



MILITARY LAW REVIEW

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AND 2(6): TIME TO LIGHTEN UP AND TIGHTEN UP

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MILITARY LAW REVIEW

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COURT-MARTIAL JURISDICTION OVER RETIREES UNDER ARTICLES 2(4) AND 2(6): TIME TO LIGHTEN UP AND TIGHTEN UP?

LIEUTENANT COLONEL (RET.) J. MACKEY IVES¹ & LIEUTENANT COLONEL (RET.)
MICHAEL J. DAVIDSON²

I. Introduction

A retired Regular Army officer working as a General Services (GS) federal employee becomes enraged during an argument with his military division head, an Army Colonel, and impolitely suggests that the senior officer perform certain anatomically impossible feats. The Colonel seeks to prefer charges against the retired officer for disrespect to a superior commissioned officer. Similarly, the retired officer then encounters a disrespectful active duty Army Captain, prompting the retired officer to prefer charges against the junior officer. A popular radio talk show host and his guest, who are both retired military officers of the regular components, publicly denounce the President and Congress, prompting another retired

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officer to request that charges be preferred against them for violating Article 88 of the Uniform Code of Military Justice.

Are retired officers subject to court-martial for these acts, even though committed long after they have retired? May the active duty officer be court-martialed for disrespect to the retired officer? Is the status of a retired officer merely honorific, or does the law treat retirees as full-fledged—albeit dormant—members of the armed forces? Although no published cases have addressed these scenarios, the law is sufficiently unclear and undeveloped that a literal reading of existing law would support court-martial jurisdiction over all of these potential accused.

To the extent the law has some clarity in the retiree arena, it is clear that retired personnel are not civilians but are instead members of the armed forces. They enjoy certain associated privileges and bear numerous responsibilities. Most significantly, as retirees they remain subject to the Uniform Code of Military Justice (UCMJ) with few, if any, legal limitations, and only ambiguous and largely unenforceable policy limitations on the exercise of military jurisdiction over them. However, beyond purely jurisdictional issues, military case law concerning the rights and responsibilities of retired military personnel is sparse.

This article discusses the status of retired members of the armed forces, reviewing existing case law involving the exercise of court-martial jurisdiction. Further, the authors address the role of retired pay and ques-

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tion whether modern treatment of retired pay by both Congress and the courts undermines one major justification for UCMJ jurisdiction over retirees. Next, the authors highlight the broad scope of military jurisdiction, examine the narrow class of offenses that may be beyond the reach of military jurisdiction for retirees, and advocate the adoption of a capacity defense in the retiree context. The article also compares the various Service standards for the discretionary exercise of such jurisdiction. Finally, the article reviews recent statutory changes affecting federal criminal jurisdiction to determine what, if any, affect these legislative developments have, or should have, on military jurisdiction over military retirees.

II. Status of Retirees

The first Army retired list was not established until 1861, and it applied only to officers.³ The legislation provided for retirement of officers for either physical disability or upon the completion of forty years of service.⁴ In 1878, Congress also drew a distinction between two types of retirement for officers. Some officers received one year's salary as a form of severance pay and were considered completely removed from military service.⁵ In a system similar to the modern retirement system, other officers received reduced pay—"seventy-five *per centum* of the pay upon which they retired"—but were "only being retired from *active service*."⁶ Further, the 1878 legislation, and subsequent Acts, made it clear that, at least from that time, military officers on the retired list were considered to

3. Brigadier General (Ret.) Frank O. House, *The Retired Officer: Status, Duties, and Responsibilities*, 26 A.F. L. REV. 111, 113 (1987) (citing Act of Aug. 3, 1861, 12 Stat. 289, 290, which applied to both officers of the Army and the Marine Corps); *see also* RUSSELL F. WEIGLEY, *HISTORY OF THE UNITED STATES ARMY* 230 (1967) ("[The] act of August 3, 1861, gave the Army its first retirement system, by authorizing retirement, with adequate pay and allowances, for officers . . .").

4. WEIGLEY, *supra* note 3, at 230.

5. House, *supra* note 3, at 113 (citing REVISED STATUTES OF THE UNITED STATES § 1275 (2d ed. 1878) [hereinafter REVISED STATUTES] (passed at the first session of the forty-third Congress, 1873-1874); *see also* *United States v. Tyler*, 105 U.S. 244, 245 (1881) ("[O]ne year's pay and allowance, in addition to what was previously allowed, is given at once, and the connection is ended.")).

6. House, *supra* note 3, at 113 (citing REVISED STATUTES, *supra* note 5, § 1276) (emphasis in original); *see also Tyler*, 105 U.S. at 245 ("[T]he compensation is continued at a reduced rate, and the connection is continued, with a retirement from active duty only.").

be part of the military.⁷ Current statutory authorities,⁸ service regulations,⁹ and case law¹⁰ also make this point no longer subject to dispute.

