOX, *supra* note 30, at 248.

[106] CRIMINAL INVESTIGATION COMMAND (CID), 1995 CID SUMMARY REPORT, EXTREMIST ACTIVITIES 3 (2 Sep. 1996) [hereinafter 1995 CID SUMMARY REPORT]. The Army Equal Opportunity Office reported only one incident of racial violence within the preceding four years, involving a black soldier at Fort Richardson, Alaska who was racially harassed by a white superior and subject to a mock lynching. Information Paper on Incidents of Racial Violence by Mr. Jerry Anderson, Equal Opportunity Manager, Office of the Secretary of Defense (8 Dec. 1995) (on file with author) [hereinafter Information Paper on Incidents of Racial Violence].

[107] 1995 CID SUMMARY REPORT, *supra* note 106, at 3. During this time, Department of the Army Equal Opportunity Offices did not routinely receive Army serious incident reporting system (SIRS) documents, which are under the control of military police. This may have caused an underreporting of racial incidents. Information Paper on Incidents of Racial Violence, *supra* note 106. Nationwide in 1995, 7947 hate crime incidents were reported to the FBI to include 20 murders and 1268 aggravated assaults. Fifty-nine percent of the offenders reported were white, 27% black, with the remaining offenders from other or multi-ethnic groups. 1995 FBI CRIMINAL INFORMATION SERVICES DIVISION HATE CRIME REPORT 1 (on file with author).

[108] 1995 CID SUMMARY REPORT, *supra* note 106, at 3. The four identified incidents were: (1) spraying of racial graffiti on the wall of a male latrine in an enlisted club (Fort Irwin); (2) two members of rival gangs fighting over a gang bandana (Fort Stewart); (3) a simple assault and aggravated assault that were racially motivated (Fort Hood); and (4) a stabbing in the face and chest by a subject who was motivated by the victim's race and national origin (Grafenwoehr, Germany). *Id.*

of Defense level, before the murders there was only slight anecdotal evidence that extremists had entered the ranks.[109] The absence of anecdotal or statistical evidence may have been the product of the suits brought against the Klan in the early 1980s, and the establishment of equal opportunity programs.[110]

Yet over the years, some disturbing facts indicated a rise in extremist and hate group recruiting and activity in the military. In 1986, active duty personnel were discovered to be members of a Klan group called the White Patriot Party. An ex-Marine also sold military weapons to the White Patriots for their training.[111] In 1991, two Special Forces soldiers were convicted for plotting to stockpile weapons for a race war.[112] Most infamously, ex-soldier Timothy McVeigh blew up the Murrah Federal Building in Oklahoma City in 1995. McVeigh, according to his lawyer, had been influenced by hate groups operating near Army bases overseas.[113]

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[109] Interview with Jerry Anderson, *supra* note 71. Mr. Anderson recalled that individuals had been rejected for service because of possible extremist connections. He also specifically remembers that most of those were from the Navy.

[110] *Id.* Mr. Anderson said that there was a decline in racial violence throughout the 1980s.

[111] The weapons included 13 LAW rockets, 10 claymore mines, and nearly 200 pounds of C-4 explosives. *Hearing on Extremist Activity in the Military*, *supra* note 38, at 15 (statement of Joseph T. Roy, Sr., Director of Klanwatch, Southern Poverty Law Center).

[112] *Id.*

[113] *See* Richard Serrano, *Radicals Recruit Soldiers,* FAYETTEVILLE OBSERVER-TIMES, Dec. 17, 1995, at 1A. The Secretary of Defense issued a memorandum to the secretaries of the military departments in the wake of the Oklahoma City bombing. The memorandum reiterated DOD Directive 1325.6 on dissident and protest activities. It asked the service secretaries to "direct commanders and supervisors to disseminate this memorandum throughout their organizations and to ensure that their personnel are briefed on this guidance in this memorandum, DOD Directive 1325.6 and Service implementing documents." Memorandum from Secretary of Defense to Secretaries of Army, Navy, and Air Force, subject: Dissident and Protest Activity (5 May 1995). The language of the memorandum shows the apparent disconnection between the policy and what actually happened at Oklahoma City. McVeigh, a loner, had vague ties to extremist groups, but was not a card-carrying member of any organization; whereas the focus of the Directive was on "dissident and protest" organizations and "active participation" in such groups. While the service secretaries did issue the memoranda to their services, this amounted to practically no more than publishing a memorandum. The Secretary of the Army's Task Force on Extremism states in its report: "Few soldiers or leaders below brigade-level recalled such briefings [on DoD Directive 1325.6]." THE SECRETARY OF THE ARMY'S TASK FORCE ON EXTREMIST ACTIVITIES: DEFENDING AMERICAN VALUES 17 (21 Mar. 1996) [hereinafter TASK FORCE REPORT].

At the 82d Airborne Division, there were no filed reports of extremist activity, and there had only been three racial complaints filed with the 82d Airborne Division Equal Opportunity Office during fiscal year 1995.[114] Yet, in and around Fort Bragg, signs indicated potential trouble with white supremacist "skinheads." In October 1994, skinheads allegedly committed six assaults on the University of North Carolina, Chapel Hill campus.[115] Two more assaults took place in November 1994 and March 1995.[116] In all of the assaults, local police suspected that some of the skinheads were soldiers. In the winter of 1995, a Chapel Hill police officer allegedly told an Army investigator at a conference on gangs that Fort Bragg soldiers were involved in skinhead crimes in Chapel Hill.[117] In April 1995, there was an off-post fight between rival skinhead gangs, both of which apparently had soldiers in them. Neo-Nazis and the "Skinheads Against Racial Prejudice" (called SHARPs) clashed, and a neo-Nazi allegedly shot a SHARP in the chest.[118] Fayetteville police investigated the incident, but the case lay dormant for several months due to apparent lack of evidence.[119]

In August 1995, PFC Burmeister got into a fight with a black soldier after Burmeister made some racially offensive remarks.[120] Burmeister's room apparently had Nazi flags and regalia.

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[114] Information Paper on Equal Opportunity Complaint Reports, by Captain John Trippon, Equal Opportunity Officer, 82d Airborne Division 1 (30 Oct. 1995) (on file with author and at Office of the Staff Judge Advocate, 82d Airborne Division).

[115] Scott Mooneyham, *Shooting Spotlighted Skinheads Suspected of Extremism*, FAYETTEVILLE OBSERVER-TIMES, Feb. 24, 1996, at 1A.

[116] *Id.*

[117] *Id.*

[118] Information Paper on Violent Incidents in Fort Bragg/Fayetteville N.C., Fort Bragg Criminal Investigation Command 2 (14 Dec. 1995) (on file with author and at Office of the Staff Judge Advocate, 82d Airborne Division). *See also* Information Paper on White Supremacists Groups on Fort Bragg, Fort Bragg Criminal Investigation Command (12 Dec. 1995) (on file with author and at Office of the Staff Judge Advocate, 82d Airborne Division).

[119] *Id.*

[120] Information Paper on Background, *supra* note 8.

When a follow-up inspection took place, these items had disappeared.[121] Burmeister's local personnel file revealed that he had been counseled earlier that year for wearing a Nazi-like medallion.[122]

Nothing linked Burmeister to the earlier shooting or assaults. Nevertheless, it appeared that bits and pieces of information did exist to indicate the potential for a serious problem. The Fayetteville Police Department was working on a crime involving rival skinhead gangs;[123] evidence existed of violent skinhead activity in Chapel Hill;[124] Burmeister's chain-of-command was aware that he had an interest in Nazi regalia, had fought with a black soldier, and used racial slurs.[125] While it is easy to speculate about what the command could and should have done to prevent Burmeister from carrying out the murders, the conclusion of the Commander, XVIII Airborne Corps, in a press conference in May 1996 that "warning signs were missed" seems justified.[126]

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[121] *Id.*
[122] *Id.*
[123] *Id.*
[124] The connection of soldiers to the Chapel Hill incidents was never firmly established. Fort Bragg CID reported that Fort Bragg soldiers were involved in the Chapel Hill incidents only as witnesses. *See* Ronald L. Simpson, Fort Bragg Criminal Investigation Report No. 1282-95-CID023 3 (23 Dec. 1995) (on file with author and Fort Bragg Criminal Investigation Command) [hereinafter CID Report].
[125] Information Paper on Background, *supra* note 8. Specialist Randy Meadows, also accused of the December murders, had no documented history of racist or extremist beliefs. In October 1995, PFC Malcolm Wright's commander counseled him for wearing the number '666' on his forehead, but he denied being involved in any extremist groups. He also reportedly had a spiderweb tattoo on his elbow, but its meaning was unknown at the time to the commander. *Id.*
[126] Lieutenant General John Keane, XVIII Airborne Corps Commander, was quoted as saying: "We missed the signals, the signs . . . some of which were so blatant that action should have been taken. Some leaders did, some did not." Amy Clarkson, *Generals Address Racism Issues at Fort Bragg*, RALEIGH POST, Mar. 27, 1996, at A1. In its assessment, the Task Force found that before the murders of Jackie Burden and Michael James there were few strong indicators that extremist organizations were "at issue at Fort Bragg. Subsequently, extremism received only passing attention in equal opportunity training." TASK FORCE REPORT, *supra* note 113, at 33.

Burmeister received a life sentence in a highly publicized trial.[127] The trial of Burmeister, and the subsequent trials of Wright and Meadows, however, were just one part of the story. After the shootings and arrests, other questions arose. If Burmeister, Wright, and Meadows were racist skinheads, how far had white supremacist ideology penetrated into the 82d Airborne Division, Fort Bragg, and the Army as a whole? How many of these neo-Nazi skinheads were there? If the command identified them, what would it do with them?

The twofold problem of identification and action had a myriad of legal and non-legal concerns. Who fits the definition of a "white extremist?" Once the command identifies him, is he disciplined? If a soldier believes in a racist ideology but takes no criminal action, can or should any action be taken against him at all? How does a command formulate a workable policy to answer these questions?

Identifying other Burmeister types turned into a process that spanned months.[128] Yet, the numbers remained low and consistent throughout the identification process.[129] A preliminary inquiry to determine the number of 82d Airborne Division paratroopers involved with extremist organizations did not find widespread evidence of participation or involvement in extremist organizations.[130] Twenty-two division soldiers had links to several different extremist groups,

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[127] *See Man Convicted of Racial Killings*, WASHINGTON POST, Feb. 27, 1997, *available at* <http://www.washingtonpost.com> (visited 1 Mar. 1998). Specialist Meadows also received a life sentence at a later trial. *Second E-Paratrooper Gets Life in North Carolina Racial Killings*, NEW YORK TIMES, May 13, 1997, at A17. Private First Class Wright, who testified against both and averred that he had no prior knowledge that the two had planned to commit the murders, was convicted and sentenced to time served. *Id.*

[128] *See* Memorandum on Actions Taken, *supra* note 16.

[129] CID Report, *supra* note 124.

[130] Information Paper, Subject Status of Investigation and Administrative and/or UCMJ Actions Taken Regarding 82d Airborne Soldiers Identified as "Skinheads," CPT Walter M. Hudson, Office of the Staff Judge Advocate, 82d Airborne Division (29 Jan. 1996) (on file with author and at Office of the Staff Judge Advocate, 82d Airborne Division).

but they fell into different subcategories.[131] Of the twenty-two soldiers, only eleven could be definitely categorized as firmly associated with racist, neo-Nazi hate groups. Four others were SHARPS, one was a so-called "Independent" (a type of multi-ethnic and non-racist skinhead), and eight others did not fit in any particular category.[132] Two soldiers from the XVIII Airborne Corps, the higher headquarters for the 82d Airborne Division also located on Fort Bragg, also had ties to local skinhead groups.[133] These numbers remained low throughout subsequent investigations. A follow-up report in March 1996 found that the number rose to twenty-six.[134] Finally, in April 1996, the widely publicized tattoo inspections of every soldier in the 82d Airborne Division identified only four more soldiers as possible racist skinheads.[135]

Army-wide, the task force appointed by the Secretary of the Army concluded that there was "minimal evidence of extremist activity."[136] The task force visited twenty-eight major Army installations in the United States, Germany, and Korea during early 1996, conducted 7638 interviews, and analyzed 17,080 confidential written surveys.[137] Of those interviewed, less than one percent (0.52%) reported that they knew a soldier or Army civilian who was a member of an extremist group. Three and one-half percent of those interviewed reported that they had been

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[131] *Id.*

[132] Press release 512-014 from Public Affairs Office, 82d Airborne Division (22 Dec. 1995), (on file with author and at Public Affairs Office, 82d Airborne Division).

[133] CID Report, *supra* note 124.

[134] Information Paper on Fort Bragg Skinhead Investigation, LTC Robert McFetridge, Staff Judge Advocate, 82d Airborne Division (March 19, 1996) (on file with author and at Office of the Staff Judge Advocate, 82d Airborne Division). In April, 1996, every soldier in the 82d Airborne Division was examined for racist or gang-related tattoos, per order of the Commanding General. Four more soldiers were identified as possible racist skinheads because of those inspections. Information Paper on 82d Airborne Division's Tattoo Inspection Results, LTC Robert McFetridge, Staff Judge Advocate, 82d Airborne Division (2 May 1996) (on file with author and at Office of the Staff Judge Advocate, 82d Airborne Division).

[135] *Id.*

[136] TASK FORCE REPORT, *supra* note 113, at I, 5-7.

[137] *Id.*

approached to join an extremist group in the surveys.[138] Of those surveyed, the numbers were highe: 7.1% reported that they knew another soldier whom they believed was a member of an extremist organization, 11.6% of soldiers surveyed believed they knew a soldier who was an extremist, but not a member of an extremist organization.[139]

If the numbers were low, one may ask whether the command should spend significant time and effort on racial extremism. A follow-up survey done in 1997 suggests that there may be even fewer extremists in the Army than originally thought.[140] Furthermore, the extremist controversy of late 1995 and 1996 was supplanted by other controversial events, including issues of sexual harassment first brought to light at Aberdeen Proving Ground and in the court-martial of the former Sergeant Major of the Army.

Yet, while the survey numbers appear low, both the interviews and surveys that formed the basis of the study were approximations. Army Research Institute analysts stated that the weighted survey results in particular could "not be used to accurately estimate the level of extremist activity" in the Army.[141] Additionally, the survey only covered extremist activity in

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[138] *Id.*

[139] *Id.*

[140] In the spring of 1997, the Army Research Institute conducted its biannual Sample Survey of Military Personnel (SSMP). For the first time questions were asked about soldiers' knowledge of extremist activity in the Army. The SSMP asked the same survey questions (no interviews were conducted) as the Task Force Survey. 2% of the soldiers surveyed stated they had been approached to join an extremist organization since joining or working for the Army (3.6% in the Task Force Survey). 4.8% said they knew someone well in the Army who they believed to be members of extremist organizations (7.1% in the Task Force survey). 12.9% stated that they had come in contact with extremist material such as pamphlets, recruiting posters, graffiti, or electronic mail messages (17.1% in the Task Force Survey). No reasons were posited for the lower percentages in the follow up survey. Interview with Lieutentant Colonel David Hoopengardner, Office of the Deputy Chief of Staff, Personnel, U.S. Army, at The Pentagon, Washington D.C. (Jan. 23, 1998).

[141] *Id.* The Task Force report stated:

> The written survey was not as precise in determining the exact extent of possible extremist activity as face-to-face interviews. Interviewers found that, while some organizations were unanimously

general. It did not distinguish statistically between white supremacist extremism, for example, and other varieties (such as anti-government or black extremism).[142]

Furthermore, not only is a tragedy such as the murders of Jackie Burden and Michael James one tragedy too many, but the tragedy reveals what tremendous and disproportionate impact a handful of extremists can have on a military unit.[143] If, as Scruton opined, an extremist views his opponent as someone not just to be confronted but eliminated,[144] this can translate into devastating destruction when the extremist has been trained in weapons or combat methods.[145]

Despite all the pain and humiliation caused by the Aberdeen Proving Ground scandal and the court-martial of the Sergeant Major of the Army, no one has pulled bodies out of rubble or said final good-byes to loved ones in either of those cases. In an Army where unit cohesion is vital to military efficiency and combat success, and the force is over one-third minority and over one-quarter black,[146] a single racial/extremist incident, such as the December 1995 Fayetteville murders, can have repercussions far beyond a single unit or post. With this in mind, was the

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viewed as extremist, there were considerable differences of opinion on many others, including ethnic and racial groups, whose ideas may be controversial. Live interviewers were better able to distinguish more generally accepted instances of extremism and to determine when one identified instance of extremism was referred to by multiple soldiers (i.e. double counted). Daily interviewer wrap-up sessions clearly showed that activities of a few individuals were repeatedly cited in different interview groups. In contrast, the survey instrument did not provide for this level of refinement.

Id. at 7.

[142] *Id.* The follow-up survey used the same method. *See supra* note 140 and p. 31.

[143] After talking extensively to soldiers and commanders, the Task Force on Extremism stated: "Although there were relatively few extremists identified in the Army, leaders recognize that even a few extremists can have a pronounced dysfunctional impact on the Army's bond with the American people, institutional values, and unit cohesion." TASK FORCE REPORT, *supra* note 113, at 29.

[144] SCRUTON, *supra* note 29 and p. 8-9.

[145] *See supra* pp. 1-2 and notes 47, 50, and 79.

[146] As of 1995, when the Fayetteville murders took place, the Army was 62.2% white, 27.2% black, 5.1% Hispanic, with 5.4% listed as other minorities. Information Paper on Infantry Brigade Demographics, Major John Trippon,

Army's policy on extremism appropriate to deal with such an incident? Is the new policy adequate?

III. The Army's Policy Toward Extremism

A. The Old Policy

At the time of the 7 December 1995 shootings, the Army policy on extremism was in the 30 March 1988 version of *AR 600-20* at paragraph 4-12.[147] It stated that "[t]he activities of extremist organizations are inconsistent with the responsibilities of military service."[148] It then defined "extremist organizations" as organizations that: (a) espouse supremacist causes; (b) attempt to create illegal discrimination based on race, creed, color, gender, religion, or national origin; or (c) advocate the use of force or violence, or otherwise engage in efforts to deprive individuals of their civil rights.[149]

The regulation distinguished so-called "passive" participation, such as "mere membership, receiving literature in the mail, or presence at an event" from "active" participation, which included recruiting others to join and participating in public rallies or demonstrations. The

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Equal Opportunity Officer, 82d Airborne Division (17 Dec. 1995) (on file with author and at Equal Opportunity Office, 82d Airborne Division).