It was not until 1885, however, that Congress established a retirement system for enlisted personnel.¹¹ The legislation applied to enlisted members of the Army and Marine Corps.¹² Few officers and enlisted men were actually on the retired list. Initially the Army retired list was limited to 300; by 1895 retired officers and enlisted men numbered only 1562.¹³ In 1907, Congress extended the retirement system to sailors, providing that

7. House, *supra* note 3, at 114 (“Congress also provided in specific and unequivocal terms as far back as 1878 that personnel on the retired list constituted a part of the Army of the United States. This provision is consistently repeated in subsequent Acts of Congress dealing with the organization and compensation of the armed forces.”); *see also* Tyler, 105 U.S. at 245 (officers on the retired list “are part of the army”), 246 (“We are of opinion that retired officers are in the military service of the government . . .”); THE MILITARY LAWS OF THE UNITED STATES 1915, pt. 1, sec. 331(a), at 665 (5th ed. 1917) (Regular Army includes officers on the retired list) (citing Act of June 3, 1916, sec. 2, 39 Stat. 166) [hereinafter MILITARY LAWS]; JAG Bull., Aug. 1942, at 152 (“A retired Army officer is an officer of the United States . . .”); BREVET COLONEL W. WINTHROP, A DIGEST OF OPINIONS OF THE JUDGE ADVOCATE GENERAL OF THE ARMY 433 (1880) (“[a]n officer on the retired list, being as much a part of the army as an officer on the active list”) (“retired officers of the army, though relieved in general from active military service, were nevertheless, as a part of the army”). The Army’s statutory requirement to maintain retired lists is contained at 10 U.S.C. § 3966. The Air Force’s statutory requirement is contained in 10 U.S.C. § 8966.

8. 10 U.S.C.A. § 3075(b)(3) (West 1998 & 2001 Supp.) (“The Regular Army includes . . . the retired officers . . . of the Regular Army.”); *see also id.* § 8075(b)(3) (Retired officers of the Regular Air Force are considered to be part of the Regular Air Force.).

9. *See, e.g.*, U.S. DEP’T OF ARMY, REG. NO. 600-8-24, OFFICER TRANSFERS AND DISCHARGES para. 6.8(a) (21 July 1995) [hereinafter AR 600-8-24] (“An RA Officer placed on the retired list continues to be an officer of the U.S. Army.”).

10. *McCarty v. McCarty*, 453 U.S. 210, 221 (1981) (“The retired officer remains a member of the Army . . .”); *Loeh v. United States*, 53 Fed. Cl. 2, 5 (2002) (“A retired officer therefore remains a member of the armed forces . . .”).

11. House, *supra* note 3, at 113 n.21 (citing Act of Feb. 14, 1885, ch. 67, 23 Stat. 305).

12. WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 87 n.27 (1920 ed.) (“By the Act of Feb. 14, 1885, enlisted men of the army and marine corps were made eligible to retirement after thirty years’ service.”). In 1890, Congress amended the 1885 Act to provide for “double time in computing the thirty years” necessary for retirement, for service during the Civil War; however, the Act still only provided for the retirement of enlisted men of the Army and Marine Corps. MILITARY LAWS, *supra* note 7, at 271 (citing Act of Sept. 30, 1890, 26 Stat. 504). However, service in the Navy was credited toward the thirty years for soldiers and marines. *Id.*

13. Joseph W. Bishop, *Court-Martial Jurisdiction over Military-Civilian Hybrids: Retired Regulars, Reservists, and Discharged Prisoners*, 112 U. PA. L. REV. 317, 332 n.70 (1964).

enlisted men of the Army, Marine Corps, *and Navy*, who had completed thirty years of service, could be placed on the retired list and receive seventy-five percent of their pay and allowances.¹⁴ Soldiers on the retired list were long considered to be part of the Regular Army.¹⁵ Currently, retired enlisted members of all the regular components are considered to be members of that component.¹⁶

Military retirees fall into two general categories: those retired for disabilities and those retired for length of service. Service members may be granted a disability retirement on either a permanent or temporary basis.¹⁷ A service member who is unfit to perform his duties because of a permanent disability, which was not caused by the service member's intentional misconduct or willful neglect or while absent without authority, may be retired on that basis if the individual has at least twenty years of service or is at least thirty-percent disabled.¹⁸ If an eligible service member's disability is not permanent, the service member may be placed on the Temporary Disability Retired List (TDRL) and receive retired pay.¹⁹

A Regular Army (RA) officer or reserve commissioned officer,²⁰ warrant officer,²¹ or soldier²² with at least twenty years of service, may request to retire and receive retired pay.²³ Unique to the Department of the Navy, enlisted Marines and sailors with less than thirty years of service are not retired, but instead are transferred to the Fleet Marine Corps Reserve or Fleet Reserve, respectively, receiving "retainer" rather than retired pay.²⁴ Upon the completion of thirty years of service, these service members are

14. MILITARY LAWS, *supra* note 7, pt. 1, sec. 1038, at 382 (citing Act of Mar. 2, 1907, 34 Stat. 1217) (emphasis added).

15. *Id.* at 665 (citing Act of June 3, 1916, sec. 2, 39 Stat. 166); *see also* MAJOR GENERAL GEORGE B. DAVIS, A TREATISE ON THE MILITARY LAW OF THE UNITED STATES 47 (3d ed., rev. 1915) (The Regular Army includes "the officers and enlisted men on the retired list . . .").

16. 10 U.S.C.A. §§ 3075(b)(3) (West 1998 & 2001 Supp.) (retired enlisted personnel part of the Army), 8075 (retired enlisted personnel of the Regular Air Force are part of the Regular Air Force).

17. *Id.* §§ 1201-1202, 1204-1205, 1210; *see also* DEFENSE FINANCE & ACCOUNTING SERVICE, CLEVELAND CENTER PAM., PREPARING FOR YOUR MILITARY RETIREMENT 2-3, para. 2(C)(3) (June 2000) [hereinafter DFAS-CL 1352.2 PH] ("disability retirement may be temporary or permanent"); *United States v. Stevenson*, 53 M.J. 257, 258 (2000) ("two basic types of disability retirement—permanent and temporary").

18. 10 U.S.C.A. § 1201. To be eligible for retirement based on at least a thirty-percent disability, the service member must also have at least eight years of service, and the disability be proximately caused by the performance of active duty, or was incurred in the line of duty. *Id.* § 1201(b)(3)(B).

placed in a retired status.²⁵ The majority of service members must retire after thirty years of military service.²⁶

As members of the armed forces, military retirees enjoy a number of

19. *Id.* § 1202; *see also* HANDBOOK FOR RETIRED SOLDIERS AND FAMILY MEMBERS para. 3-1(a)(3) (2 June 1999) [hereinafter HANDBOOK FOR RETIRED SOLDIERS] (“The TDRL is for officers, warrant officers, and enlisted soldiers who are retired for disabilities which may or may not be permanent.”), available at <http://www.odcsper.army.mil>; 2001 RETIRED MILITARY ALMANAC 16 (24th ed. 2001) (“If the disability is not permanent, the member is placed on the Temporary Disability Retired List (TDRL) and is subject to physical examination no less than once every 18 months.”). A service member may remain on the TDRL for a maximum of five years. DFAS-CL 1352.2-PH, *supra* note 17, at 2-3, para. 2(C)(3) (“resolved within a five-year period”); HANDBOOK FOR RETIRED SOLDIERS, *supra*, para. 3-1(b). After five years, the service member must be retired for permanent disability, returned to duty or separated from the military. 2001 RETIRED MILITARY ALMANAC, *supra*, at 16.

20. 10 U.S.C.A. § 3911 (“regular or reserve commissioned officer of the Army”); *see also* AR 600-8-24, *supra* note 9, para. 6.14(c) (“An RA or USAR commissioned officer with 20 years AFS (of which 10 years is active commissioned service) . . . may on his or her request and the approval of the Secretary of the Army be retired”); *see* 10 U.S.C.A. §§ 6323(a)(1) (Navy or Marine Corps officer), 8911 (Air Force officer). Through 31 December 2001, the ten years’ active commissioned service requirement may be reduced to an eight-year requirement. *Id.* §§ 3911(b) (Army), 6323(a)(2) (Navy and Marine Corps), 8911(b) (Air Force).

21. 10 U.S.C.A. § 1293 (“The Secretary concerned may, upon the warrant officer’s request, retire a warrant officer of any armed force under his jurisdiction who has at least 20 years of active service”); *see also* AR 600-8-24, *supra* note 9, para. 6.14(c)(2) (“Any warrant officer with 20 years AFS may upon his or her request and the approval of the Secretary of the Army be retired”).

22. *Id.* § 3914 (“[A]n enlisted member of the Army who has more than 20, but less than 30, years of service . . . may, upon his request, be retired.”); *see also id.* § 8914 (Air Force); U.S. DEP’T OF ARMY, REG. 635-200, ENLISTED PERSONNEL para. 12-4(a) (1 Nov. 2000).