[147] U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY, para. 4-12 (30 Mar. 1988) [hereinafter AR 600-20, para 4-12 (old policy)].

[148] *Id.* While all the services came out with extremist policies, the Army was the only service that listed "prohibited activities." Anderson Interview, *supra* note 71.

policy did not prohibit passive participation in extremist organizations, though it did not condone it. It prohibited active participation, though did not indicate whether those prohibitions were punitive.[150]

Much of the text of *AR 600-20*, paragraph 4-12 came almost verbatim from *Department of Defense Directive 1325.6, Guidelines for Handling Dissent and Protest Activities Among Members of the Armed Forces* (change 2).[151] At the time the directive was initially promulgated in 1969, the Defense Department was concerned with the infiltration of anti-war and anti-military organizations within the services.[152] The directive focused on dissident and protest activities within the military, and especially on activities such as underground newspapers, on-post demonstrations, and serviceman organizations.[153]

In 1986, following the discovery that military personnel in North Carolina were involved with the White Patriot Party, the Secretary of Defense updated the directive. The directive's new language prohibited "active" participation in "extremist organizations." It was silent, however, on whether "passive" participation could also be prohibited, or why it only prohibited active participation in extremist organizations/groups, rather than extremist activity itself.[154]

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[149] AR 600-20, para. 4-12 (old policy), *supra* note 147, para. 4-12a.(1), (2), (3).
[150] *Id.* para. 4-12c.(7).
[151] U.S. DEP'T OF DEFENSE, DIR. 1325.6, GUIDELINES FOR HANDLING DISSIDENT & PROTEST ACTIVITIES AMONG MEMBERS OF THE ARMED FORCES (12 Sep. 1969) (change 2, 8 Sep. 1986) [hereinafter DOD Dir. 1325.6 (1986 change)].
[152] *See supra* note 53.
[153] DOD Dir. 1325.6 (1986 change), para. III.C., D., E.
[154] DOD Dir. 1325.6 (1986 change), para. III.G.states:

> Prohibited activities. Military personnel must reject participation in organizations that espouse supremacist causes; attempt to create illegal discrimination based on race, creed, color, sex, religion, or national origin; advocate the use of force or violence; or otherwise engage in efforts to deprive individuals of their civil rights. Active participation, such as publicly demonstrating or rallying, fund raising, recruiting and training members, organizing or leading such organizations

This use of "active" participation in "extremist organizations" comes from language in Executive Order (EO) 11785.[155] President Eisenhower had issued its predecessor, EO 10450 in 1953, during the height of the Cold War, when the government feared Communist infiltration.[156] Executive Order 10450 stated that the government had wide authority to investigate its employees to determine "whether the employment in the federal service of the person being investigated is clearly consistent with the interests of the national security."[157] The government could investigate the following:

> Membership in, or affiliation or sympathetic association with, any foreign or domestic organization, association, movement, group, or combination of persons which is totalitarian, Fascist, Communist, or subversive, or which has adopted, or shows, a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United

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> or other wise engaging in activities in relation to such organizations or in furtherance of the objectives that are viewed by command to be detrimental to the good order, discipline, or mission accomplishment of the unit, is incompatible with Military service, and is therefore, prohibited. Commanders have authority to employ the full range of administrative procedures, including separation or appropriate disciplinary action against military personnel who actively participate in such groups.

Id.

[155] Exec. Order No. 11,785, 3 C.F.R. 874 (1971-1975) *reprinted in* 1974 U.S.C.C.A.N. 8277.

[156] For a summary of some executive and congressional actions against communist subversion during the late 1940's and early 1950's, and the courts' responses to those actions, *see* Alan I. Bigel, *The First Amendment and National Security: The Court Responds to Governmental Harassment of Alleged Communist Sympathizers*, 19 OHIO N.U. L. REV. 885 (1993).

[157] Exec. Order No. 10,450, § 8(a), 3 C.F.R. 936 (1949-1953) *reprinted in* 1953 U.S.C.C.A.N. 1007. Executive Order (EO) 10450 required loyalty investigations of all governmental departments. Any federal employee could be dismissed if an agency department head determined that the employee's continued employment was not in the national interest. *Id.*

States, or which seeks to alter the form of government of the United States by unconstitutional means.[158]

By 1974, the national mood had dramatically changed. Executive Order 11785 amended EO 10450. It forbade designating *any* groups as "totalitarian, fascist, Communist, or subversive" and forbade any circulation or publication of a list of such groups.[159] Furthermore, action against federal employees now required "knowing membership with the specific intent of furthering the aims of, or adherence to and *active participation* in" a group which "unlawfully advocates or practices the commission of acts of force or violence to prevent others" from exercising constitutional rights.[160]

Both the term "active participation" and the focus on organizations carried over into *DOD Directive 1325.6* and the subsequent Army policy on extremism.[161] In doing so, the directive and regulation adopted language not intended for extremism, but for subversion. In the 1950s, the executive branch decided to attempt to investigate infiltration (especially by Communists) into the government. Years later, that seemed an overreaction, and in 1974, the President severely limited what could be investigated.

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[158] *Id.* § 8(a)(5).

[159] Exec. Order No. 11,785, *supra* note 155. Executive Order 11785 was a further dismantling of EO 10450 begun by EO 11605, published in 1971. It required the old Subversive Activities Control Board to make specific findings whether an organization was "totalitarian, Fascist, Communist, or subversive" rather than relying on a list. It was revoked by EO 11785. *See* Exec. Order No. 11,605, 3 C.F.R. 580 (1971-1975) *reprinted in* 1971 U.S.C.C.A.N. 2560.

[160] Exec. Order No. 11,785, *supra* note 157, § 3 (emphasis added).

[161] TASK FORCE REPORT, *supra* note 113, at 17. ("The first time the terms *knowing membership* and *active participation* were used to determine policies toward individual involved in extremist organizations was in Executive Order 11785, published in 1974.")

Extremism, particularly white supremacist extremism, posed different challenges and required its own definitions. This need became apparent following the Fayetteville murders. The Army policy caused confusion among commanders and judge advocates; questions arose.[162] What was an "organization?" Did it mean a formal organization with membership, recruiting drives and dues? Was it something far less formal? Where did someone like Burmeister fit in? He apparently was not a formal member of any hate group or white supremacist organization like the American Nazi Party or the Ku Klux Klan. He seemed to be involved with an informal network of neo-Nazi skinheads in and around Fort Bragg.[163]

"Active" and "passive" participation caused confusion also. If a soldier were a "passive" participant, presumably the command could not punish or tell him to stop his "passive" activity.[164] How could the command punish him if the Army said passive activities were "not prohibited"?[165] There were also questions over whether anything in the policy was punitive or could be made punitive. It listed six prohibitions, but did not state that they were punitive, though the regulation stated that commanders could initiate "UCMJ action against soldiers whose activities violate military law."[166]

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[162] At a teleconference following the shootings, the topic of what constituted an extremist "organization" was much debated. Forces Command Staff Judge Advocate Teleconference on Extremism (Teleconference Broadcast Dec. 18, 1995).

[163] Virginia White, *Swastikas, 'Skinheads' Part of Suspect's Life, Soldiers Say*, FAYETTEVILLE OBSERVER-TIMES, Dec. 10, 1995, at 1A.

[164] AR 600-20, para. 4-12 (old policy), *supra* note 147, para. 4-12*b*.

[165] *Id.*

[166] Commanders could thus take action, either judicially or non-judicially, against soldiers for violating certain articles of the UCMJ, to include: Article 92, failure to obey an order or regulation or general order (for example, participation in non-approved on-post meetings or demonstrations, or distribution of literature without approval); Article 116, riot or breach of peace; Article 117, provoking words or gestures; or Article 134, conduct which is disorderly or service discrediting (the "general" article). AR 600-20, para. 4-12 (old policy), *supra* note 147, para. 4-12d.(5)(a), (b), (c), & (d).

At the 82d Airborne Division, these problems became real. According to reports, twenty-two soldiers had alleged skinhead connections.[167] Fayetteville police charged and arrested three–Burmeister, Wright, and Meadows–for murder or conspiracy to commit murder.[168] Other soldiers either were charged with violent crimes or had committed other acts of separate misconduct.[169] This left twelve identified as possible neo-Nazi skinheads or associates.[170] Further investigation revealed that three of these twelve had no ties to racist skinheads, leaving nine soldiers in a gray area. These nine had varying degrees of involvement with racist skinhead activities but had not committed any offenses.[171]

Thus, in several cases, the command took no disciplinary action against avowed skinheads, even racist ones.[172] This frustrated commanders, as indicated in the task force's report.[173] The language of the regulation contributed to this frustration. The regulation focused exclusively on organizations. It gave commanders unclear direction on what was active and passive extremist participation. It appeared to be non-punitive.[174]

For these reasons, the task force recommended several changes to the regulation. It recognized that "[t]he current policy on participation in extremist organizations is confusing and complicates the commander's interpretation of extremist activity."[175] The task force

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[167] CID Report, *supra* note 124.
[168] Memorandum from Captain Walter Hudson, Office of the Staff Judge Advocate, 82d Airborne Division, to Commanding General, 82d Airborne Division, subject: Summary of Possible UCMJ/Administrative Actions Against 82d Airborne Soldiers Identified as Skinheads (4 Jan. 1996) (on file with author and at Office of the Staff Judge Advocate, 82d Airborne Division).
[169] *Id.*
[170] *Id.*
[171] *Id.*
[172] *Id.*
[173] TASK FORCE REPORT, *supra* note 113, at 34.
[174] *Id.* at 11.
[175] *Id.* at 34.

recommended the following: "[E]liminate the confusion created by the distinctions between active and passive participation in organizations and activities[,] . . . specify more clearly when commanders will counsel and/or take adverse action against soldiers who are displaying extremist behavior, and . . . make the regulation punitive."[176]

B. The New Policy

The task force findings and recommendations caused the Army to change its extremist policy.[177] The new policy speaks directly to, and is a mandate for, commanders. The old policy does not refer to command authority until the second to last subparagraph.[178] The new policy

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[176] *Id.* at 37.

[177] The extremist policy in DOD Directive 1325.6 was subsequently changed as well. The new policy reads:

> Prohibited activities. Military personnel must reject participation in organizations that espouse supremacist causes; attempt to create illegal discrimination based on race, creed, color, sex, religion, or national origin; advocate the use of force or violence; or otherwise engage in efforts to deprive individuals of their civil rights. Active participation, such as publicly demonstrating or rallying, fund raising, recruiting and training members, organizing or leading such organizations or other wise engaging in activities in relation to such organizations or in furtherance of the objectives that are viewed by command to be detrimental to the good order, discipline, or mission accomplishment of the unit, is incompatible with Military service, and is therefore, prohibited. Commanders have authority to employ the full range of administrative procedures, including separation or appropriate disciplinary action against military personnel who actively participate in such groups. Functions of command include vigilance about the existence of such activities; active use of investigative authority to include a prompt and fair complaint process; and use of administrative powers, such as counseling, reprimands, orders, and performance evaluations to deter such activities. Military Departments shall ensure that this policy on prohibited activities is included in initial active duty training, pre-commissioning training, professional military education, commander training, and other appropriate service training programs.

U.S. DEP'T OF DEFENSE, DIR. 1325.6, GUIDELINES FOR HANDLING DISSIDENT & PROTEST ACTIVITIES AMONG MEMBERS OF THE ARMED FORCES, para. C.5.h (1 Oct. 1996). Note the DOD directive retains the definitions focusing on organizations used in the older directive, as well as "active participation." The new language in the directive starts at the sentence beginning "[f]unctions of command . . . ."

[178] Beginning in subparagraph d., it states: "Commanders should take positive actions when soldiers in their units are identified as members of extremist groups and/or when they engage in extremist group activities." AR 600-20, para. 4-12 (old policy), *supra* note 147, para. 4-12d.

begins by highlighting the commander's responsibility regarding extremist activity.[179] It has a subparagraph entitled "Command Authority":

> Command authority. Commanders have the authority to prohibit military personnel from engaging in or participating in any . . . activities that the commander determines will adversely affect good order and discipline or morale within the command. This includes, but is not limited to, the authority to order the removal of symbols, flags, posters, or other displays from barracks, to place areas or activities off-limits (see AR 190-24), or to order soldiers not to participate in those activities that are contrary to good order and discipline or morale of the unit or pose a threat to health, safety, and security of military personnel or a military installation.[180]

Commanders have responsibility and authority to act against extremists. Showing how broad this mandate is, the paragraph uses an example that might trigger First Amendment analysis. Commanders have the authority to order the "removal of symbols, flags, posters, and other displays from barracks . . . ."[181]

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[179] AR 600-20 para. 4-12 (new policy), *supra* note 33, para. 4-12C.2.
[180] *Id.* para. 4-12C.2.C.
[181] *Id.* The Secretary of the Army reiterated this mandate in relation to the First Amendment in a news briefing following the release of the Task Force Investigation:

> And incidentally, if they see a swastika or something hanging on a wall, [in reference to] the bright line test you wanted [from] me, I saw today in an article where a law professor said, ["W]ell, the Army doesn't have the authority to take banners off the wall. They'll have to take them all off except for Old Glory or leave them [all] up.["] That's not the Army's view. That is not the Secretary of the Army's direction. If a commander or NCO sees on the wall of any government building, an item, an object, a display, that is calculated to disrupt the good order,

Two more subparagraphs reference the commander. Subparagraph D,[182] entitled "Command Options," states the options available to the commander, from UCMJ punishments to administrative actions (somewhat similar to subparagraph *d.* in the older version).[183] The new regulation includes a new subparagraph E, entitled "Command Responsibility." Here the language not only empowers, but demands action: "In any case of apparent soldier involvement with or in extremist organizations or activities, whether or not violative of the prohibitions in subparagraph B, commanders *must take* positive actions to educate soldiers . . . ."[184] Subparagraph E(3) also mandates:

> The commander of a military installation or other military controlled facility under the jurisdiction *shall* prohibit any demonstration or activity on the installation or facility that could result in interference with or prevention of orderly accomplishment of the mission . . . . Further, such commanders *shall deny* requests for the use of military controlled facilities by individuals or groups that engage in discriminatory practices . . . .[185]

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discipline, moral cohesiveness, ability to operate as a unit of that unit, he or she has all the authority necessary to take it down and to discipline the soldier who sponsors it.

DEP'T OF DEFENSE NEWS BRIEFING, SUBJECT: FINDINGS & RECOMMENDATIONS ON THE TASK FORCE ON EXTREMIST ACTIVITIES, DEFENDING AMERICA'S VALUES 9 (Mar. 21, 1996).

[182] AR 600-20, para. 4-12 (new policy), *supra* note 33, para. 4-12C.2.D. Various subparagraphs in the new policy (in ALARACT message format) are all in upper case. To avoid confusion, I cite them as they appear in that text.

[183] *Id.*

[184] *Id.* para. 4-12C.2.E (emphasis added).

[185] *Id.* para 4-12C.2.E.(3) (emphasis added).

The new policy does more than provide a broad mandate for commanders. It clarifies the commander's role. It defines extremism more broadly, as "participation in extremist organizations *or activities*."[186] Commanders and legal advisors no longer have to engage in legal hair-splitting as to what is an "organization."[187] Furthermore, the old policy included the definition that an organization must "espouse[s] supremacist causes."[188] The new policy is more specific: "Extremist organizations or activities are ones that advocate racial, gender, or ethnic hatred or intolerance; [or] advocate, create, or engage in illegal discrimination based on race, color, sex, religion, or national origin . . . ."[189] The policy resolves defining "supremacist causes" by labeling them as hatred or intolerance regarding gender and minorities.

The regulation prohibits six activities: (1) participating in a public demonstration or rally; (2) attending a meeting or activity knowing the activity involved an extremist cause, when on duty, in uniform, or in a foreign country (whether on or off duty or in uniform); (3) fundraising; (4) recruiting or training members; (5) creating, organizing, or taking a visible leadership role in such an organization or activity; (6), and distributing extremist literature on or off the military installation. The policy makes these six prohibitions punitive, and it allows the commander to make others punitive as well.[190]

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[186] *Id.* para 4-12C.2.B (emphasis added).
[187] *See supra* note 141 and p. 31.
[188] AR 600-20, para. 4-12 (old policy), *supra* note 147, 4-12a.
[189] AR 600-20, para. 4-12 (new policy), *supra* note 33, para. 4-12C.2.B. The other definitions for extremist activities or organizations are:

> Extremist organizations and activities are ones that . . . advocate the use of or use force or violence or unlawful means to deprive individuals of their rights under the United States Constitution or the laws of the United States, or any state, by unlawful means.

Id.
The substance of these definitions is the same as in the old definitions.
[190] It states: "Violations of the prohibitions contained in this paragraph or those established by a commander may result in prosecution under various provisions of the [UCMJ]." *Id.* para. 4-12C.2.

Finally, the new regulation no longer uses "active" and "passive" participation to distinguish prohibited from non-prohibited conduct. Eliminating this distinction apparently gives commanders much greater discretion.[191] The new policy eliminates the language that "[p]assive activities, such as mere membership, receiving literature in the mail, or presence at an event . . . are not prohibited by Army policy."[192] Instead, the regulation states that:

> Any soldier involvement with or in an extremist organization or activity, such as membership, receipt of literature, or presence at an event, could threaten the good order and discipline of the unit . . . . In any case of apparent soldier involvement with or in extremist organizations or activities, whether or not violative of the prohibitions in subparagraph B, commanders must take positive actions to educate soldiers . . . .[193]

The new policy lists some of these "positive actions." They include: (1) educating soldiers regarding the Army's equal opportunity policy; (2) advising soldiers of the inconsistency of involvement in extremism with Army goals, beliefs, and values; and (3) stating that extremist participation can be a factor in evaluating duty performance and promotions.[194]

Ironically, the abolition of the active/passive participation dichotomy is the new policy's only real source of ambiguity. While it eliminated the distinction, the policy does not clearly

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[191] *See supra* p. 37-38.
[192] AR 600-20, para. 4-12 (old policy), *supra* note 147, para. 4-12b.
[193] AR 600-20, para. 4-12 (new policy), *supra* note 33, para. 4-12C.2.E.
[194] *Id.* para. 4-12C.2.E.(1) & (2).

state when commanders can act against activities once considered "passive," such as mere membership. While testifying before the House Subcommittee on National Security, the Secretary of the Army indicated that he did not think that the Army policy prohibited membership alone.[195] One may conclude that formerly "passive" activities are still only administratively actionable and that the old active/passive distinction perhaps comes in through the back door.

Yet, the regulation also states that a unit commander may "order soldiers not to participate in those activities that are contrary to good order and discipline of the unit or pose a threat to health, safety, and security of military personnel or a military installation."[196] This appears to give the commander great authority. One can reconcile the two by focusing on what a soldier *does*, not what he believes. The regulation focuses on prohibiting participation in organizations and *activities*, not mere beliefs. Read this way, the boundary for what a commander can prohibit

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[195] Secretary West stated:

> We have attempted to avoid the confusion between merely passive and merely active, [sic] however, by saying that if you prepare to take punitive action, it must be based on action, based on conduct. That is consistent with the position we have taken in a number of similar situations across the Department.
>
> . . . .
>
> When I say that membership is not without its disadvantages, the Army regulation will continue to point out that membership itself is, in the Army's view, not to be encouraged. That can be taken into account when considering things like promotion or assignments. That's different from when you take it into account for purposes of punishment or separation.
>
> That depends on conduct. That will be the way the AR, as it is currently drafted, is focused. We think it's a lot clearer and commanders shouldn't be trying to decide between what's active and what's passive. The question is their conduct. If it contributes to the disruption of the morale and discipline of the unit, the commander acts.

Hearing on Extremist Activity in the Military, supra note 38, at 168 (statement of Secretary of the Army Togo West). When further questioned whether membership was *per se* prohibited, he stated: "[A]s it exists in draft now, there is not a position that says that membership is directly punishable." *Id.* at 169.

[196] AR 600-20, para. 4-12 (new policy), *supra* note 33, para. 4-12C.2.C.

is at "mere" membership or association. A soldier who is a "mere" member, but does not act, distributes no literature, or propagates no views, cannot be prohibited from being a member. His conduct, however, is another matter. Once he engages in activity beyond merely being a member or merely having extremist beliefs, the commander can act to prohibit that activity.[197]

In contrast to the language in the old policy, the new policy directs commanders to "lean forward" to aggressively combat extremism in their units. This makes the role of the judge advocate more demanding, and fortunately, more explicit. Subparagraph F states that "commanders should seek the advice and counsel of their legal advisor when taking actions pursuant to this policy."[198] The new policy, thus, specifically tasks the judge advocate, not the equal opportunity officer, the chaplain, or anyone else, with advising the commander.

This tasking is not surprising because the new policy has potential constitutional ramifications. It recognizes a commander's inherent authority to prohibit actions and speech that might appear protected under the First Amendment. This requires two questions to be answered. First, is such a policy lawful? Second, at the unit level, how does a commander ensure that a local extremist policy is lawful? These questions are addressed in the next part of this article.

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[197] Likewise, and in keeping with the apparent intent of the regulation's change, the soldier who simply *acknowledges* his beliefs when asked by his chain-of-command, but takes no actions as a result of them (e.g., displays no posters or paraphernalia, attends no meetings, and disseminates no propaganda) should be considered in the same category as a soldier who is a "mere" member. Thus, a commander can take the same "administrative" actions regarding the soldier (education, counseling, and consideration in making duty evaluations and promotions), but no sanction-type action. *See supra* pp. 43-44 and note 194. Whether a commander can legitimately ask such a question must be examined in light of the standard of legal orders. *See infra* 80-82.

[198] AR 600-20, para. 4-12 (new policy), *supra* note 33, para. 4-12C.2.F.

IV. The Legality of the Army's New Extremist Policy

A. The Idea of Deference

Whether a policy is lawful requires an understanding of how the courts review military policy. Because of First Amendment challenges brought during the Vietnam War era, the Supreme Court issued a series of opinions that upheld military policies, rules, and regulations.[199] The cases vary in their standards of review of military policies. In *Parker v. Levy*,[200] the Court stated that the standard of review for a vagueness challenge in the military would be the same as for statutes that regulate economic affairs.[201] In *Brown v. Glines*,[202] the Court upheld a Navy regulation because it protected a "substantial government interest."[203] In *Goldman v. Weinberger*,[204] the Court deferred to the Air Force's own policy justification.[205]

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[199] The major cases in the past 25 years involving the military and the First Amendment are: Goldman v. Weinberger, 475 U.S. 503 (1986) (upholding an Air Force regulation that prohibited the plaintiff from wearing a yarmulke); Brown v. Glines, 444 U.S. 348 (1980) (upholding an Air Force regulation that controlled the circulation of petitions on an air base); Greer v. Spock, 424 U.S. 828 (1976) (upholding a local Army regulation that banned on-post political speeches and demonstrations without prior approval); Secretary of the Navy v. Amrech, 418 U.S. 676 (1974) (ruling that Article 134 of the UCMJ, which prohibits conduct prejudicial to the good order and discipline of the armed forces, is not unconstitutionally vague); Parker v. Levy, 417 U.S. 733 (1974) (ruling that Article 133, which prohibits conduct unbecoming an officer and a gentleman, as well as Article 134, are neither vague nor overbroad). Other important military cases involving challenges to military policies, though not involving the First Amendment, are: Chappell v. Wallace, 462 U.S. 296 (1983) (ruling that enlisted military personnel may not sue superior officers for alleged constitutional violations); Rostker v. Goldberg, 453 U.S. 57 (1981) (upholding all-male selective service legislation); Middendorf v. Henry, 425 U.S. 25 (1976) (ruling that that a summary court-martial is not a "criminal prosecution" within the meaning of the Sixth Amendment).

[200] 417 U.S. 733 (1974).

[201] "Because of the factors differentiating military society from civilian society, we hold that the proper standard of review for a vagueness challenge to the articles of the Code is the standard which applies to criminal statutes regulating economic affairs." *Id.* at 756. That standard, announced in a previous Supreme Court case, is that as long as an economic entity knew *or should have known* its actions violated an economic statute, the statute is not unconstitutionally vague. *See* United States v. National Dairy Products Corp., 372 U.S. 29, 32-34 (1963).

[202] 444 U.S. 348 (1980).

[203] "These regulations, like the Army regulation in the *Spock* case, protect a substantial Government interest unrelated to the suppression of free expression. Like the Army regulation that we upheld in *Spock*, the Air Force regulations restrict speech no more than is reasonably necessary to protect the substantial governmental interest." *Id.* at 354.

[204] 475 U.S. 503 (1986).

The unifying theme in these cases has not been a consistent standard of review, but the idea of deference to either the military[206] or Congress[207] to determine and to create policies for the military. This deference extends to the military's policies that restrict individual rights, which are constitutionally protected for civilians.[208] The Supreme Court has not held that the Constitution and the Bill of Rights are inapplicable to the military,[209] but it has held that the military and Congress have extraordinary leeway to determine the extent of those rights.

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[205] "The considered professional judgment of the Air Force is that the traditional outfitting of personnel in standardized uniforms encourages the subordination of personal preferences and identities in favor of the overall group mission . . . . The desirability of dress regulations in the military is decided by the appropriate military officials, and they are under no constitutional mandate to abandon their considered professional judgment." *Id.* at 509.

[206] In *Brown v. Glines*, upholding an Air Force regulation that related to the circulation of petitions on air bases, Justice Powell wrote: "Because the right to command and the duty to obey ordinarily must go unquestioned, this Court long ago recognized that the military must possess substantial discretion over its internal discipline." *Brown*, 444 U.S. at 356. In *Goldman v. Weinberger*, upholding an Air Force regulation that prohibited the plaintiff from wearing a yarmulke, Justice Rehnquist stated:

> Our review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society . . . The considered professional judgment of the Air Force is that the traditional outfitting of personnel in standardized uniforms encourages the subordination of personal preferences and identities in favor of the overall group mission. Uniforms encourage a sense of hierarchical unity by tending to eliminate outward individual distinctions except for those of rank. The Air Force considers them as vital during peacetime as during war because its personnel must be ready to provide an effective defense on a moment's notice; the necessary habits of discipline and unity must be developed in advance of trouble.

Goldman, 475 U.S. at 507-8.

[207] In *Parker v. Levy*, Justice Rehnquist wrote: "For the reasons which differentiate military society from civilian society, we think Congress is permitted to legislate both with greater breadth and with greater flexibility when prescribing the rules by which the former shall be governed than it is when prescribing rules for the latter." *Parker*, 417 U.S. at 756. In *Rostker v. Goldberg*, upholding the all-male selective service provision, the Court deferred to Congress. "Whenever called upon to judge the constitutionality of an Act of Congress . . . the Court accords great weight to the decisions of Congress." *Rostker*, 453 U.S. at 64 (citing Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94 (1973). The Court went on to say: "This is not, however, merely a case involving the customary deference accorded congressional decisions. The case arises in the context of Congress' authority over national defense and military affairs, and perhaps in no other area has the Court accorded Congress greater deference." *Rostker*, 453 U.S. at 64.

[208] "The rights of military men must yield somewhat 'to meet certain overriding demands of discipline and duty . . . .'" *Parker*, 417 U.S. at 744 (quoting Burns v. Wilson, 346 U.S. 137, 140 (1953) (plurality opinion)).

[209] Shortly after the UCMJ was promulgated and the military court system was formalized, the Supreme Court asserted that the Bill of Rights should apply to military personnel. Burns v. Wilson, 346 U.S. 137 (1953) (military actions subject to habeas corpus review).

Accordingly, the military may curtail a service member's rights far more than civilian authorities can curtail a civilian's rights.[210]

The absence of a constant standard of review and the great deference to military policy has caused confusion and controversy. On rare occasions, the Supreme Court has not been deferential to a military policy and has applied the same sort of review that it would apply to a similar civilian case.[211] Consequently, some federal appellate courts have adopted their own standards of review.[212]

Furthermore, commentators have attacked the idea of deference.[213] They have criticized the idea that the military is a "separate community" deserving great deference. Two commentators

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[210] "The military need not encourage debate or tolerate protest to the extent that such tolerance is required of the civilian state by the First Amendment; to accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps." *Goldman*, 475 U.S. at 506.

[211] In cases that involve discrete personnel matters with little long range ramifications for the military, the Court has generally subjected those actions to some form of scrutiny. In cases that involve significant constitutional challenges to regulations themselves that might affect a military function, the Court has allowed far more deference. *See* John Nelson Ohweiler, Note, *The Principle of Deference: Facial Constitutional Challenges to Military Regulations*, 10 J.L. & POL. 147, 166-7(1993). In Frontiero v. Richardson, 411 U.S. 677 (1973), for example, the Supreme Court invalidated an administratively convenient policy in which male members of the military could automatically claim wives as dependents before being allowed dependent status, while female members had to produce evidence of husband's dependence before being allowed such status.

[212] The most widely used standard is the so-called *Mindes* test. *See* Mindes v. Seamen, 453 F.2d 197 (5th Cir. 1971). For the *Mindes* test to apply, the plaintiff must first meet a threshold requirement: the court will not review a claim unless there is an abridged constitutional right and the claimant has exhausted his administrative remedies. If this threshold is met, then the court uses a four-part balancing test to determine if the claim is reviewable. The court balances: (1) the nature and strength of the plaintiff's challenge; (2) the potential injury to the plaintiff if the challenge is denied; (3) the type and degree of anticipated interference to the military if the challenge is upheld or allowed; and (4) the extent to which exercise of military expertise or discretion is involved. *Id.* at 201.

[213] Some of the academic literature attacking this proposition includes: Stephanie A. Levin, *The Deference That is Not Due: Rethinking the Jurisprudence of Judicial Deference to the Military*, 35 VILL. L. REV. 1009 (1987) (arguing, among other points, that the deference the judiciary gives to the military is not rooted in Constitutional history: rather the Founders expressed great distrust toward the military's potential power and influence); C. Thomas Dienes, *When the First Amendment is Not Preferred: The Military and Other "Special Contexts"*, 56 U. CIN. L. REV. 779 (1986) (arguing that the excessive judicial deference to the military reveals "a tendency to seek to solve problem cases by adopting conceptualistic, categorical, formalistic approaches which fail to identify and assess the competing interests actually at stake in particular factual contexts."); Edward Zillman & Edward Imwinkelried, *Constitutional Rights and Military Necessity: Reflections on the Society Apart*, 51 NOTRE DAME L. REV. 397 (1976) (a post-Vietnam critique of the military as unfettered in its dispensing of constitutional rights of

have argued that deference does not reflect how closely intertwined the military and civilian communities are in the present era.[214] Another commentator posits that First Amendment protections of freedom of speech are particularly valuable to the military.[215] Within the Supreme Court, the notion has been the subject of heated debate. Justice Brennan, for example, has stated that it is the judiciary's role, not the executive's or legislative's, to determine the boundaries of constitutional protections in the military. According to him, the Supreme Court should establish a consistent standard of review, even in matters with wide ranging impact.[216]

Why should there be judicial deference to the Army's policy on extremism? There are two principal reasons. First, the Constitution's separation of powers doctrine gives control of the military to the legislative and executive branches, with no explicit role for the judiciary. Second, the military is a "separate community" with a highly unique mission that requires it to be separate and unique from civilian society, with more stringent standards and less constitutional

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service members and as isolated from civilian society, therefore requiring greater judicial scrutiny of its policies). For the most sustained defense of the principle of deference, *see* James M. Hirschorn, *The Separate Community: Military Uniqueness and Servicemen's Constitutional Rights*, 62 N.C. L. REV. 177 (1984).

[214] *See* Zillman & Imwinkelried, note 213, at 397.

[215] *See* Richard W. Aldrich, Comment, *Article 88 of the UCMJ: A Military Muzzle or Just a Restraint on Military Muscle?* 33 UCLA L. REV. 1189, 1195 (1988). The author argues that not allowing military officers to criticize government officials cuts off criticism of policies by those most familiar with the process. "It seems that a self-governing society is notably hampered if it muzzles the sector of society that is most intimate with the details of such important national concerns [as national defense]." *Id.*

[216] Brennan states in a dissent in *Goldman*:

> Today the Court eschews its constitutionally mandated role. It adopts for review of military decisions affecting First Amendment rights a sub-rational standard . . . . If a branch of the military declares one of its rules sufficiently important to outweigh a service person's constitutional rights, it seems that the Court will accept that conclusion, no matter how absurd or unsupported it may be.

Goldman, 475 U.S. at 515 (Brennan, J., dissenting). *See* Brennans's dissent in *Greer v. Spock*: "The Court gives no consideration to whether it is actually necessary to exclude all unapproved public expression from a military installation under all circumstances and, more particularly, whether exclusion is required of the expression involved here. It requires no careful composition of the interests at stake." *Greer*, 424 U.S. at 855 (Brennan, J., dissenting).

protections for soldiers than for civilians.[217] Both of these are especially relevant when reviewing the Army's extremist policy.

1. The Separation of Powers Doctrine[218]

The Supreme Court cites the separation of powers doctrine as a basis for deferring to either Congress or the military to create military policy.[219] The idea of separation of powers comes from the text of the Constitution itself. The articles of the Constitution assign each branch distinct roles and functions. The Constitution gives the power to raise, to support, and to train the armed forces to the legislative branch[220] and the authority to command them to the executive branch.[221] The Constitution assigns no such role to the judiciary.[222]

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[217] These two bases for the notion of deference are taken, to some extent, from Hirschorn, *supra* note 212. Hirschorn justifies the "separate community" doctrine on four grounds: (1) the distinct subculture of the armed forces which subordinates the individual; (2) the existence of this subculture indicates that it serves the armed forces' internally and society as a whole; (3) the judiciary's distrust of its ability to reconcile individual rights with the armed forces' functioning; and (4) the unique nature of the armed force–to fight wars. *Id.* at 201-2. In this article, 1, 2, and 4 of these rationales are all subsumed under the "separate community" doctrine. Rationale 3 is distinguished from the idea of the military as a separate community and a corollary of the idea of separation of powers. *See infra* pps 54-56. Hirschorn also separately discusses the idea of separation of powers. Hirschorn, *supra* note 213, at 210-212. Some revisionists have begun to question the viability of rationale 4 in other contexts by some revisionists, given the military's newer "peacekeeping" type missions in the post-Cold War era. *See, e.g.*, MARTIN VAN CREWELD, THE TRANSFORMATION OF WAR (1991); Edward Luttwak, *Toward Post-Heroic Warfare*, 74 FOREIGN AFFAIRS (May/June 1995) at 109-22. "Revisions of the revision," however, have already appeared as well. *See, e.g.* PHILLIPPE DELMAS, THE ROSY FUTURE OF WAR (1997).

[218] While separation of powers is often defined as a doctrine through which one branch of government prevents another from imposing its unchecked will, that actually defines the related concept of checks and balances. Furthermore, separation of powers is often thought of as an "inefficient" concept. However, in the case of discussion here, I intend to show that efficiency is the basis for separation of powers among branches of the government as to which controls the military. *See also* Hirschorn, *supra* note 212, at 210-12.

[219] *See Goldman*, 475 U.S. at 507-8; *Rostker*, 453 U.S. at 64-5; *Chappell*, 462 U.S. at 301.

[220] U.S. CONST. art. I, § 8, cls. 11-16.

[221] *Id.* art. II, § 2, cl. 1.

[222] Hirschorn, *supra* note 213, at 210 (referencing explicit authority only).