23. 2001 RETIRED MILITARY ALMANAC, *supra* note 19, at 12 (“Generally, regular and Reserve commissioned officers, warrant officers, and enlisted members may retire after completing 20 or more years of active service.”); *see also* McCarty v. McCarty, 453 U.S. 210, 211 (1981) (“A regular or reserve commissioned officer of the United States Army who retires after 20 years is entitled to retired pay.”) (citing 10 U.S.C. §§ 3911, 3929); U.S. DEP’T OF AIR FORCE, INSTR. 36-3203, SERVICE RETIREMENTS 8, para. 2.1 (30 Apr. 2001) [hereinafter AFI 36-3203] (“Members are eligible to retire if they have at least 20 years of total active federal military service (TAFMS).”) Retired reserve soldiers, with twenty years of qualifying military service, are entitled to retired pay upon reaching the age of sixty. HANDBOOK FOR RETIRED SOLDIERS, *supra* note 19, para. 1-1(b); *see also* 2001 RETIRED MILITARY ALMANAC, *supra* note 19, at 6, 40-41. The current twenty-year retirement system for the active components is the culmination of various legislative efforts between 1915 and 1948. GENERAL ACCOUNTING OFF., MILITARY RETIREMENT: POSSIBLE CHANGES MERIT FURTHER EVALUATION, REP. NO. GAO/NSAID-97-17, at 21 (Nov. 1996) [hereinafter GAO/NSAID-97-17].

privileges,²⁷ including a limited right to wear their uniforms,²⁸ greater First Amendment freedoms,²⁹ exchange and commissary rights,³⁰ burial benefits,³¹ enjoy limited use of their military titles for commercial purposes,³² and may be referred to by their rank.³³ Further, as members of the armed forces they bear certain responsibilities. They remain subject to court-martial jurisdiction,³⁴ labor under various employment restrictions,³⁵ and may be recalled to active duty either voluntarily or involuntarily.³⁶ However, a retired officer not recalled to active duty is ineligible to command.³⁷

Currently, it is the policy of the Department of Defense that “military retirees shall be ordered to active duty (as needed) to fill personnel shortages due to mobilization or other emergencies”³⁸ Military retirees are grouped into three categories: (1) “[n]on disability military retirees under age 60 who have been retired less than 5 years;” (2) “[n]on disability military retirees under age 60 who have been retired 5 years or more;” and (3) all other military retirees including those retired for disability.³⁹ As a matter of policy, category three retirees are normally assigned only to civilian jobs in the event of mobilization, but “[a]ge or disability alone may not be the sole basis for excluding a retiree from active service during mobiliza-

24. 10 U.S.C.A. §§ 6330(b), (c)(1); *see also* DFAS-CL 1352.2 PH, *supra* note 17, para. 2(C)(1). In contrast, Army and Air Force personnel with more than twenty, but less than thirty, years of service “are all classified as retired.” *Id.* Retired Regular Army soldiers in this category become part of the Retired Reserve. HANDBOOK FOR RETIRED SOLDIERS, *supra* note 19, para. 3-4 (b)(3). Significantly for purposes of military jurisdiction over retirees, “Article 2, UCMJ, makes no distinction between retired pay and retainer pay.” *United States v. Morris*, 54 M.J. 898, 899 (N-M. Ct. Crim. App. 2001).

25. DFAS-CL 1352.2 PH, *supra* note 17, para. 2(C)(1); *see also* 10 U.S.C.A. § 6331.

26. 2001 RETIRED MILITARY ALMANAC, *supra* note 19, at 12 (“Ordinarily, members may serve a maximum of 30 years prior to mandatory retirement.”); *see also* 10 U.S.C.A. §§ 634 (Regular component Colonels and Navy Captains must retire at 30 years of active commissioned service if not selected for promotion), 1305 (Regular Army Warrant Officer), 633 (Regular Army Lieutenant Colonels and commanders not selected for promotion must retire at twenty-eight years), 1251 (most Regular Army officers must retire by age sixty-two), 1263 (Warrant Officers must retire by age sixty-two); *cf. id.* §§ 3917 (A Regular Army enlisted soldiers with thirty years of service “shall be retired upon his request.”), 6326 (enlisted members of the Regular Navy or Marine Corps with thirty years of service who apply for retirement “shall be retired by the President”).

27. *See generally* HANDBOOK FOR RETIRED SOLDIERS, *supra* note 19.