By granting the elected branches plenary and command power over the military, the Constitution links military control to the democratic will and the democratic process. Because the people will feel the burden of war, the elected branches can best respond to that will.[223] Furthermore, in granting power to the elected branches to control the military, the Constitution acknowledges that the elected branches grant a degree of legitimacy to military policy that courts cannot. These elected branches can best reflect and respond to the societal consensus, a particularly relevant and important concern when dealing with national security.[224]

Of the three branches, the judiciary has the least competence to evaluate the military's formation, training, or command. It has, as one court stated, "no Armed Services Committee, Foreign Relations Committee, Department of Defense, or Department of State" nor does it have the same access to intelligence and testimony on military readiness as does Congress or the President.[225] The Supreme Court has thus repeatedly cited its own lack of competence to evaluate military affairs.[226]

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[223] *Id.* at 217-8.

[224] The Fourth Circuit Court of Appeals cites this rationale in upholding the military's "Don't ask, don't tell" homosexual policy in *Thomasson v. Perry*:

> Even when there is opposition to a proposed change as when Congress abolished flogging in the 19th Century or when President Truman ended the military's racial segregation in 1948 – the fact that the change emanates from the political branches minimizes both the likelihood of resistance in the military and the probability of prolonged social division. In contrast, when courts impose military policy in the face of deep social division, the nation inherently runs the risk of long-term social discord because large segments of our population have been deprived of a democratic means of change. In the military context, such divisiveness could constitute an independent threat to national security.[224]

Thomasson v. Perry, 80 F.3d 915, 926 (4th Cir. 1996).

[225] *Id.* at 925.

[226] The Supreme Court stated in *Gilligan v. Morgan*:

> [I]t is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches.

To analyze the oft-criticized judicial deference to military matters, it is important to understand the structural differences between the ability of the elected branches and the courts to determine policy. The elected branches use regulatory decision making to determine policy. Regulatory decision-making, which is the creation of administrative policy through internal-rule formation, is a far more efficient means of policy making than adjudicated decisions.[227]

There are several problems with adjudication as a means of rule making. Adjudication is more costly and more time consuming. Years and millions of dollars can be spent in litigating one issue that involves one individual.[228] Adjudication concerns itself with an individual remedy based upon "a small set of controverted facts" that are highly contextual and may or may not be applicable to a larger class of individuals.[229] Furthermore, adjudication sets up elaborate procedures according to its ultimate goal–to determine whether a particular individual should prevail in a particular case.[230]

Gilligan v. Morgan, 413 U.S. 1, 10 (1973).
See Rostker, 453 U.S. at 65-6 ("Not only is the scope of Congress' constitutional power in this area broad, but the lack of competence on the part of the courts is marked."); Simmons v. United States, 406 F.2d 456, 459 (5th Cir. 1969), *cert. denied*, 395 U.S. 982 (1969) ("That this court is not competent or empowered to sit as a super-executive authority to review the decisions of the Executive and Legislative branches of government in regard to the necessity, method of selection, and composition of our defense forces is obvious and needs no further discussion"); Orloff v. Willoughby, 345 U.S. 83, 93 (1953) ("Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters.")

[227] *See* J. Skelly Wright, *The Courts and the Rulemaking Process: the Limits of Judicial Review*, 59 CORNELL L. REV. 375.

[228] *Id.* at 376.

[229] *Id.* at 379. The power of interest groups representing individuals in such disputes is also especially relevant. The debate about hate speech and legislation prohibiting it has been largely shaped by free speech groups such as the American Civil Liberties Union (ACLU), with no comparable support from groups such as the National Association for the Advancement of Colored People (NAACP) supporting hate speech restrictions. The lack of such powerful advocacy groups may explain why the Court has never allowed any significant restrictions on hate speech. *See* SAMUEL WALKER, HATE SPEECH: THE HISTORY OF AN AMERICAN CONTROVERSY, 13, 23-24 (1994).

[230] Wright, *supra* note 227, at 378.

Dissenters, in particular Justice Brennan, have asserted that the Court decides issues that are far more technically complicated than adjudicating rather straightforward rules on discipline.[231] Yet that argument does not address rules formation in an administrative, as opposed to an adjudicative, system.

Military policy-making is, by its nature, meant to do precisely what administrative policy-making does: allocate rights, benefits, and sanctions, among large groups using consistent standards.[232] What makes military policy making along administrative rule-making lines even more advantageous is that the military's primary concern is ensuring military discipline and combat effectiveness of units, rather than focusing primarily on individuals themselves. Applying consistent and predetermined norms among large groups is what administrative rule making is best equipped to do.[233]

Where Brennan's argument may appear to be the most persuasive is where the potential "penalties" cut into the interests that the adjudicative process is best suited to protect–namely, constitutional protections. In dealing with constitutional protections, individual rights often trump majority concerns. Discerning whether individuals should be granted these protections may not be particularly complex, on the surface.[234] When viewing the grant of constitutional protections in relation to the military's goal–successful combat operations–this argument loses force. This is because "simplicity" as defined in civilian contexts often does not have the same meaning in the military context. Clausewitz, the Prussian general and author of the military

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[231] *Id.*
[232] *Id.* at 379.
[233] *Id.*

classic, *On War*, once famously stated: "Everything in war is very simple, but the simplest thing is difficult."[235]

Clausewitz terms all the uncertainties and problems that accompany wartime operations as "friction."[236] Friction can be defined as the "realm of uncertainty and chance, even more [is] it the realm of suffering, confusion, exhaustion and fear"[237] that accompanies military wartime operations. All these exist to a much higher degree in war, because, as Clausewitz points out, in war, not only is chance and uncertainty a constant,[238] but also one side is trying to impose its will on its opponent, which is an "animate object that reacts."[239] In other words, in war, you are seeking to overcome an opponent who is reacting to (and may be anticipating) your movements, who is trying not only to defeat but to destroy you, and who may not be constrained by your own laws, customs, and behavior.

It is not thus simply the lack of judicial competence in military affairs, but the effects that the lack of competence may have that is an additional "friction" in the military environment. The problem in applying a standard of review similar to the kind used for civilian society is not just that the court may err, but the ramifications of such an error given the uncertainty of conflict.[240] An error in military policy making could impede military effectiveness and thereby

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[234] For an example of judicial deference in administrative policymaking in economic matters, *see* Ethyl Corp. v. Environmental Protection Agency, 541 F.2d 1, 33-34 (1976).
[235] CARL VON CLAUSEWITZ, ON WAR, bk. I, ch. 7, 119 (Michael Howard & Peter Paret eds. & trans. 1989).
[236] *Id.*
[237] MICHAEL HOWARD, CLAUSEWITZ 25 (1983). For an example of friction, *see* EDWARD LUTTWAK, STRATEGY, THE LOGIC OF WAR & PEACE, 10-15 (1987).
[238] "War is the realm of chance. No other human activity gives it greater scope: no other has such incessant and varied dealings with this intruder. Chance makes everything more uncertain and interferes with the course of events." CLAUSEWITZ, *supra* note 235, bk. I, ch. 3, 101.
[239] *Id.* at bk. 2, ch. 3, 149.
[240] Hirschorn, *supra* note 213, at 182.

jeopardize national security.[241] These judicial decisions put the courts squarely into the political arena. Judges unwittingly become "strategists"–unelected and ill-equipped officials deciding matters of potentially ultimate importance.

Judicial deference, therefore, is generally appropriate to military decision-making, and in particular, a unit commander's decision-making on extremism. Extremism's disproportionate impact on the community where it occurs is an impact that can only be magnified in a military unit. The best way to appreciate that impact is to look at the gravest danger posed by racial extremists–the violent hate crime.

If the courts rely solely on the statistics that compare the few numbers of bias crimes committed in relation to total crimes, they may be misled about the effect on good order and discipline.[242] The courts may not be aware of the totality of information about extremist hate crimes. The vast majority of bias-oriented crimes are crimes against persons, not property. These crimes are also more likely to involve physical assault than non-bias crimes.[243] Usually, at least four or more individuals commit them.[244] The median age group is among young adults.[245]

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[241] *Id.*

[242] One bias crime expert has stated: "Raw numbers [alone] mean absolutely nothing in this business." John Cook, Major, Maryland State Police Criminal Intelligence Unit, *quoted in* Brian Levin, *Bias Crimes: A Theoretical and Practical Overview*, 4 STAN. L. & POL'Y REV. 165, 172 (Winter 1992-3).

[243] BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE REPORT TO THE NATION ON CRIME & JUSTICE 12 (2d ed. 1988). According to this 1988 report, the first major study on the subject, assaults make up more than 30% of all bias crimes. The year before the Murrah Bombing and the Fayetteville murders, the statistics remained the same. Assaults in 1994 made up over 30% of all bias crimes (simple assault: 18%; aggravated assault: 14%). The report stated that crimes against persons constituted 72% of hate crime offenses reported. U.S. DEP'T OF JUSTICE, 1994 HATE CRIME REPORT.

[244] Abraham Abramovsky, *Bias Crime: A Call for Alternative Responses*, 19 FORDHAM URB. L.J., 875, 887 (1992).

[245] Different statistics regarding median age of bias crime confirms the relative youth of offenders. The median age group for most bias criminals in New York City was 18-25. James Garofolo, Bias and Non-Bias Crimes in New York City, 11 (Nov 9, 1990) (unpublished manuscript presented to the American Society of Criminology) *cited in* Levin, *supra* note 242, at 166. A study done by an attorney general task force in Minnesota found that 65% of bias

Loosely associated individuals, not organized extremist groups, commit most hate crimes.[246] Furthermore, the most explosive element about the crimes is not necessarily the criminal act. Rather, the race or bias motivation can cause a community to polarize and even to explode.[247] This impact is essential to the military's need for judicial deference to extremist policies–at both the local commander policy level and the Army policy level.

The separation of powers doctrine supplies a constitutionally based rationale for judicial deference, based upon the division of governmental powers. But is there a basis, apart from the government's structure, for this deference? Is there, more specifically, a policy basis for deference in the institution of the military itself? The following section examines this policy basis, which falls under the heading of the "separate community" doctrine.

2. The Military as a "Separate Community"

The Supreme Court often refers to the military as a "separate community" with the wholly unique purpose of providing for the nation's defense and waging the nation's wars.[248] The Supreme Court expressed this idea most notably in *Solorio v. United States.*[249] In this case, the

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crimes were committed by persons between the age of 11-20. *Bias Related Crime Development, Minnesota Hate Crime Legislation*, NATIONAL ASSOCIATION OF ATTORNEYS GENERAL CIVIL RIGHTS UPDATES, Spring 1997, at 2.

[246] Abramovsky, *supra* note 244, at 886-7.

[247] Levin, *supra* note 242, at 167. Levin gives the example of a fatal car accident in New York in August 1991 that became racially polarizing. It resulted in 1500 police officers being called out to contain riots that lasted for four days and resulted in 180 arrests. *Id.*

[248] "The military constitutes a specialized community governed by a separate discipline from that of the civilian." Chappell v. Wallace, 462 U.S. 296, 300 (1983). "[T]he different character of the military community and of the military mission requires a different application of [First Amendment] protections." Parker v. Levy, 417 U.S. 733, 758 (1974).

[249] 438 U.S. 435 (1987).

Court granted the military criminal jurisdiction over all of its active duty personnel at all times.[250]

Courts base the argument for the separate community doctrine on the military's exigent function, on which the survival of the nation depends, and which has no analogue or parallel in civilian society.[251] This function can best be accomplished by designating the military as a separate community. To provide for the nation's defense and survival, this separate community abides by strict rules of discipline that will necessarily involve restriction of otherwise constitutionally provided protections.[252]

In the context of the Army's extremist policy, understanding the separate community doctrine is important. It provides a justification for the Army's extremist policy and for local unit extremist policies as well. The doctrine derives from the military's special demands for discipline and cohesion necessary to make its units combat effective. Some sociological data exists that indicates that a military must indoctrinate its personnel into a total or near-total system to make them perform under combat conditions.[253] This system must have the authority to punish resistance, to establish a hierarchy that demands obedience to orders, and to create unit

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[250] *Id.*

[251] *See Brown*, 444 U.S. at 356-7; *Middendorf*, 425 U.S. at 46 (quoting U. S. ex rel. Toth v. Quarles, 350 U.S. 11 (1955)); *Schlesinger*, 420 U.S. at 757; *Parker*, 417 U.S., at 743-44; Orloff v. Willoughby, 345 U.S. 83, 94 (1953); *Chappell*, 462 U.S. at 300. *See also* Hirschorn, *supra* note 213, at 201-2.

[252] *See supra* note 208. *See also* Hirschorn, *supra* note 213, at 213-14. Hirschorn bases the separate community doctrine on the nature of international armed conflict, which has no parallel in the domestic arena. When the government commits itself to war, it does not operate under the standard principles that would necessarily bind opponents in domestic arenas. Rather, in going to war, the government engages in activities–the deliberate killing and destruction of the other side–that would, in any other context, be unlawful. The military is the government's legitimate means to accomplish this unique task. *Id.* at 236.

[253] *See* Hirschorn, *supra* note 213, at 219.

cohesion.[254] Commentators frequently question the proposition of a "separate community;" this article will address some of these questions, as follows.

Does the modern military need a "separate community"? -- Some critics, however, contend that the "separate community" doctrine fails to address the realities of the modern military.[255] They argue that the military, especially the post-World War II military, resembles a vast civilian-like corporation with a massive bureaucracy, where a relative few of its members actually perform traditional military, combat-type functions.[256] The civilian and military spheres have dramatically converged. Technicians crossover readily from the military to the civilian markets, and senior officers transfer their managerial skills into the executive world.[257]

Such arguments, however, are insufficient in themselves, for they only address current similarities with the civilian community, and not current distinctions. The military may be "more" or "less" separate from the civilian community as times and standards change, but its patterns of obedience and its overtly hierarchical structure remain unique. No other government or civilian agency has, for example, a separate criminal code of justice, or the ability to punish its

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[254] *Id.* at 219-21. Studies on bureaucratic organizations include: AMITAI ETZIONI, A COMPARATIVE ANALYSIS OF COMPLEX ORGANIZATIONS: ON POWER, INVOLVEMENT, & THEIR CORRELATES 40-78 (1975); BARRINGTON MOORE, INJUSTICE: THE SOCIAL BASIS OF OBEDIENCE & REVOLT 3-48 (1978). For a classic study of military discipline and organizations in combat situations, *see* S.L.A. MARSHALL, MEN AGAINST FIRE: THE PROBLEM OF BATTLE COMMAND IN FUTURE WAR 138-178 (1947).

[255] *See, e.g.*, Courtney W. Howland, *The Hands-Off Policy and Intramilitary Torts*, 71 IOWA L. REV. 93, 106-21 (1985).

[256] *Id.* at 106-10.

[257] *Id.* at 109.

members criminally for acts such as being disrespectful to superiors.[258] Furthermore, the military has not eliminated its unique combat role.[259]

Alternatively, some critics argue not that the separate community rationale is largely a fiction, but rather that the rationale rests on a faulty premise.[260] Specifically, these critics assert that the cornerstone of the "separate community" doctrine–the military's unique need for consistent and authoritarian discipline–is not particularly important in the area that the military stresses soldiers need it most, on the battlefield.[261] Rather, what really makes soldiers combat effective is their adherence to their "primary groups" in combat. These are the "small groupings in which social behavior is governed by informal, intimate, face-to-face relations."[262] In these small groupings hierarchical discipline has less impact in making such units effective, and is de-emphasized by the contemporary military itself.[263] Therefore, changes in the military

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[258] UCMJ arts. 89, 91 (1998).

[259] Sociologist Morris Janowitz, one of the most prominent scholars of the growing "civilianization" of the military, even in the context of Cold War nuclear warfare, states:

> [W]hile it is true that modern warfare exposes the civilian and the soldier to more equal risks, the distinction between military roles and civilian roles has not been eliminated. Traditional combat-ready military formations need to be maintained for limited warfare. The necessity for naval and air units to carry on the hazardous tasks Of continuous and long-range reconaissance and detection, demand organizational forms that will bear the stamp of conventional formations.
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> . . . .
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> More important, no military system can rely on expectation of victory based on the initial exchange of firepower, whatever the form of the initial exchange may be. Subsequent exchanges will involve military personnel–again, regardless of their armament–who are prepared to carry on the struggle as soldiers, that is, subject themselves to military authority and continue to fight.

MORRIS JANOWITZ, SOCIOLOGY & THE MILITARY ESTABLISHMENT 20 (rev. ed. 1965).

[260] Howland, *supra* note 255, at 115-21; Jonathan P. Tomes, *Feres to Chappell to Stanley: Three Strikes and Servicemembers Are Out*, 25 U. RICH. L. REV. 93, 107-10 (1990).

[261] Howland, *supra* note 255, at 115; Tomes, *supra* note 259, at 107.

[262] Howland, *supra* note 255, at 115.

[263] Tomes, *supra* note 260, at 108-9.

community that make it more similar to the civilian society may impact on its authoritarian and hierarchical control structure, but will have little impact on the battlefield.[264]

Sociologists have compiled considerable data in support of the theory that "primary groups" in combat mean more to soldiers than other extrinsic factors such as love of country, ideology, and externally imposed military discipline.[265] It is oversimplified, however, to assert that external disciplinary controls are relatively unimportant in combat environments, and that challenges to those controls through adjudication will not undermine combat effectiveness. Rather, the sociologist Morris Janowitz points out that effective primary groups *arise* from both the larger military as well as civilian communities, and that primary groups can be highly cohesive yet nevertheless impede military success.[266]

Military success is at its most optimal level when there is a strong link between the formal authority's standards and those of the primary group.[267] When formal authority gives way (as when units disintegrate during mutiny, mass flight, or massacre) the primary groups seem to disintegrate as well. Soldiers become mobs, whether *en masse* refusing to obey orders, blindly fleeing before an advancing foe, or turning into mass murderers.[268]

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[264] Howland argues for allowing service members to sue one another for torts committed incident to military service. Howland, *supra* note 255, at 94-5. Tomes contends that service members should be allowed to sue the government for torts. Tomes, *supra* note 260, at 133-4.

[265] The two most famous studies regarding unit cohesion based upon loyalty to "primary groups" are Morris Janowitz's and Edward Shils' study of the Wehrmacht in World War II, and Samuel Stouffer's immense study of World War II American servicemen. Morris Janowitz & Edward Shils, *Cohesion and Disintegration in the Wehrmacht in World War II*, 12 PUB. OPINION Q. 284 (1984); SAMUEL STOUFFER, et.al., THE AMERICAN SOLDIER (1949).

[266] JANOWITZ, *supra* note 259, at 78.

[267] *Id.*

[268] This is the theme developed by Bruce Allen Watson in *When Soldiers Quit: Studies in Military Disintegration* (1997), which studies military failures and breakdowns as disparate as the French Army mutinies of 1917, the disintegration of the 106th Infantry Division during the Battle of the Bulge in 1944, and the My Lai Massacre in 1968.

Asserting that either formal disciplinary controls are predominant in ensuring combat effectiveness, or conversely, that they are of little value, does not fully address the question. Rather the two are linked together. When they work in concert, military success is more attainable than when either is absent. Thus, if formal discipline remains a valid premise for the "separate community" doctrine in general, the next question to be answered, in light of defending the Army's extremist policy, is whether the military's unique formal disciplinary system help resolve racial problems, and what effects extremism would have in that system.

How does being a "separate community" enable the military to perform its mission? -- The "institutional/occupational" (I/O) thesis, first developed by the sociologist Charles Moskos, helps to understand the notion of the military as a deliberately separated society and in understanding the Army's success at racial integration.[269] According to the I/O thesis, the leaders of an "institutional" organization legitimate the organization in terms of values and norms that deliberately devalue individual goals and self-interests for the higher goals of the organization.

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[269] Moskos developed this thesis in the late 1970's when the military shifted to an all-volunteer force. For the seminal article propounding the I/O thesis, *see* Charles C. Moskos, *From Institution to Occupation: Trends in the Military Organization*, 4 ARMED FORCES & SOCIETY 41 (1977). The I/O thesis was the subject of an international conference held at the Air Force Academy in 1985. The papers presented there made up the book *See Acknowledgements* to THE MILITARY: MORE THAN JUST A JOB? xi (Charles C. Moskos & Frank R. Wood eds. 1988). Studies on unit cohesion in the military have cited Moskos' I/O thesis as well. In a study by the Defense Management Study Group on Military Cohesion, the authors state:

> Charles C. Moskos, Jr., has captured the imagination of many people with his writings on an alleged shift of the military from an "institution" (where membership is legitimated in terms of a "calling or profession, which implies self-sacrifice and moral commitment) to an "occupational" model (where membership is legitimated in terms of the economic marketplace; that is, duties are performed in exchange for material benefits). If Moskos is correct, the shift from an institutional to an occupational model has important implications for military cohesion.

Marketplace considerations, such as supply and demand, legitimate an "occupational" organization.[270] Occupational organizations tend to rely more on extrinsic motivation (such as increased pay for skills); institutional organizations rely more on intrinsic motivation (such as value based motivations, like, patriotism and self-pride).[271] Institutions are also far more hierarchical than occupations. In institutions, for example, aggrieved parties do not resolve those grievances themselves (for example, strikes) but address them through the institution's hierarchical structure.[272]

According to Moskos, the military has many of the features of an "institution," among them fixed terms of enlistment, inability to strike or to negotiate over wages, liability for twenty-four hour service, and being subject to military discipline.[273] These "institutional" features set the

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DEFENSE MANAGEMENT STUDY GROUP ON MILITARY COHESION, COHESION IN THE U.S. MILITARY 2 (1984). *See* Lieutenant Colonel WILLIAM DARRYL HENDERSON, COHESION: THE HUMAN ELEMENT IN COMBAT 57-60 (1985).

[270] Moskos states:

> An *occupation* is legitimated in terms of the marketplace. Supply and demand, rather than normative considerations, are paramount . . . . In a modern industrial society, employees usually enjoy some voice in the determination of appropriate salary and work conditions. Such rights are counterbalanced by responsibilities to meet contractual obligations. The cash-work nexus emphasizes a negotiation between individual (or workers' groups) and organizational needs. A common form of interest articulation is the trade union. The occupational model implies the priority of self-interest rather than that of the employing organization.

Charles C. Moskos, *Institutional and Occupational Trends in the Armed Forces*, *in* THE MILITARY: MORE THAN JUST A JOB? 16-19 (Charles C. Moskos & Frank R. Wood, eds. 1988).

[271] Moskos lists several basic traditional distinctions between occupational and institutional models. Among them are societal regard (institutional: esteem based on notions of service; occupational: prestige based on level of compensation); recruitment appeals (institutional: appeals to character and lifestyle; occupational: appeals to technical training and higher pay); and basis of compensation (institutional: rank and seniority; occupational: skill level and manpower shortages). *Id.* at 16.

[272] *Id. See* Hirschorn, *supra* note 213, at 218-19:

> The armed forces are an example of a rational bureaucracy: a hierarchical organization characterized by a specialized division of labor according to system and authority based on role rather than personality, in which each individual's role is to pursue goals established by the heads of the hierarchy through methods that they have calculated will attain these goals.

Id.

[273] Moskos, *Institutional and Occupational Trends in the Armed Forces*, *supra* note 270, at 16.

military apart from the civilian community. They also provide the basis for its distinct ability to impose discipline on its members.[274]

Two Supreme Court rulings on military jurisdiction illustrate the opposing institutional and occupational principles. In *O'Callahan v. Parker*,[275] the Supreme Court held that military courts-martial did not have jurisdiction for non-service connected offenses.[276] A service member who committed an offense off-duty, off-post, and not connected to military performance would fall under exclusive civilian criminal jurisdiction.[277] As Moskos states: "The net effect of [*O'Callahan* and similar decisions] was to move toward a legal redefinition of the military from one based on traditional status toward one more consistent with generally accepted contract principles."[278] Relying in large part on the doctrine of the military as "separate community" with its particular need for discipline, the Supreme Court overturned *O'Callahan* in *Solorio v. United States*[279] and permitted court-martial jurisdiction over active duty servicemembers regardless of status, time, or location.[280]

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[274] Moskos does not assert that the military is "purely" institutional or the civilian community purely occupational. Rather he assumes:

> [A] continuum ranging from a military organization highly divergent from civilian society to one highly convergent with civilian structures . . . . Concretely, of course, military forces have never been entirely separate or entirely coterminous with civilian society, but the conception of a scale, along which the military more or less overlaps with civilian society, highlights the ever-changing interface between the armed forces and society.

Moskos, *Institutional and Occupational Trends in the Armed Forces*, *supra* note 269, at 15.
For critiques of the I/O thesis *see* Morris Janowitz, *From Institution to Occupation: The Need for Conceptual Clarity*, ARMED FORCES & SOCIETY, VOL. 4, 41-50 (1977); John H. Faris, *The Social Psychology of Military Service and the Influence of Bureaucratic Rationalism*, *in* THE MILITARY: MORE THAN JUST A JOB? 57-75 (Charles C. Moskos & Frank R. Wood, eds. 1988).
[275] 395 U.S. 258 (1969).
[276] *Id.*
[277] *Id.*
[278] Moskos, *Institutional and Occupational Trends in the Armed Forces*, *supra* note 270, at 22.
[279] 438 U.S. 435 (1987).

The I/O thesis helps in understanding the military's, and especially the Army's, success at racial integration.[281] Before President Truman's compelling desegregation by Executive Order 9981 on 26 July 1948,[282] task force studies indicated that most military officers did not want such a change.[283] Despite such opposition, once ordered, integration came relatively quickly to the ranks. By the mid-1960s, the military, compared to the rest of American society, was not only desegregated, but also remarkably racially harmonious.[284] The late Vietnam-era and post-draft military of the 1970s had serious racial problems.[285] By the time of Desert Shield/Storm, however, racial integration of the Army seemed complete, with approximately thirty percent of the Army black.[286]

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[280] *Id.*

[281] Charles Moskos, *Success Story: Blacks in the Army*, ATLANTIC MONTHLY, May 1986, at 64. "Blacks occupy more management positions in the military than they do in business, education, journalism, government, or other significant sections of American society. The armed forces still have race problems, but these are minimal compared with the problems that exist in other institutions, public and private." *Id.*

[282] Exec. Order No. 9,981, 3 C.F.R. 722 (1943-1948) *reprinted in* 1948 U.S.C.C.A.N. 2673.

[283] John Sibley Butler, *The Military as a Vehicle of Social Integration: The Afro-American Experience as Data, in* ETHNICITY, INTEGRATION, & THE MILITARY 39 (Henry Dietz, Jerrold Elkin, and Maurice Roumani, eds. 1991); *see* CHARLES MOSKOS & JOHN SIBLEY BUTLER, ALL THAT WE CAN BE 30 (1996).

[284] According to Moskos and Butler:

> By the mid-1950s, a snapshot of a hundred enlisted men on a typical parade would have shown twelve black faces; integration had become a way of Army life. At a time when Afro-Americans were still arguing for their educational rights before the Supreme Court and marching for social and political rights in the Deep South, the Army had become desegregated with little fanfare.

MOSKOS & BUTLER, *supra* note 283, at 31.
Moskos and Butler divide the integration of the military into two phases: (1) organizational integration which put an end to formal discrimination in the ranks (recruitment, training, and living arrangements); and (2) leadership integration, which came after the civil rights movements of the 1960's and in which different races (particularly black) were brought into leadership roles. *Id.* at 31.

[285] The problems in the Army, however, were not just confined to race. Moskos and Butler see the many problems in the military during and after the Vietnam War (e.g., racial strife, indiscipline, "fragging" of superiors) as part of a general unraveling of the Army during that time. MOSKOS & BUTLER, *supra* note 283, at 32-3.

[286] *Id.* at 32-35. There have been other studies to indicate that racial problems remain. In 1994, the House Armed Services Committee Task Force on Equality of Treatment and Opportunity in the Armed Services provided a report on the equal opportunity climate in the military. According to the Task Force report, its findings comprised "a complex web of good news and bad news." While only one of nineteen military installations reported a high level of racial tension, at nearly every facility minority members expressed concerns. Specifically, concerns about "disproportionate discipline, both in frequency and severity," the prevalence of "good old boy" networks, a fear to express racial concerns by junior leadership, and an overemphasis on sexual harassment training at the expense of training on racial issues. HOUSE ARMED SERVICES COMMITTEE STAFF TASK FORCE ON EQUALITY OF TREATMENT & OPPORTUNITY IN THE ARMED SERVICES, 103RD CONG., "AN ASSESSMENT OF RACIAL DISCRMINATION IN THE

The sociologist John Sibley Butler points out two reasons for this relatively rapid integration.[287] First, the institutional and hierarchical nature of the military advances integration. Because of the hierarchical structure, decisions regarding race do not have to accommodate individual interests of military personnel.[288] Rather, the institution's greater good trump personal desires.[289] Second, the military as a "separate community" can create its own values different from those of the society at large.[290] The military is a self-contained entity. An individual's values can come from within it and do not have to reflect the outside culture.[291] The military hierarchy promoted desegregation as a value to its members and continues to promote racial integration. As a separate community, it had and continues to have the ability to create its own values. The military, therefore, transitioned to racial integration faster and continues to have fewer racial problems than civilian society.[292]

The institutional character of the military also helps to explain the so-called "contact hypothesis" proffered by the sociologist Samuel Stouffer in his studies of soldiers during and

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MILITARY: A GLOBAL PERSPECTIVE" at 2-5 (1994). The North Carolina Branch of the NAACP appointed a task force to survey the racial climate at North Carolina military installations following the Fayetteville murders. The Task Force found no evidence of an organized white supremacist movement at the installations it visited. It did state, however, based upon anecdotal evidence, that reports of only 22 "skinheads" in the 82d Airborne Division were "unbelievably optimistic." Further, "the potential for (if not the reality of) organized racist or skinhead activities clearly exists" at Fort Bragg. NORTH CAROLINA STATE CONFERENCE OF BRANCHES, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE TASK FORCE ON COMMUNITY & MILITARY RESPONSE TO WHITE SUPREMACIST ACTIVITIES IN & AROUND MILITARY BASES, TASK FORCE REPORT 16 (1996).

[287] Butler, *supra* note 283, at 44-5.

[288] *Id.* According to Butler: "[A] factor interacting strongly with the separateness of military society to produce the transformation was the bureaucratic hierarchical power structure of the organization." *Id.* at 45.

[289] *Id.*

[290] "Although the military is a part of America and its social structure, it has traditionally been a separate entity . . . . [T]he net effect of becoming a part of military organizations is to be separated from one's past life both physically, and, to an extent, psychologically." *Id.*

[291] *Id.*

[292] One of the many contrasts between civilian and Army life for blacks, as Moskos and Butler point out, is that blacks in the Army are three times more likely to say that race relations are better than their civilian counterparts. MOSKOS & BUTLER, *supra* note 283, at 5.

following World War II and which contemporary scholars still cite.[293] Stouffer found that, under certain conditions, the more contact individuals from different races had with each other, the more positive their attitudes toward each other would be.[294] The four conditions he found necessary were: (1) the authority must positively sanction the interaction; (2) the group must have commonly shared goals; (3) the contact is by individuals with equal status; and (4) the interaction must be cooperative, prolonged, and cover a wide range of activities.[295] These four conditions explained the relatively successful integration of the military, especially at basic entry levels. The conditions there were very controlled, as compared to the far less controlled attempts in the civilian world at large.[296]

In an institutional organization such as the military, the conditions that give rise to the contact hypothesis occur with greater ease. A hierarchical authority sanctions (in the case of the military, mandates) the interaction between the individuals. The goals of unit success subsume individual ones. Especially at entry level, all are the same rank, receive the same pay, and undergo the same training. Finally, as a self-contained society, the members all live together and work for sustained periods on common tasks.[297]

The reasons that justify the military as an institution and a "separate community" converge when dealing with racial extremism in the military. If the I/O thesis is tenable, then it appears

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[293] SAMUEL STOUFFER, ET. AL., 1 THE AMERICAN SOLDIER 549 (1949) *cited in* John Sibley Butler, *Race Relations in the Military*, *in* THE MILITARY: MORE THAN JUST A JOB? 120-121 (Charles C. Moskos & Frank R. Wood eds., 1988). Additional research conducted in the late 1970's supports Stouffer's hypothesis. *See* John Sibley Butler & Kenneth L. Wilson, *The American Soldier Revisited: Race and the Military*, 59 SOCIAL SCIENCE QUARTERLY 451-67 (1978).

[294] Butler, *supra* note 283, at 121.

[295] *Id.*

[296] *Id.*

[297] *See supra* pp. 60-3.

that an expansion of personal liberties in an organization erodes its institutional characteristics and aligns it more with an occupation.[298] Yet it appears that the foundations for the military's racial integration success is somewhat in the suppression of individual choices and rights that characterize an institution.[299]

If the institution's goal is racial integration, then in regard to decision making over race, the organization's needs and desires will take precedence over an individual's desires.[300] Furthermore, the organization will not only sanction but mandate racial interaction to achieve common goals. Especially at the entry level, the organization will provide a total system wherein the members will work and live together for sustained periods and learn the same values.[301] On the other hand, if the institution's goal is integration, but its policy is tolerant of racial extremism, the policy will tend to pull the organization toward the "occupational" end of the spectrum. In a policy relatively "tolerant" of racial extremism, an individual's autonomous desires (e.g., racial supremacy or separatism) take precedence over the organization's. The organization tolerates to a greater degree certain blatantly anti-institutional ideas, such as racial or ethnic prejudice, thus creating an alternative set of values from the institution itself.

The I/O thesis assists to conceptualize the "separate community" doctrine. It helps justify deference to both the Army's extremist policy and a particular commander's applications of that policy. But an "institution" or "occupation" is neither good nor bad in and of itself. An institution can have goals and foster values that many may consider immoral or unjust.

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[298] *See supra* pp. 61-3.
[299] *See supra* pp. 62-3.
[300] *See supra* p. 62.
[301] *See supra* pp. 62-3.

Furthermore, the American military operates within democratic traditions that stress individual rights, and these rights do not disappear when one enters the military.[302] Thus, a commander does not have unlimited deference. He can defend an extremist policy on the idea that the Army is a "separate community" and an institution. He can stress the need for command authority and the ability to sanction anti-institutional behavior. First Amendment concerns, however, still exist and create a tension with this idea of deference.

B. Two First Amendment Concerns

The previous section demonstrates why the Supreme Court should defer, as it generally does in other military areas, to the Army's policy on extremism. Two remaining questions, however, have possible constitutional ramifications.

First, what if a commander decides to prohibit a particular *type* of extremist speech or speech-related conduct? In *Goldman v. Weinberger*[303] and *Greer v. Spock*,[304] the Court deferred to military policies that focused on a broader range of speech/conduct rather than particular, partisan forms of communication.[305] The Army extremist policy, on the other hand, focuses

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[302] *See supra* note 209.
[303] 457 U.S. 503 (1986).
[304] 424 U.S. 828 (1976).
[305] In *Goldman,* the Court stated: "The Air Force has drawn the line essentially between religious apparel that is visible and that which is not, and we hold that those portions of the regulations challenged here reasonably and evenhandedly regulate dress in the interest of the military's perceived need for uniformity." Goldman v. Weinberger, 457 U.S. 503, 509 (1986). In *Greer*, the policy in question prohibited the distribution or displaying "of *any* publication, including newspapers, magazines, handbills, flyers, circulars, pamphlets or other writings, issued,

specifically on extremist activity and organizations. It especially focuses on those advocating gender and racial and ethnic intolerance.[306] The policy allows commanders wide latitude to prohibit expressions of those forms of extremism. Second, where does a commander cross constitutional boundaries by issuing an order that is so general that it may be vague and with only an ambiguous link to good order and discipline? Even with judicial deference, a policy or command order must not be vague or ambiguous.

To answer these questions, this article will first analyze the policy in light of the Supreme Court's holding in *R.A.V. v. City of St. Paul*[307] on "viewpoint-based" discrimination. Second, the article will discuss military courts' decisions on invalid orders and examine *Parker v. Levy*,[308] the Supreme Court's ruling on vague speech in the military.

1. "Viewpoint" Discrimination in Extremist Policy[309]

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published or otherwise prepared by any person, persons, agency or agencies . . . on the Fort Dix Military Reservation without prior written approval of the Adjutant General, this headquarters." Greer v. Spock, 424 U.S. 828, 831 (1976) [emphasis added]. As the Court stated in *Thorne v. Department of Defense*, a case involving the military's "Don't Ask, Don't tell" homosexual policy: "No case has explicitly defined the appropriate level of scrutiny to be applied in content based restriction on speech in the military context." Thorne v. Dep't of Defense, 916 F. Supp. 1358, 1369 (E.D. Va., 1996).