28. U.S. DEP’T OF ARMY, REG. 670-1, WEAR AND APPEARANCE OF ARMY UNIFORMS AND INSIGNIA para. 29.3 (1 July 2002) (retirees may wear their uniforms during certain ceremonial occasions and parades); *see also* 10 U.S.C.A. § 772(c) (“A retired officer of the Army, Navy, Air Force, or Marine Corps may bear the title and wear the uniform of his retired grade.”); 2001 RETIRED MILITARY ALMANAC, *supra* note 19, at 72 (“In general, the uniform may be worn for ceremonies or at official functions when the dignity of the occasion and good taste would dictate the propriety of the uniform.”).

tion.”⁴⁰ Theoretically, only death cuts off the military’s ability to recall its retired members to active duty and/or to subject them to court-martial jurisdiction.⁴¹

29. U.S. DEP’T OF ARMY, REG. 360-5, PUBLIC INFORMATION para. 4.2(c)(3) (31 May 1989) (“Manuscripts or speeches by retired Army personnel . . . are not required to be submitted for clearance.”); *see also* U.S. DEP’T OF DEFENSE, DIR. 5230.9, CLEARANCE OF DoD INFORMATION FOR PUBLIC RELEASE para. 4.7 (9 Apr. 1996) (“Retired personnel . . . *may* use the review services to ensure that the information intended for public release does not compromise national security.”) (emphasis added); HANDBOOK FOR RETIRED SOLDIERS, *supra* note 19, para. 4-8 (except for civilian federal employees and material containing classified information, “[r]etirees are not required to submit writings and public statements on military subjects to the Department of the Army for official clearance”); 2001 RETIRED MILITARY ALMANAC, *supra* note 19, at 85 (“There is no requirement that requires retired military personnel to submit copies of articles or speeches to the DoD or applicable branch of service for clearance.”); *cf.* Captain Walter R. Thomas, USN, *And Another Thing I’ll Say After I Retire*, MIL. REV., June 1973, at 74 (noting the “admittedly, tedious and trivial administrative obstacles which discourage these officers from writing controversial articles while they are on active duty,” but arguing that “active duty officers should be as prolific writers on military matters as retired officers”).

The relaxation of restrictions on retired service members who wish to express their opinion on a controversial topic publicly may prove significant. To illustrate, Marine LTC William Corson wrote a book critical of U.S. policy in Vietnam, entitled *The Betrayal*, while on active duty, but scheduled for publication after his retirement in 1968. J.Y. Smith, *William R. Corson, 74, Author and Retired Marine Officer, Dies*, WASH. POST., July 19, 2000, at B7. The Marine Corps delayed his retirement and initiated steps to convene a court-martial based on Corson’s alleged failure to follow a Marine regulation requiring “officers on active duty to submit statements on public policy to review before making them public.” *Id.* Eventually, the public controversy surrounding Corson’s potential court-martial drew attention to his book, causing the Marines to forego the court-martial. *Id.* Instead, Corson received a reprimand and was permitted to retire. Elaine Woo, *Col. William Corson; Critic of U.S. Policy in Vietnam War*, L.A. TIMES (July 22, 2000), <http://ebird.dtic.mil/Jul2000/s20000724col.htm>.

Similarly, Army officials have used occasional threats of disciplinary action to restrict controversial publications. As Majors, George Patton and Dwight Eisenhower wrote articles for *Infantry Journal* advocating changes in the use of armor. After Eisenhower challenged existing infantry doctrine and suggested that the standard infantry division be reorganized to add a tank company, “[h]e was summoned before the chief of infantry and told the facts of life.” PETER LYON, EISENHOWER: PORTRAIT OF THE HERO 56-57 (1974). As Eisenhower recalled: “I was told that my ideas were not only wrong but dangerous and that henceforth I would keep them to myself. Particularly, I was not to publish anything incompatible with solid infantry doctrine. If I did, I would be hauled before a court-martial.” *Id.* at 56. The authors are aware of at least one modern instance when an Army official made similar threats of criminal action against an active duty officer prompted by disagreement over the content of a pending publication.

Military retirees are neither civilians nor divorced from the military. They are viewed as “an experienced and tested wartime resource”⁴² and a reservoir of expertise on military issues.⁴³ Advocating the retention of court-martial jurisdiction over officers on the retired rolls, President Woodrow Wilson articulated his view of their status and the role retirees played within the military. Wilson posited that they were “regarded and governed at all times as an effective reserve of skilled and experienced

30. U.S. DEP’T OF ARMY, REG. 60-20, ARMY AND AIR FORCE EXCHANGE SERVICE OPERATING POLICIES para. 2-9(a)(8) (15 Dec. 1992) (retired personnel and their dependents are authorized patrons). Retirees and their family members may also use morale, welfare, and recreation (MWR) facilities; and receive an identification card that permits them to use medical, commissary, exchange, and theater facilities. HANDBOOK FOR RETIRED SOLDIERS, *supra* note 19, paras. 2-6(a), 2-8(a).

31. Retired members of the armed forces, their spouses, and children are eligible for burial in Arlington National Cemetery. U.S. DEP’T OF ARMY, REG. 290-5, ARMY NATIONAL CEMETERIES para. 2-4 (19 Mar. 1976); *see also* 2001 RETIRED MILITARY ALMANAC, *supra* note 19, at 177 (“Military retirees, their spouses, and minor children may be buried in national cemeteries, including Arlington National Cemetery.”). Subject to availability, retired members are entitled to burial honors. U.S. DEP’T OF ARMY, REG. 600-25, SALUTES, HONORS, AND VISITS OF COURTESY para. 6-17 (1 Sept. 1983).