[306] AR 600-20, para. 4-12 (new policy), *supra* note 33, at para. 4-12C.2.C.

[307] 505 U.S. 377 (1992).

[308] 417 U.S. 733 (1974).

[309] In examining the current law regarding hate speech, this article acknowledges that the "absolutist" protections afforded by the Supreme Court to forms of hate speech derive from cases decided during and immediately after World War II that marked the "birth of a national policy on hate speech." Walker, *supra* note 229, at 76. The most important cases decided by the Court during this time involved the rights of Jehovah's Witnesses to distribute literature and promulgate views considered offensive, and not to have to salute or pledge allegiance to the flag. *See* Lovell v. Griffin, 303 U.S. 444 (1938); Schneider v. Irvington, 308 U.S. 147 (1938); Cantwell v. Connecticut, 310 U.S. 296 (1940); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943). Prior to these series of cases, the Supreme Court took a much less absolutist view of the protections afforded to offensive speech under the First Amendment. *See* Walker, *supra* note 229, pp. 1-61 (reviewing the Supreme Court positions prior to World War II).

The Supreme Court has held that the Constitution protects a whole range of speech-related conduct beyond oral and written communication.[310] Statutory prohibitions, however, on speech-related conduct continue to exist.[311] The Supreme Court limited these prohibitions in *R.A.V. v. City of St. Paul.*[312] In *R.A.V.*, a St. Paul, Minnesota ordinance prohibited the willful or negligent display of symbols such as Nazi swastikas and burning crosses for the purposes of arousing anger, alarm, or fear in others on the basis of "race, creed, color, or gender."[313] Writing for the court, Justice Scalia stated that the ordinance was "viewpoint-based discrimination" and, hence, unconstitutional.[314]

The lower court in *R.A.V.* held the ordinance constitutional, relying on the doctrine in *Chaplinsky v. New Hampshire.*[315] In *Chaplinsky*, the Supreme Court upheld a statute that prohibited so-called "fighting words."[316] In *R.A.V.*, the Supreme Court accepted the lower court's determination that the ordinance applied only to expressions considered to be so called

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[310] These include, for example, the right: to hold conventions (Keefe v. Library of Congress, 777 F.2d 1573 (D.C. Cir. 1985)); to canvas in political elections (Hynes v. Mayor of Ordell, 425 U.S. 610, 616-17 (1976); to contribute money to political causes (Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley, Ca., 454 U.S. 290, 298 (1981)); to solicit for money for political or other causes (Cornelius v. NAACP Legal Defense and Educ. Fund, 473 U.S. 788, 797 (1984)); to distribute literature (United States v. Grace, 461 U.S. 171, 176 (1983)); to picket (Carey v. Brown, 447 U.S. 455, 460 (1980)); and to hold peaceful demonstrations (NAACP v. Claiborne Hardware, 458 U.S. 866, 927 (1982)).

[311] Seventeen states, for example, have so-called "anti-mask" statutes that prohibit the wearing of masks, hoods, and disguises in public areas or on the private property of others without permission. These laws were passed following the advent of the KKK in the early 20th Century. Jeannine Bell, *Policing Hatred: Police Bias Units and the Construction of Hate Crimes*, 2 MICH. J. OF RACE & L. 421, 430-1 (1991).

[312] 505 U.S. 377 (1992).

[313] *Id.* at 381.

[314] *Id.*

[315] Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). The Supreme Court in that case upheld the statute that allowed the conviction of a Jehovah's Witness who called a city marshal a "damned Fascist" and a "G- - d - - - racketeer." *Id.* at 569. The Court, in upholding the statute announced that such utterances "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Id.* at 572. Such utterances, deemed "fighting words" are words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Id.*

[316] *Id.* at 572.

"fighting words."[317] Justice Scalia, however, stated that the St. Paul ordinance was unconstitutional because it "prohibits otherwise permitted speech solely on the basis of the subject the speech addresses."[318] The First Amendment does not permit "content discrimination" that bans only certain "fighting words" of a particular viewpoint.[319] Scalia distinguished such "viewpoint"-based speech prohibitions from other prohibitions upheld as constitutional:

> The proposition that a particular instance of speech can be proscribable on the basis of one feature (e.g., obscenity) but not on the basis of another (e.g., opposition to the city government) is commonplace, and has found application in many contexts. We have long held, for example, that nonverbal expressive activity can be banned because of the action it entails, but not because of the ideas it expresses - so that burning a flag in violation of an ordinance against outdoor fires could be punishable, whereas burning a flag in violation of an ordinance against dishonoring the flag is not. Similarly, we have upheld reasonable "time, place, or manner" restrictions, but only if they are "justified without reference to the content of the regulated speech.[320]

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[317] *R.A.V.*, 505 U.S. at 381 (citing *Chaplinsky*, 315 U.S. at 572). The rationale behind banning fighting words was based upon the reaction they provoke. They trigger an "automatic unthinking reaction, rather than a consideration of an idea" and thus, the Court did not consider them within the realm of protected speech, since they are essentially non-communicative. *Id.* As one commentator has pointed out, however, the "fighting words" doctrine originally focused "primarily on the content of the communication without closely examining the context within which it was uttered." LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-10 at 617 (1978). The doctrine was modified in subsequent cases in which the Supreme Court distinguished language that may provoke an unthinking reaction but, nevertheless, was the communication of an idea. In *Cohen v. California*, for example, the Court held that the words "F--- the draft" on a jacket were *not* fighting words: "One man's vulgarity is another man's lyric," said Justice Douglas. Cohen v. California, 403 U.S. 15, 25 (1971).

[318] *R.A.V*, 505 U.S. at 381.

[319] *Id.*

In the ordinance, the prohibition *only* applied to content- or viewpoint-based words or symbols. Specifically, it applied to those that aroused anger, alarm, or fear "on the basis of race, color, creed, religion, or gender."[321] The ordinance did not cover other groups, such as persons of a certain political persuasion, union members, or homosexuals.[322] According to Scalia, "[t]he First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects."[323]

R.A.V. has had a significant impact on laws proscribing speech–particularly on campus speech codes and hate crime legislation.[324] Commentators have criticized it for being confusing,[325] for advancing an agenda harmful to minorities under the guise of viewpoint-discrimination analysis,[326] and for defying reasonable and normal legislative practice.[327]

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[320] *Id.* at 385.
[321] *Id.*
[322] *Id.* at 391.
[323] *Id.*
[324] Between 100-200 colleges and universities have various hate speech policies. Several of these have been modified in wake of *R.A.V.* Jonathan M. Holdowsky, Note, *Out of the Ashes of the Cross: The Legacy of R.A.V. v. City of St. Paul*, 30 N. ENG. L. REV. 1115, 1173 (1996). *See* IOTA XI Chapter of Sigma Chi Fraternity v. George Mason Univ., 993 F.2d 386 (4th Cir. 1993) as an example of a challenge to a university hate speech policy. New Jersey's hate crime statute was declared unconstitutional because of *R.A.V.*, and the New Jersey State Senate subsequently rewrote its hate crime bill. State v. Vawter, 642 A.2d 349 (N.J. 1994).
[325] *See* Holdowsky, *supra* note 324, at 1165 (criticizing *R.A.V.*'s failure to answer whether it requires that the class of speech be proscribable before determining whether the particular law falls under an exception); Elena Kagan, *Regulation of Hate Speech and Pornography After R.A.V.*, 60 U. CHI. L. REV. 873, 878-9 (1993) (criticizing the distinction between viewpoint and harmed based analyses as fictive).
[326] *See* Steven H. Shiffrin, *Racist Speech, Outsider Jurisprudence, and the Meaning of America*, 80 CORNELL L. REV. 43 (1994).
[327] "The notion that a state may not differentiate harms presented by speech, especially when the expression is not protected, contradicts the reasonable expectations that regulating objections may be pursued piecemeal under such circumstances." Donald E. Lively, *Racist Speech Management: The High Risks of Low Achievement*, 1 VA. J. SOC. POL'Y & L. 1, 27 (1993).

R.A.V. has garnered admiration as well. Courts have applied it to a variety of speech across the political spectrum, from a hate crime statute[328] to a decision by transit authorities not to run advertisements by AIDS action committees.[329] As opposed to more vague standards, the restriction on "viewpoint-based" discrimination, in the words of one commentator, "is a concept of real force and influence."[330] The *R.A.V.* analysis forces a close inspection of speech, even presumably unprotected speech.[331] It also refocuses the rationale for the prohibition of that speech on the *consequence* of the speech, rather than the speech itself.[332]

R.A.V. creates concerns about speech and conduct prohibitions under the Army's extremist policy. *Army Regulation 600-20*, para. 4-12 explicitly defines, in part, "extremist activity or organizations" as "ones that advocate racial, gender, or ethnic hatred or intolerance [and]; advocate, create, or engage in illegal discrimination based on race, color, sex, religion, or national origin."[333] The policy then lists six explicit prohibitions.[334] It also permits commanders to take further action to prohibit other forms of speech and conduct.[335] The Army's policy and a

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[328] *See* State v. Vawter, 642 A.2d 349 (N.J. 1994); State v. Sheldon, 629 A.2d 753 (Md. 1993) (State Supreme Courts in both states held that the state hate crimes statute were unconstitutional based upon *R.A.V.*).

[329] *See* AIDS Action Comm. of Mass. v. Metropolitan Boston Transp. Auth., 42 F.3d 1 (1st Cir. 1994) (Metropolitan Boston Transportation Authority's decision not to run advertisements produced by AIDS Action Committee on the basis that they were sexually explicit was viewpoint based discrimination, given that it allowed blatantly exploitative language and photographs featuring women in sexually suggestive manner). *See also* Gay & Lesbian Bisexual Alliance v. Pryor, 110 F.3d. 1543 (11th Cir. 1997) (University of Alabama's decision not to fund gay/lesbian groups because sodomy was illegal under Alabama was viewpoint based discrimination).

[330] "[A]s opposed to "rational relation" tests "rarely failed by the most outlandish law." George G. Size & Glenn R. Britton, *Is There Hate Speech?: R.A.V. and Mitchell in the Context of First Amendment Jurisprudence*, 21 OHIO N.U. L. REV., 913, 924 (1995).

[331] Edward J. Eberle, *Hate Speech, Offensive Speech, and Public Discourse in America*, 29 WAKE FOREST L. REV, 1135, 1152-3(1994). Eberle lists three important functions of *R.A.V.*: (1) the method serves as a valuable tool for close inspection of what speech should be protected; (2) it serves as a tool for applying the First Amendment even in presumably unprotected areas; and (3) it forces judges, prosecutors, and lawmakers to focus on what is relevant and worth protecting under the First Amendment. *Id.*

[332] *Id.*

[333] AR 600-20, para. 4-12 (new policy), *supra* note 33, para 4-12C.2.A.

[334] *Id.* para. 4-12C.2.

[335] *Id.* para. 4-12C.2.C.

commander's application of it could constitute a form of viewpoint-based prohibition, similar to the St. Paul Ordinance, since they focus on an unpopular, *particular* type of speech.

There are two responses to this challenge, apart from the Court's deference to military policy. The first response is the Army's general policy itself; the policy does not exclusively select particular viewpoints. *Army Regulation 600-20* has a *third* definition of "extremist activity and organizations." It defines these organizations and/or activities as those that "advocate the use of [force] or use force or violence or unlawful means to deprive individuals of their rights under the United States Constitution or the laws of the United States, or any state, by unlawful means."[336]

The focus of this definition is on racial, ethnic, religious, and gender intolerance. This does not mean the policy excludes other forms of extremism. The policy could potentially include extremists of *any* political affiliation if they use or advocate violence or "unlawful means" to deprive others of rights under the Constitution, or federal and state laws.[337] This third definition is broad enough to encompass a much greater range of speech-related conduct than the *R.A.V.* ordinance. For example, gangs whose motivation appears to be to fight other gangs (for example, SHARPs) could be considered "extremist" since they advocate or use violence against racist skinheads.

The second response concerns specific applications of the policy. The Supreme Court has held that even viewpoint-based restrictions, in certain contexts, are constitutional. Specifically,

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[336] *Id.* para. 4-12C.2.A.
[337] *Id.*

the First Amendment permits regulating airline advertising,[338] banning the promotion of casino gambling,[339] and prohibiting adult movie theatres in certain residential areas.[340] In each of these cases, the statute or ordinance focused on a select class (airlines, casino owners, and adult theatre proprietors) and proscribed their speech or speech-related conduct. In *R.A.V.*, Justice Scalia provides bases for such restrictions.[341] The relevant basis for purposes of the Army's extremist policy concerns speech's "secondary effects." If the restriction of the speech is justified "without reference to the speech," but in reference to its effects, the restriction can be upheld.[342]

What constitutes a "secondary effect" is somewhat contextual. The Supreme Court does require more than the "emotive impact" of the speech on the listener.[343] The speech must have another impact.[344] In *R.A.V.*, Scalia used two examples. First, a state could prohibit only those

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[338] Morales v. Trans World Airlines, Inc., 504 U.S. 374 (1992).
[339] Posodos v. Puerto Rico Assoc., 478 U.S. 328 (1995).
[340] City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986).
[341] The first basis for an exception is when the reason for the discrimination is the same reason that the "entire class of speech is proscribable." Therefore, the federal government can single out threats against the President and make them illegal *because* such threats when against the President have "special force." R.A.V. v. City of St. Paul, 505 U.S. 377, 388 (1992). The second basis is that the "secondary effect" of the speech is the rationale for the restriction, not the content of the speech itself. *Id.* at 388. Scalia leaves open the possibility for other bases as well: "[I]t may not even be necessary to identify any "neutral" basis, so long as the nature of the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot." *Id.* at 390. For purposes of examining the Army's extremist policy, this article focuses on the "secondary effects" rationale as the basis that provides justifications for the policy and local implementations of it. Analyzing speech proscriptions under this rationale focuses on "effects." In the military context, this is easily explained in terms of impact on morale and good order and discipline. While it is possible to examine extremism, and in particular white supremacism, in relation to the "entire class" rationale, it is more conceptually difficult because the focus is not on easily understood ideas such as good order and discipline but more on the nature of the proscribed speech itself.
[342] *R.A.V.*, 505 U.S. at 389. *See Renton*, 475 U.S. at 48. In *Renton*, the Supreme Court sustained a municipal ordinance prohibiting adult theaters within a thousand feet of schools, parks, churches, and residential neighborhoods. Renton focused on the "secondary effects" of such theaters: uniquely among businesses, created negative economic consequences in communities where they were present. *Renton*, 475 U.S. at 48-9.
[343] *R.A.V.*, 505 U.S. at 394. Thus, St. Paul's argument that the ordinance intended to protect minority victimization failed because it focused on victim's reactions. *See* Thorne v. Department of Defense, 916 F. Supp. 1358 (E.D. Va., 1996).
[344] *R.A.V.*, 505 U.S. at 389. The Supreme Court discussed this in *Boos v. Berry*. In *Boos*, the Supreme Court held unconstitutional a District of Columbia code provision that prohibited the display of any sign within 500 feet of a foreign embassy if the sign tended to bring that government into "public odium" or "public disrepute." Boos v. Berry, 485 U.S. 312, 315 (1988). The Court rejected the "secondary effects" argument brought by the District of

obscene live performances involving minors.[345] Second, a law could prohibit sexually derogatory words that also violate Title VII's general prohibition against sexual discrimination in employment practices.[346] In both cases, the focus is not on the speech and conduct, but its effects. The proscriptions' purposes are not to ban speech, but to protect children and prevent illegal sex discrimination.

The secondary effect doctrine may appear limited concerning so-called hate crimes and hate speech legislation. States have been unsuccessful basing such statutes on secondary consequences.[347] Rather, in order to avoid the *R.A.V.* viewpoint discrimination analysis, some states have drafted (or redrafted) their statutes. These new statutes do not focus on viewpoints. Instead, they are neutral proscriptions focusing on threats or acts of violence.[348]

Columbia ("our international law obligation to shield diplomats from speech that offends their dignity"). Justice O'Connor discussed the doctrine as follows:

> To take an example close to *Renton*, if the ordinance there was justified by the city's desire to prevent the psychological damage it felt was associated with adult movies, then analysis of the measure as a content-based statute would have been appropriate. The hypothetical regulation targets the direct impact of a particular category of speech, not a secondary feature that happens to be associated with that type of speech.

Id. at 321. For an application of the "secondary effects" rationale to the military, *see Thorne*, 916 F. Supp. at 1361. In that case, the court rejected the argument that the "Don't ask, Don't tell" military homosexual policy is not aimed at the speech but at the speech's secondary effects, based upon the disruption to "unit cohesion." "This argument is unpersuasive, it stretches the "secondary effects doctrine" too far." The court did not indicate why the argument stretches the doctrine "too far," but rather cited other cases as examples of the Supreme Court refusing to apply the doctrine. *Id.* at 1368.

[345] *Id.*

[346] *Id.*

[347] In *State v. Sheldon*, Maryland argued that the prohibition on cross-burning aimed at the secondary effect of fire hazards to property owners. The Maryland Supreme Court rejected this argument. The court noted that the legislative history of the statute did not aim to protect against fire hazards, rather that the State clearly looked to prohibit the "primary effect" of cross burning, "the political idea it expresses." State v. Sheldon, 629 A.2d 753, 761 (Md. 1993).

[348] Richard J. Williams, Jr., Comment, *Burning Crosses and Blazing Words: Hate Speech and the Supreme Court's Free Speech Clause Jurisprudence*, 5 SETON HALL CONST. L.J. 609, 662-3 (1995). New Jersey's statutes in this area are a good example of viewpoint based proscriptions redrafted to viewpoint neutral ones. One of the original statutes stated that:

> A person is guilty of a crime . . . if he purposely, knowingly, or recklessly puts or attempts to put another in fear of bodily violence by placing on public or private property a symbol, an object, a

If *R.A.V.* required content neutral proscriptions in statutes, it would void much hate crime legislation; but *R.A.V.* does not require this.[349] At least one state court cited the "secondary effects" doctrine in upholding hate crime statutes.[350] The tenability of the secondary effect doctrine to hate crimes has special relevance to the Army's extremist policy and its applications. If the Army could not proscribe speech or activity regarding specific groups, it would essentially have no viable extremist policy. In fact, a commander would have to create a unit policy so broad and indefinite in its meaning as to be vague or invalid.

It may appear that in most cases, one can easily identify extremist speech or activity and thus its secondary effect. But other cases may be more ambiguous. In certain cases, it could be argued that one person's extremist symbol is another's symbol of honor and pride. In such cases, the secondary effect doctrine may help clarify the issue for a commander.

> characterization, appellation or graffiti that exposes another to threats of violence, contempt or hatred on the basis of race, color, creed, or religion, including, but not limited to a burning cross or Nazi swastika.

N.J. STAT. ANN. § 2C:17-3 (West 1996).
Following *State v. Vawter*, the New Jersey legislature passed a new statute with the same language except removing the phrase "contempt or hatred on the basis of race, color, creed, or religion, including, but not limited to a burning cross or Nazi swastika." N.J. STAT. ANN. § 2C:33-11.

[349] Nowhere in the opinion does Scalia state that St. Paul had to make the proscribed language a threat of violence or other criminal activity. According to one commentator, this is a flaw of *R.A.V.* "[I]ts failure to identify a particularly intolerable mode of communication such as threats of violence or intimidation" that might be utilized as a basis for justifying content–or viewpoint—based discriminations on speech and speech-related conduct. Williams, *supra* note 348, at 650.

[350] *See, e.g.*, People v. Stephen S., 31 Cal. Rptr. 2d 644, 648 (Ct. App. 1994). In that case, the California Appellate Court stated that the hate crimes statute proscribed targeted cross burning on one's private property, since the focus was on the "infliction upon a specific victim of immediate fear and intimidation and a threat of specific harm–rather than the racist message conveyed." *Id.*

The following is an example of *R.A.V.* analysis and the secondary effect doctrine in a military context. Relying on the command authority language in the Army's extremist policy,[351] an infantry brigade commander prohibits soldiers from displaying Confederate flags or regalia on the walls in their barracks rooms, even if the flags or regalia cannot be viewed from outside the rooms. The commander has thus proscribed a particular "viewpoint." He prohibited no other form of speech or speech-related conduct–soldiers can display other flags or regalia. The unit has no reported racial problems. No reported extremist activity has occurred on the post. Soldiers who displayed the flags and regalia claim that they did it not for white supremacist or racist reasons, but to express their Southern heritage, and within the privacy of their rooms. The commander's response is that he fears that the flags would offend other soldiers, in particular black soldiers.

A commander has authority to proscribe speech and activities, but the proscription in this example is clearly viewpoint-based. The commander expressly prohibited the speech because of its emotive impact on others. He cannot rely on that emotive impact as a "secondary effect" that could otherwise justify the policy.[352] Furthermore, the soldiers who display the flags claim that they do not advocate white supremacy or racial extremism. Therefore, they consider it an arbitrary exercise of command authority, with a dubious connection to the Army policy. One

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> Commanders have the authority to prohibit military personnel from engaging in . . . activities that the commander determines will adversely affect good order and discipline within the command. This includes, but is not limited to, the authority to order the removal of symbols, flags, posters, or other displays from barracks . . . .

AR 600-20, para. 4-12 (new policy), *supra* note 33, para. 4-12C.2.C.

352 For purposes of analytical clarity in the example above, this article leaves out the idea of judicial deference discussed earlier in this paper. *See supra* pp. 46-68 and accompanying notes. Judicial deference is, of course, a major concept that would factor into any analysis regarding the legality of a military policy. Yet if the commander can only provide as his rationale a desire not to offend sensibilities of other soldiers, then the commander has not articulated the very reason for deference–the need for order and discipline so a unit can be combat effective.

may argue that the judiciary gives a commander great deference in establishing policies for his unit. This is indeed true, but the basis for that deference is the commander's need for good order and discipline. Here, the commander has made no argument that unit discipline is affected.[353] His concern is about offending individual sensibilities.[354]

Change the facts in the above example. The infantry brigade is on alert. A soldier in the brigade has made an equal opportunity complaint claiming that his company chain-of-command is racist. A fight between a black soldier and a white soldier occurred in the barracks. It appears racially motivated. Soldiers have seen white supremacist recruiting posters displaying the Confederate flag around post. The commander has noticed what he considers a dangerous racial polarization proceeding in his unit. In this particular context, a commander issues an order similar to the one above. Here, however, his concern is not individual sensibilities, but the

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[353] Of course, a commander *can always* make the "good order and discipline" argument. The problem arises, however, when the definition of what good order and discipline is not statutorily imposed (e.g., disobedience or disrespect to a superior commissioned officer), but reliant on the individual commander. This article discusses the limits of such authority later. *See infra* pp. 80-85. If, on the other hand, the offending of sensibilities were *statutorily* proscribed, that would in itself qualify as a "secondary effect" under *R.A.V.* Justice Scalia cites the example of sexually derogatory language that "may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices, 42 U.S.C. §2000e-2; 29 C.F.R. §1604.11 (1991)." R.A.V. v. City of St. Paul, 505 U.S. 377, 389 (1992). In the example above, a Title VII argument has little force because the commander's prohibition extends beyond the workplace to soldiers' barracks rooms.

[354] In their book, *All That We Can Be*, Charles Moskos and John Sibley Butler discuss why the military does not have explicit "hate speech" criminal codes:

> In short, the military code seeks only to limit utterances likely to undermine good order and discipline, not to deal with statements that hurt feelings or cause outrage. Regulations narrowly drawn to regulate disruptive conduct–not its symbolic content – have credibility and authority not usually enjoyed by promulgators of university anti-hate codes, for example. At the same time, since the Army does not assume responsibility for protecting Afro-Americans from all racial slights and hard feelings, its codes presume that black soldiers possess an implicit fortitude and self-control.

MOSKOS & BUTLER, *supra* note 283, at 53.

Moskos and Butler point out that this more limited approach is the result of many factors, among them that blacks in the Army trust the superiors much more than their civilian counterparts trust their civilian superiors. Also, the strong presence of black leadership in Army units, particularly at the senior NCO level. *Id.* at 53-6. The important point is to ensure the policy focuses on the mission at hand, which is unit combat effectiveness. "The Army treats race relations as a means to readiness and combat effectiveness–not as an end to itself." *Id.* at 53.

"secondary effect" on good order and discipline in his unit. He can articulate a powerful rationale for prohibiting the speech. His action, strongly linked to preserving good order and discipline, deserves judicial deference.[355]

These examples illustrate that *R.A.V.*'s "secondary effect" doctrine actually provides some clarity to the Army's extremist policy and its specific implementation by commanders. The judiciary gives the military and its commanders great deference in policymaking, and the extremist policy gives a commander great discretion in restricting extremist speech and conduct.

Yet, *R.A.V.* forces a commander to articulate the impact of the viewpoint-based speech on good order and discipline in the unit. If he can only articulate that impact primarily in terms of offending sensibilities, then there is no underlying rationale for judicial deference to the commander's discretion.[356] In section C, this article proposes a method to assist a commander to articulate that impact.[357]

2. Illegal Orders, Vagueness, and the Extremist Policy

If *R.A.V.* creates an "inner" boundary, is there an "outer" boundary as well? In other words, might a commander issue a local policy, order, or regulation that is so vague and so tenuously

[355] This article makes the contrasts in these two scenarios sharp to illustrate the application of *R.A.V.* analysis in a military setting.

[356] While the Supreme Court case has not made rationality the standard of review for command policy, in the most deferential holding, *Goldman v. Weinberger*, the Court held that the policy regarding the wear of religious garb could be upheld in part because the Air Force asserted a rational basis for it. Goldman v. Weinberger, 475 U.S. 503 (1986).

connected to good order and discipline that it is unconstitutional or illegal? Part IV of the *Manual for Courts-Martial* sets forth the standard for an order's legality:

> The order must relate to military duty, which includes all activities reasonably necessary to accomplish a military mission, or safeguard or promote the morale, discipline, and usefulness of members of a command and directly connected with the maintenance of good order in the service. The order may not, without such a valid military purpose, interfere with private rights or personal affairs . . . . Disobedience of an order which has for its sole object the attainment of some private end, or which is given for the sole purpose of increasing the penalty for an offense which it is expected the accused may commit, is not punishable under the article.[358]

Hence, a military court held that orders are invalid if they only "tangentially further a military objective, are excessively broad in scope, are arbitrary and capricious, or needlessly abridge a personal right."[359] Another military court held that a policy was unlawful, stating that

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[357] *Infra* pp. 85-88.

[358] MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. IV, para. 14c(2)(a)(iii) (1998).

[359] United States v. Padgett, 45 M.J. 320 (C.G. Ct. Crim. App., 1996) (court held that an order forbidding the accused to have any contact with a fourteen year old girl with whom he was allegedly romantically linked was unlawful). The court noted that a primary reason that it found the order unlawful was that the nature of the relationship was unclear. *Id.* at 522. It further stated:

> [W]e wish to make clear that an order which effectively requires a service member to cease all contact with another individual is not, per se, patently illegal. As long as such an order furthers the valid military purposes of maintaining good order and discipline and/or protecting the well-being of unit members, such orders will be upheld.

Id.

no soldier could have any alcohol in his system or on his breath during duty.[360] Other examples of unlawful orders include a Navy policy prohibiting loans for profit between service members without the commander's consent,[361] "no contact" orders,[362] and an order to file complete personal business reports with a commander.[363]

These cases propose that orders that are tenuous to good order and discipline can be unlawful. Based on these cases, a court might invalidate an unclear extremist order. What would be the test for an unclear policy (that had the effect of an order) on extremism? The Supreme Court case, *Parker v. Levy*, sets forth the test.[364]

Captain Howard Levy was an Army physician stationed at Fort Jackson, South Carolina during the Vietnam War.[365] Levy disobeyed the hospital commandant's order to train Special Forces soldiers.[366] He also made several public statements to enlisted personnel at the post. He publicly stated that the United States should not be involved in the Vietnam War; that he would refuse to go to Vietnam if ordered to do so; that black soldiers should refuse to go to Vietnam; and that Special Forces soldiers were liars, thieves, and killers of peasants and murderers of women and children.[367] A general court-martial convicted Levy of disobeying the hospital

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[360] United States v. Green, 22 M.J. 711 (A.C.M.R. 1986).
[361] United States v. Smith, 1 M.J. 156 (C.M.A. 1975).
[362] United States v. Flynn, 34 M.J. 1183 (1992) (order to cease contact with female airman involved in suspected fraternization invalid; United States v. Button, 31 M.J. 897 (A.F.C.M.R. 1990) (order to accused to stay away from family quarters and to have no contact with stepdaughter invalid); United States v.Wine, 28 M.J. 688, 690 (A.F.C.M.R. 1990) (order to have no contact with dependent wife of another servicemember invalid); United States v. Wysong, 26 C.M.R. 29 (1958) (order not to speak with other soldiers in company involved in an investigation except in the line of duty invalid).
[363] United States v. Milldebrandt, 25 C.M.R. 139 (1958).
[364] Parker v. Levy, 417 U.S. 733 (1974). For an historical as well as legal review of the court-martial, *see* Robert N. Strassfield, *Vietnam War on Trial: The Court-Martial of Dr. Howard B. Levy*, 1994 WISC. L. REV. 839 (1994).

[366] *Parker*, 417 U.S. at 733.
[367] *Id.*

commandant's order. It also convicted him of violating UCMJ articles 133 (conduct unbecoming an officer and gentleman) and 134 (conduct prejudicial to good order and discipline) for making the public statements.[368]

Levy argued that the language of articles 133 and 134–"conduct prejudicial to good order and discipline" and "conduct unbecoming an officer and gentleman"–was unconstitutionally vague. The Supreme Court rejected the argument.[369] Justice Rehnquist noted that the Supreme Court had on prior occasions voided statutes because they "contained no standard whatever by which criminality could be ascertained."[370] The Court did not do so in this case.

Instead, the Court ruled that because of "the factors differentiating military society from civilian society[,] . . ." the standard for "a vagueness challenge to the articles of the Code is the standard which applies to criminal statutes regulating economic affairs."[371] This meant that Levy could not challenge the articles in terms of hypothetical conduct, but only in light of his own conduct. Because he "could have no reasonable doubt" that his conduct was both unbecoming an officer and prejudicial to good order and discipline, his argument that the articles were vague failed.[372]

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[368] *Id.*

[369] *Id.* at 755-7. Levy also contended that articles 133 and 134 were "overbroad." The Supreme Court rejected Levy's position on this issue as well. Writing for the Court, Justice Rehnquist stated that the "necessity for obedience, and the consequent necessity for imposition of discipline" could permit "imprecise language" even if that language pertained to "conduct which would be ultimately held to be protected by the First Amendment." *Id.* at 760.

[370] *Id.* at 755.

[371] *Id.* at 756.

[372] The standard for statutes regulating economic affairs was set forth in United States v. National Dairy Products Corp., 372 U.S. 29, 32-33 (1963). In that case, National Dairy Products was charged with violating §3 of the Robinson-Patnam Act, which made it illegal to sell products at "unreasonably low costs for the purposes of destroying the competition." *Id.* The Supreme Court rejected National Dairy Product's argument that the statute was facially void. National Dairy Products could not challenge the statute hypothetically but only in terms of its

While *Parker v. Levy* establishes a standard to evaluate vague speech in the military, it does so in an unusual set of facts. Levy told soldiers not to go to war; he directly disobeyed an order from his superior to train soldiers for combat operations; and he openly disparaged soldiers engaged in combat as war criminals.[373] One can scarcely imagine a more egregious speech-related threat to good order and discipline. While it may have seemed obvious that Levy should have known what he did prejudiced good order and discipline, it may not be so clear in other contexts. How can a commander develop an extremist policy that is within the boundaries of the test set forth in *Parker*?

The following example will help clarify the answer to this question. A division commander, after hearing about possible problems regarding extremists, issues the following order: No soldier will participate in any extremist meeting while off-duty and off-post. One division soldier attends a Ku Klux Klan rally and, while there, makes a statement supporting the Ku Klux Klan. Another soldier attends a meeting of a state militia group that is strongly anti-government and is rumored to have ties with white supremacist organizations.

The commander can clearly punish the soldier who attends the Klan rally, and that soldier cannot successfully argue that the order is vague.[374] It seems reasonable to assume that he should have known attending a Klan rally and speaking there violated the order. The second soldier has a stronger argument against punishment. He contends that the organization is not

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own conduct. Given the language of the Act and past federal legislation, it knew or should have known its actions were violative of the Act. *Id.* at 29-34.

[373] *Parker*, 417 U.S. at 733.

[374] *See supra* pp. 80-82 and accompanying notes.

extremist under the extremist policy's definition–it does not advocate racial, ethnic, or religious intolerance, nor does it advocate violence. Furthermore, he claims he simply attended the meeting as an observer and did not speak, donate money, or offer to perform any functions for the organization. In the case of this particular soldier, it appears that the commander's order was vague and thus invalid. The order has the desired effect of prohibiting soldiers from attending extremist meetings as defined in the Army regulation, but may be invalidly vague.

C. A Proposed Method

Army Regulation 600-20 gives great authority to a commander to prohibit behavior and to create policy–an authority traditionally and appropriately given judicial deference. This article submits that the boundaries for that authority are set in *R.A.V.* and *Parker v. Levy*.[375] Therefore, this article proposes a method to create a policy that addresses both the granted authority as well as its limitations.

This method helps a commander articulate his rationale in terms of effect on unit good order and discipline. It helps to ensure that the policy does not penetrate *R.A.V.*'s inner boundary of protected viewpoint speech by focusing on the speech or speech-related conduct's "secondary effects." It also ensures that the policy does not exceed the outer boundary of *Parker v. Levy*'s test for vagueness. It also serves a practical purpose of ensuring the policy is not simply an arbitrary and unfair double standard, so soldiers will not complain: "Why ban our symbols/flags/posters but not theirs?"

What is proposed is a checklist of factors, along the lines of those established in the case of *Relford v. Commandant.*[376] In *Relford*, the Supreme Court articulated a series of factors for military courts to analyze to determine whether there is service member jurisdiction.[377] The purpose of such factors is to link the punishable conduct with its impact on good order and discipline, and thereby create "service-connection."[378]

While *Relford* factors are no longer relevant to determine jurisdiction after *Solario,*[379] the method remains sound. The best way to show impact upon good order and discipline is to identify the conduct and show its impact. A commander can do this by looking at the conduct in its totality; a list of factors is the easiest and most efficient way to identify the conduct and its impact.

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[375] The abolition of the "passive/active" participation distinction in the Army's old policy did away with one possible model for guidance, however flawed. AR 600-20, para. 4-12 (old policy), *supra* note 146, paras. 4-12a.-b.

[376] 401 U.S. 355 (1971).

[377] *Id. Relford* was decided in the wake of the Supreme Court's establishment of service connection for court-martial jurisdiction in *O'Callahan v. Parker. See supra* p. 63 and note 275. The Court listed the factors as:

> (1) The serviceman's proper absence from the base; (2) The crime's commission away from the base; (3) Its commission at a place not under military control; (4) Its commission within our territorial limits and not in an occupied zone of a foreign country; (5) Its commission in peacetime and its being unrelated to authority stemming from the war power; (6) The absence of any connection between the defendant's military duties and the crime; (7) The victim's not being engaged in the performance of any duty relating to the military; (8) The presence and availability of a civilian court in which the case can be prosecuted; (9) The absence of any flouting of military authority; (10) The absence of any threat to a military post; (11) The absence of any violation of military property; and (12) The offense's being among those traditionally prosecuted in civilian courts.

Relford, 401 U.S. at 365.

[378] *Relford*, 401 U.S. at 365.

[379] Solorio v. United States, 438 U.S. 435 (1987). *See supra* p. 63

The factors are arranged in two groups. The first group deals with preliminary factual questions; the second concerns command policy determinations because of those factual questions. The first four factors are:

(1) Does the extremist speech/conduct to be proscribed openly challenge military authority/policy (for example, directly attack Army regulations/policy on race relations, attack a unit chain-of-command, or attempt to discredit particular leaders)?