32. U.S. DEP’T OF DEFENSE, REG. 5500.7-R, JOINT ETHICS REGULATION para. 2-304 (30 Aug. 1993) (C4, 16 Aug. 1998) (“Retired military members . . . not on active duty, may use military titles in connection with commercial enterprises, provided they clearly indicate their retired . . . status. However, any use of military titles is prohibited if it in any way casts discredit on DoD or gives the appearance of sponsorship, sanction, endorsement, or approval by DoD. In addition, in overseas areas, commanders may further restrict the use of titles by retired military members . . .”); *see also* HANDBOOK FOR RETIRED SOLDIERS, *supra* note 19, para. 3-7(a) (may use “military titles . . . in connection with commercial enterprises” if use does not discredit the Army or imply Army endorsement).

33. 2001 RETIRED MILITARY ALMANAC, *supra* note 19, at 73 (“Retirees should be addressed, in writing and orally, by their retired military rank.”); *see, e.g.*, Ben Barber, *State Awaits Word on Ross Successor*, WASH. TIMES, Jan. 5, 2001, at A11 (Secretary of State Colin Powell “has asked that he not be addressed as ‘general’ inside the [State Department] building.”). Retirees may use their military titles in a social context. HANDBOOK FOR RETIRED SOLDIERS, *supra* note 19, para. 3-7(a).

34. UCMJ art. 2(a)(4)-(6) (2002).

35. Retirees may accept employment with a foreign government only after receiving the approval of the retiree’s Service Secretary and the Secretary of State. 37 U.S.C.A. § 908 (West 2001). Army regulations provide that any retiree “who accepts Civil employment with a foreign government without the approval specified . . . is subject to having retired pay withheld in an amount equal to the amount received from the foreign government . . . in addition to any other penalty that may be imposed under law or regulation.” U.S. DEP’T OF ARMY, REG. NO. 600-291, FOREIGN GOVERNMENT EMPLOYMENT para. 11 (1 July 1978) (citing *Department Of Defense Military Pay and Allowance Committee*, Comp. Gen. B-178538, Oct. 13, 1977); *accord* DFAS-CL 1352.2 PH, *supra* note 17, at 2-8, para. 2(F). Title 18 U.S.C. § 207 restricts retired officers in their business dealings with the federal government.

officers and a potential source of military strength . . . ”⁴⁴ They constituted a part of the Army, “members of the Military establishment distinguished

36. 10 U.S.C.A. § 688 (West 1998 & 2001 Supp.) (retired members of the regular components, certain members of the Retired Reserve, and members of the Fleet Reserve or Fleet Marine Corps Reserve); *see also* U.S. DEP’T OF ARMY, REG. 601-10, MANAGEMENT AND MOBILIZATION OF RETIRED SOLDIERS OF THE ARMY para. 1.5 (30 Nov. 1994) (Regular Army retired soldiers and reserve retired soldiers with at least twenty years of active service may be recalled to active duty); AFI 36-3203, *supra* note 23, at 43, para. 4.9.1, and 100, para. A7.9. Retirees may volunteer for active duty or be involuntarily recalled during times of “war or national emergency declared by Congress, or when otherwise authorized by law.” AR 601-10, *supra*, para. 1-5(b)-(c). Soldiers who fail to report once ordered to active duty “will be reported as deserters.” *Id.* para. 4-11(d).

37. 10 U.S.C.A. § 750 (“A retired officer has no right to command except when on active duty.”); U.S. DEP’T OF AIR FORCE, INSTR. 51-606, APPOINTMENT TO AND ASSUMPTION OF COMMAND para. 1.9 (1 Oct. 2000) (“A retired officer has no right to command except when on active duty (10 U.S.C. 750).”). The restriction on command has been longstanding. *See* Retired Officers, Op. OTJAG, Army (Oct. 28, 1913), *as digested in* Dig. Opns. JAG 1912-1917, at 308 (Retired Army officer not authorized to be placed in charge of a post that required him to exercise command over enlisted men and an officer of the Medical Corps) (citing 88-600, J.A.G., Oct. 28, 1913); EDGAR S. DUDLEY, MILITARY LAW AND THE PROCEDURE OF COURTS-MARTIAL 221 n.3 (1st ed. 1907) (“Retired officers . . . may be employed on active duty, other than the command of troops, in time of war (Act March 2, 1899)”); *cf.* Retirement, Op. JAGN, Navy (July 19, 1951), *as digested in* Dig. Opns. JAG 1951-1952, sec. 11.3, at 452 (“[A] retired [Naval] officer is not ‘eligible for command at sea’ except during time of war, and then only when detailed to command a squadron or single ship in accordance with the Act of May 22, 1917”). For purposes of the Act, a “time of war” included only a declared war and was not triggered by the Korean Conflict. *Id.* (citing Op. JAGN, 1951/18, 19 July 1951).