(2) Is it connected to an actual or possible credible threat of extremist activity in the area (based upon, for example, Criminal Investigative Command (CID)/local law enforcement investigations)?

(3) Have there been racial/ethnic or similar type disturbances/complaints in the unit?

(4) What is the status of the unit (e.g., deployed, in training, on alert)?

With these four factual questions answered, they form the basis for answering the remaining command policy questions:

(5) Should the (policy/order/regulation) single out a particular extremist viewpoint to be proscribed?

(6) If not, how broad should the proscriptive language in the (policy/order/regulation) be?

(7) Should the (policy/order/regulation) extend off-post as well as on-post and concern off-duty speech/conduct as well as on-duty?

(8) How closely do any proscriptions in the (policy/order/regulation) conform to the prohibitions listed in *AR 600-20*, para. 4-12C.2.B.(1)-(6) as well as the command options listed in *AR 600-20*, para. C.2.B.C., D. & E?

Commanders can use this list as a template for developing local extremist policies that will withstand constitutionally based challenges. The "factual" factors (one through four) and factor five deal with the *R.A.V.* problem of viewpoint-based discrimination. They require a commander to articulate the "secondary effect" of the speech or conduct, and to demonstrate the necessity for any particular "viewpoint-based" discrimination.[380] Factors six and seven address potential problems of vagueness, addressing issues raised in *Parker v. Levy*.[381] Factor eight causes a commander to articulate whether his policy conforms to *AR 600-20*'s. It thus focuses the commander on whether his own policy represents a significant departure from *AR 600-20* and may, therefore, be illegal.[382]

[380] *See supra* pp. 68-80 and accompanying notes.
[381] *See supra* pp.80-81 and accompanying notes.
[382] *See supra* pp.80-81 and accompanying notes.

As in the *Relford* factors, no one factor predominates; all factors are weighed together. Taken in totality, they help articulate the underlying constitutional rationale for the policy.[383] Using these factors as a template, this article next analyzes specific scenarios.[384]

V. Scenarios

The following three scenarios show how the proposed method assists commanders and their attorneys in answering questions dealing with racial extremism policy.

Scenario 1. During a health and welfare inspection, a company commander in a Special Forces support unit discovers a copy of *Resistance*[385] magazine in a soldier's barracks room. *Resistance*, which based on reliable information from CID and elsewhere, is created and distributed by soldiers within Special Forces units on post. The magazine expresses disdain, among other things, for United Nations sponsored interventions in areas such as Haiti and Bosnia. It also frequently editorializes about leadership at the installation and at higher levels. When asked, the soldier admits that he subscribes to the magazine, and while not a card-carrying member of any extremist organization, he has certain sympathy to the views in the magazine.

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[383] It should be stressed that this is not a "lawyer" but "command" driven decision. Commanders, not lawyers, have ultimate authority in determining any extremist policy. Some may complain that this proposed method represents another example of "lawyering"–excessive rule-creation and interference by lawyers in command prerogatives. While this article recognizes this criticism is often justifiable, in the area of extremism, official Army policy explicitly states: "Commanders should seek the advice and counsel of their legal advisor when taking actions pursuant to this policy." AR 600-20, para. 4-12 (new policy), *supra* note 33, para. 4-12C.2.F. Judge advocates need to have articulable and rationale bases for their recommendations to commanders, as do commanders themselves. The purpose of this template is to provide such a basis for both lawyers and commanders.

[384] *See infra* pp. 89-100.

[385] *Resistance* is a fictional magazine.

Currently the unit is not deployed but, like many other units, is at a high state of readiness for possible deployment. There have been no reported ethnic or racial disturbances connected to or associated with *Resistance* magazine. Indeed, the language of *Resistance* in its editorials disavows any sort of racism or claims of racial superiority altogether.

The commander wants to know what he can do about *Resistance* (that is, can he order soldiers not to read it?).

Proposed Solution. Using the eight-part method we determine that:

(1) Resistance openly attacks Army, or at least executive, decision making and the chain-of-command.

(2) It does not appear to be connected with any threatening extremist actions at the time.

(3) There have been no recent ethnic/racial disturbances in the unit.

(4) The unit, while not deployed, is in a high state of readiness. With these predicate factual questions answered, we move to the next factors in fashioning a policy.

(5) The rationale for singling out *Resistance* for proscription, as opposed to other forms of expression, appears at first glance to be slight. *Resistance* apparently has no "extremist" content as defined in *AR 600-20*, para. 4-12. It does not express views of racial or ethnic supremacy, but

expresses a highly "anti-government" stance that is strongly critical of the chain-of-command and the Army as an institution. It is thus a highly "political" publication. How is it that different, say, from a popular paramilitary magazine such as *Soldier of Fortune*, which often editorializes disdainfully about governmental policies, particularly U.S. policies with the United Nations?

What makes it demonstrably different is that it expresses criticism for the *local chain-of-command and is apparently produced without authority by soldiers within the unit.* This, then, is the problem with the publication. Having a channel of underground dissent within a unit, which criticizes its leadership, undermines the discipline needed to make the unit combat effective. This becomes especially relevant when dealing with a unit such as the one in the scenario, that must be in a high state of readiness at all times.

(6) With this distinction in mind, if the command issues any policy at all, it should involve proscribing, in some way, *materials that are critical of the local chain-of-command and apparently produced by soldiers within the Special Forces units on post.* This focuses on the harm we are trying to prevent–not the "political content" of *Resistance*, but its undermining of good order and discipline.

(7) The next problem to resolve is the parameters of the proscription. Here, one must ask how far the proscription should extend: on- or off- duty and on- or off- post? The magazine's criticism of the chain-of-command and that it is produced by soldiers within the command can undermine good order and discipline. Therefore, prohibiting soldiers from reading or discussing

Resistance on-duty has a close connection to preserving good order and discipline. Soldiers are thus prevented from criticizing their chains-of-command openly among other soldiers, while on duty.

While off-duty, however, the impact of reading or discussing the magazine diminishes significantly. Soldiers are less likely to discuss it among other soldiers. They are less likely to do so in uniform or while undergoing training and taking orders from their leadership. The undermining nature of *Resistance* still exists to a certain degree while a soldier is on the installation, however, even if not on-duty. The soldier is more likely to discuss it with other soldiers on the installation, is more likely to be in uniform, and is more likely to be on his way to duty.

Allowing soldiers to disseminate such literature on the installation may give the impression of a weak and easily undermined chain-of-command that can be openly mocked or derided even in its area of control. Off the installation, however, these concerns are dramatically reduced. The soldier is less likely to be in uniform, to discuss with other soldiers, and less likely to be going to duty. Since the location is outside the installation, there is much less of an impression that the chain-of-command is weak.

(8) The final factor concerns how closely the policy conforms to prohibitions listed in *AR 600-20*, para. 4-12C.2.B.(1)-(6) as well as the command options listed in *AR 600-20*, para. C.2.B.C., D. & E. Here is where the example is most problematic, because *Resistance* magazine probably does not fall under the definitions of *AR 600-20* at all. The magazine does not have

"extremist" content as defined. It is more akin to "political" speech, which the Army wants to avoid policing.[386]

The focus, however, is on the speech's undermining character–its criticisms of the chain-of command from within the unit itself. Thus, while the speech does not fall under the definition of *AR 600-20*, the speech may be proscribed or prohibited for similar reasons.

With such a parallel in mind, three provisions in *AR 600-20* are especially relevant: (a) *AR 600-20*, paragraph 4-12C.2.B.6's prohibition on distributing literature on or off a military installation that either promotes extremist causes or materially interferes with the military mission;[387] (b) *AR 600-20*, paragraph 4-12C.2.E's discussion of command responsibility for soldier activity, such as receipt of extremist literature;[388] and (c) *AR 600-20*, paragraph 4-12C.2.C's discussion of a commander's authority to remove symbols, posters, and other displays from barracks.[389]

Army Regulation 600-20, paragraph 4-12C.2.B.6 *prohibits* distribution, whereas *AR 600-20*, para. 4-12C.2.C. discusses the command taking "*positive action*" for such activities as *receipt* of literature. Thus while prohibiting *distribution* of *Resistance*, on or off the installation, and also presumably on- or off-duty, would be in conformity with the intent of the extremist policy, *receipt* of *Resistance*, appears to fall on the non-punitive side.

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[386] *See supra* note 41 and pp. 12.
[387] AR 600-20, para 4-12 (new policy), *supra* note 33, para. 4-12C.2.B.6.
[388] *Id.* para. 4-12C.2.E.
[389] *Id.* para. 4-12C.2.C.

Taking all these factors together, it appears that limited restrictions on, not just *Resistance*, but any unauthorized, soldier-produced publications that criticize the chain-of-command are defensible. The policy could contain the following provisions:

(a) Prohibiting distribution (selling, handing out free copies, or advertising) of unauthorized, soldier-produced publications that criticize the chain-of-command on or off the installation.

(b) Prohibiting possession of such publications while on-duty.

(c) Possession of such publications on the installation, to include the barracks, if not on duty should not be prohibited; however, a soldier can be ordered not to display its contents (posters or manifestoes critical of the chain-of-command) in the barracks. (Soldiers should also be reminded that "loaning" other soldiers a copy of such publications could be considered "dissemination" and thus punishable.)

Scenario 2. A soldier admits to his company commander that he is a white supremacist and a member of a local neo-Nazi "skinhead" organization. The soldier has no prior disciplinary record and has never been a problem in the unit. The CID and local law enforcement officials have indicated the presence of skinhead organizations in the local community that express racist views. While there have been no racial or ethnic disturbances in the unit, there have been some

reports of fighting (with other skinhead groups and random violence) by skinheads. The unit is in garrison, and no "real-world" deployments are imminent.

The commander wants to know if he can take action against the soldier, to include directing the soldier not to discuss his white supremacist views with other soldiers, and if he can prevent him from attending off-post meetings of white extremists. The soldier claims he should be able to discuss what he wants with other soldiers and should be able to attend meetings and rallies if he wants.

Proposed Solution. Using the method, we determine that:

(1) The soldier's *views*, non-articulated, do not violate Army policy. It is only when he *expresses* them in some format that they violate the Army extremist policy.[390] The focus in this particular scenario is on the expression of extremist viewpoints and the extremist viewpoints themselves.

(2) There has been reported violent activity off-post involving neo-Nazi skinheads. The soldier is a professed neo-Nazi skinhead with apparent ties to a skinhead organization off-post.

(3) There have been no racial or ethnic disturbances in the unit.

(4) The unit is in a garrison status.

(5) In this scenario, the commander is not creating unit-wide policy, but dealing with a particular soldier. The commander is dealing with one specific viewpoint–that of neo-Nazi

[390] *Id.* para. 4-12C.2.A. *See supra* note 195.

skinheads. The commander may want to deal with the extremist problem in general after dealing with this particular soldier, but the issue at hand is *this* soldier. Furthermore, the commander has good cause to focus his order on this particular *expression* of viewpoint: the soldier is an admitted neo-Nazi skinhead; such skinheads have apparently caused off-post problems; and the soldier wants to attend meetings with other neo-Nazi skinheads.

The "secondary effect" rationale can be effectively stated here: any proscription of this particular soldier has a direct nexus to good order and discipline, not only given the off-post disturbances involving neo-Nazi skinheads, but also given the Army's extremist policy prohibiting certain involvement in extremist activity.[391]

(6) Because the commander is dealing with one soldier who professes adherence to one particular type of extremism, the language in any order given to that soldier will, by logic, concern that particular form of extremism.

(7) Because of the off-post activity involving neo-Nazi skinheads, and because the Army policy on extremism explicitly refers to off-post activities, the commander can order the soldier to refrain from extremist activity off-post as well as on-post. Similarly, the commander can order the soldier to refrain from extremist activity off-duty as well as on-duty.

(8) Explicit prohibitions regarding extremist activity are listed in *AR 600-20*, para. 4-12B.2.B.(1)-(6).[392] Several prohibitions are applicable in this case and will define the parameters of this commander's order.

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[391] AR 600-20 (new policy), *supra* note 33, para. 4-12C.2.
[392] *Id.* para. 4-12B.2.B.(1)-(6).

The commander can limit the soldier's ability to discuss extremist views and to participate in extremist events.[393] Specifically, the commander can order the soldier not to discuss extremist views while on-duty, or to attend the off-post rally. How is the latter restriction possible, given that *AR 600-20* prohibits attending such a meeting if "on duty, in uniform, or in a foreign country"?[394] The soldier could simply state that he intends to go while off-duty and not in uniform.

The answer lies in *AR 600-20*, para. 4-12C.2.C., which gives the commander authority to "order soldiers not to participate in those activities that are contrary to good order and discipline of the unit . . . ."[395] In this particular scenario, attending the off-post rally is more than being a member; it is activity. This soldier admits to white supremacist views. He would show public allegiance to white supremacy by attending the rally, and perhaps extremists at the rally could persuade him to recruit other soldiers.

The important point in this scenario is to look at the surrounding circumstances that will either allow or restrict a commander's actions and orders. A blanket prohibition to all soldiers from attending such a rally would be much more difficult to sustain under the current extremist policy. The commander would be within the policy's parameters if he articulated the rationale outlined above to prohibit this soldier's attendance at the rally.

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[393] *Id.*
[394] *Id.* para. 4-12B.2.B.2.
[395] *Id.* para. 4-12C.2.C.

Scenario 3. A division commander wants to forbid the displaying of "any signs or symbols that may be considered offensive or in bad taste" in the barracks. A black soldier has a poster that shows Malcolm X and Louis Farrakhan in his barracks room. He says he displays those posters as an expression of "Black Nationalism." There have been no complaints about the posters.

There has been reputed white supremacist activity off-post, along with alleged problems with black gangs–though white supremacists and black gang members have not clashed. There is no evidence linking the soldier to any gang activity. The company is a line infantry unit at a large installation in the United States, but is not on any alert status. The soldier's company commander tells him to remove the poster. Other displays such as pictures of other historical figures are allowed in other rooms (for example, one soldier has a picture of Martin Luther King; another has a picture of Ronald Reagan). What is legal, appropriate action?

(1) The particular speech/conduct the commander wishes to proscribe does not directly challenge military authority or policy. The poster simply displays black leaders. The soldier's apparent intent is not "extremist" but an expression of black pride. (If the poster contained language that expressed views of black racial supremacy, that would change the analysis–then the displays themselves would challenge Army policy.)

(2) There is no evidence that the soldier is involved in gang activity, or in any other activity that is violent or extremist.

(3) There have been no complaints about the poster in the unit and no other racial tensions.

(4) The status of the unit is standard "training" status.

(5) The company commander's order singles out only the pictures of Malcolm X and Louis Farrakhan, apparently deeming them offensive, whereas other pictures (the pictures of King and Reagan) are not deemed offensive. The question is whether there is ample justification to single out the Malcolm X and Louis Farrakhan pictures apart from other pictures. Using the *R.A.V.* analysis[396] of "secondary effect," there does not appear to be significant justification for the removal of the Farrakhan and Malcolm X posters exclusively. Nothing indicates that the posters have a disruptive impact on the unit.

(6) Instead, a better solution would be for the company commander to create a policy and order that forbids the display of signs and symbols that are expressions of extremism as defined in *AR 600-20*, paragraph 4-12C.2.A. With that proscriptive language established, he could then order the removal of particular signs and symbols that violate the order, but only after examining such signs and symbols in light of particular circumstances. In other words, the commander could issue a non-viewpoint-based order giving him authority to prohibit extremist signs and symbols in the barracks. The question may arise as to what is "extremist"–a Confederate flag, a picture of Farrakhan? One could prohibit particular signs and symbols based upon a "secondary effect" analysis, using factors one through four of this method.[397]

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[396] R.A.V., 505 U.S. 377, 388 (1992); *see supra* pp. 68-75.
[397] *See supra* pp. 90-91.

(7) The limitation of the order would be to restrict the proscription to the soldier's barracks rooms. Here, the presence of signs and symbols are at their most disruptive. Barracks rooms are government owned property, subject to command inspection, and accessible to other soldiers in the unit. The expectations of privacy of soldiers in such rooms is considerably lower than in private off-post dwellings or on-post quarters.[398] Therefore, the extent of such a policy would be to barracks rooms only, and not private on- or off-post quarters.

(8) Such a proscription closely conforms with a commander's authority, listed in *AR 600-20*, para. 4-12.C., to "order the removal of symbols, flags, posters, or other displays from barracks"[399] and is therefore in keeping with the intent of *AR 600-20*, para. 4-12.

VI. Conclusion

This article reviewed racial extremism in the Army and the Army's policies on racial extremism, focusing on white supremacist extremism. It examined the Army's old and new policies, highlighted their differences, and then proposed arguments to justify these policies under the Constitution, specifically the First Amendment. In doing so, the article fashioned an analytical template for commanders to develop their own policies. Lastly, the article provided a series of scenarios to illustrate some of the proposed analyses and methodologies.

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[398] The military courts have consistently held that soldiers have a greatly reduced expectation of privacy in barracks rooms. *See, e.g.*, United States v. Middleton, 10 M.J. 23 (C.M.A. 1981) (no reasonable expectation of privacy during inspections); United States v. McCarthy, 38 M.J. 398 (C.M.A. 1993) (diminished or no expectation of privacy of airman apprehended in barracks room without authorization to apprehend from commander); United States v. Jackson, 48 M.J. 292 (1998) (proper inspection conducted after commander received anonymous information about soldier possessing and distributing drugs in barracks).

[399] AR 600-20 (new policy), *supra* note 33, para. 4-12C.

This article does not contend that this survey is complete; however, if a commander understands the legal standards and uses this template, that commander can create a legal policy to control racial extremists. Two considerations are key: first, good order and discipline of our fighting forces; and second, the individual rights of soldiers. Something else matters too: the right of civilians to know that their soldiers are guarding them, not planning their destruction because of their race, origin, or beliefs. The proposed method provides a balanced and rational approach that can hopefully aid commanders and their legal advisors in answering the continuing problem of extremism, especially racial extremism, in the Army.