38. U.S. DEP’T OF DEFENSE, DIR. 1352.1, MANAGEMENT AND MOBILIZATION OF REGULAR AND RESERVE RETIRED MILITARY MEMBERS para. 4 (Mar. 2, 1990) (citing 10 U.S.C. §§ 672, 688).

39. *Id.* encl. 2, para. E1.1.3.

40. *Id.* para. 6.1.5. Category III retirees may also be assigned to positions that reflect their critical skills and may volunteer for particular jobs. *Id.*

41. *Id.* para. 6.3.3 (“The Secretary of a Military Department may order any retired Regular member, retired Reserve member who has completed at least 20 years of active military service, or a member of the Fleet Reserve or Fleet Marine Corps Reserve to active duty without the member’s consent at any time to perform duties deemed necessary to the interests of national defense in accordance with 10 U.S.C. § 683 This includes the authority to order a retired member who is subject to the Uniform Code of Military Justice (UCMJ) to active duty to facilitate the exercise of courts-martial under [10 U.S.C. § 302(a)].”); *see* 10 U.S.C.A. § 688 (“may be ordered to active duty . . . at any time”). *But cf.* HANDBOOK FOR RETIRED SOLDIERS, *supra* note 19, at 3-6(c) (“Retired soldiers may be recalled up to age 64 for general officers, 62 for warrant officers, and 60 for all others.”).

42. 2001 RETIRED MILITARY ALMANAC, *supra* note 19, at 72; *see also* United States v. Hooper, 26 C.M.R. 417, 424 (C.M.A. 1958) (“regarded and governed at all times as an effective reserve of skilled and experienced officers and a potential source of military strength”) (citing 53 CONG. REC. 12,844 (1916)) (statement of President Wilson).

by their long service, and, as such, examples of discipline to the officers and men in the active Army.”⁴⁵ Wilson believed that these retirees “represent the spirit of the Military Establishment,” are “exemplars of discipline, and have in their keeping the good name and good spirit of the entire Military Establishment before the world.”⁴⁶

Because of their special position and relationship with the military, Wilson believed that such retired personnel had been subject to military jurisdiction as a matter of necessity, “in order that the retired list might not become a source of tendencies which would weaken the discipline of the active land forces and impair that control over those forces which the Constitution vests in the President.”⁴⁷ Further, Wilson advocated a uniform application of military jurisdiction to active duty personnel and those on the retired list, believing such application essential for the Army to be an effective and coherent force once called to war.⁴⁸

III. The Historical Development of Court-Martial Jurisdiction over Retired Military Personnel

Although reported courts-martial of military retirees are relatively rare, jurisdiction over retired Army officers has long been a staple of military law.⁴⁹ Additionally, retired officers of the Navy have been subject to court-martial jurisdiction since at least 1857.⁵⁰ The initial 1861 legislation establishing a retired list for Army officers clearly provided they would be

43. See *Hooper*, 26 C.M.R. at 425 (“They form a vital segment of our national defense for their experience and mature judgment are relied upon heavily in times of emergency.”). It is not unusual for senior retired service members to be called upon to give their advice of military matters. See, e.g., Patrick J. Sloyan, *Military Lessons from Nazi Army*, LONG ISLAND NEWSDAY, June 13, 2001, at 18 (“A retired general advising Defense Secretary Donald Rumsfeld on transforming the military yesterday recommended following in the footsteps of the Nazi army by changing the combat capability of only a small percentage of U.S. forces to achieve a dramatic improvement on future battlefields.”); Patrick J. Sloyan, *Advisor: Military Needs Minorities*, LONG ISLAND NEWSDAY, June 14, 2001, at 3 (“A retired Navy admiral advising Defense Secretary Donald Rumsfeld on overhauling the military called yesterday for an aggressive recruitment of Hispanic and African-American sergeants and officers to lead what he predicted will be a military dominated by minorities in the coming decades.”); Thomas E. Ricks, *Rumsfeld on High Wire on Defense Reform*, WASH. POST, May 20, 2001, at A1 (“The criticism has focused on Rumsfeld’s score of study groups, staffed by retired generals and admirals and other experts . . .”).

44. *Hooper*, 26 C.M.R. at 424 (citing 53 CONG. REC. 12,844).

45. *Id.*

46. *Id.*

47. *Id.*

“subject to the rules and articles of war, and to trial by general court-martial for any breach of the said articles.”⁵¹ Further, as early as 1881, the Supreme Court noted that Army officers retired from active service were “subject to the rules and articles of war, and may be tried, not by a jury, as other citizens are, but by a military court-martial, for any breach of those rules”⁵²

Military jurisdiction over enlisted retirees has not existed as long as jurisdiction over retired officers and has varied by service. Retired enlisted soldiers have historically been considered part of the Army and subject to

48. *Id.* Specifically, President Wilson stated:

The purpose of the Articles of War in times of peace is to bring about a uniformity in the application of military discipline which will make the entire organization coherent and effective, and to engender a spirit of cooperation and proper subordination to authority which will in time of war instantly make the entire Army a unit in its purpose of self-sacrifice and devotion to duty in the national defense. These purposes can not be accomplished if the retired officers, still a part of the Military Establishment, still relied upon to perform important duties, are excluded, upon retirement, from the wholesome and unifying effect of this subjection to a common discipline.

Id.

49. The Act of August 3, 1861, which established the retired list for Army and Marine Corps officers, also stated that such officers were “subject to the rules and articles of war, and to trial by general court-martial for any breach of the said articles.” 12 Stat. 290, *quoted in* House, *supra* note 3, at 113 (emphasis deleted). *See also* United States v. Tyler, 105 U.S. 244, 246 (1881) (“subject to the rules and articles of war, and may be tried . . . by a military court-martial”); JAG Bull., Aug. 1942, at 156 (“retired officers are at all times subject to the rules and articles of war, and to disciplinary action for any breach thereof”); DUDLEY, *supra* note 37, at 220 (Retired officers “unless ‘wholly’ retired, . . . though not in active service are subject to discipline as other officers and may be tried and sentenced by court-martial for any breach of the rules and articles of war.”); WINTHROP, *supra* note 7, at 433 (“[a]n officer on retired list . . . subject to trial by general court-martial”).

50. Commander E.T. Kenny, *Uniform Code, Art. 2—Persons Subject to the Code*, JAG J. 12, Aug. 1950, at 13 (“We know that retired regular officers have been expressly subject to naval jurisdiction since 1857 (34 U.S.C. 389).”); *cf.* White v. Treibly, 19 Fed. 2d 712, 713 (D.C. Cir. 1927) (Retired officers of the Navy “shall be subject to the rules and articles for the government of the Navy and to trial by general court-martial.”). In 1916 a retired naval officer, William H. Morin, was subjected to court-martial and dismissed from the service. 1 COMPILATION OF COURT-MARTIAL ORDERS, U.S. DEP’T OF NAVY, 1916-1927, at 53 (1940).

51. House, *supra* note 3, at 113 (citing 12 Stat. at 290) (emphasis deleted).

52. Tyler, 105 U.S. at 246.

military jurisdiction.⁵³ Indeed, military jurisdiction over Army enlisted retirees appears to have been exercised since at least 1896.⁵⁴ Further, since at least 1895, the *Manual for Courts-Martial (MCM)* clearly provided that military jurisdiction extended to both retired Army officers and enlisted personnel.⁵⁵ The exercise of military jurisdiction over retired enlisted soldiers was not pursuant to specific statutory authority; rather, it “was asserted more indirectly under the general rubric of membership in the Regular Army.”⁵⁶

In contrast, military jurisdiction was not exercised against Navy enlisted men on the retired list until the enactment of the UCMJ in 1951.⁵⁷ In *Murphy v. United States*,⁵⁸ the Court of Claims held that enlisted soldiers on the retired list were not part of the Army for purposes of a specific pay-increase Act.⁵⁹ In dicta, the court conceded that, by statute, retired soldiers were considered to be part of the Army, but the court expressed confusion as to their actual status, noting that retired soldiers were not “a part of the organization of the Army, subject to military duty as enlisted men on the active list.”⁶⁰ The court questioned how retired soldiers could

53. Retirement, Op. OTJAG, Army (1912), as digested in Dig. Ops. JAG 1912, sec. II B.1, at 1001 (“retired enlisted men are not formally discharged from the service at the date of retirement”), sec. II B.5, at 1002 (“a retired soldier is part of the Army”), sec. II F.3, at 1003 (“An enlisted man on the retired list is subject to trial by court-martial (C. 21089, Feb. 11, 1907) and to dishonorable discharge by sentence if such be adjudged.”); see also LEE S. TILLOTSON, THE ARTICLES OF WAR ANNOTATED 7 (1942) (“Retired enlisted men of the Regular Army are subject to military law.”).

54. Retirement, Dig. Ops. JAG 1912, sec. II B.3a, at 1001 (“Held that a retired enlisted man may be tried for not paying his debts. C.2716, Nov. 2, 1896.”).

55. FIRST LIEUTENANT ARTHUR MURRAY, MANUAL FOR COURTS-MARTIAL 12 n.2 (1895) (court-martial jurisdiction extends to “retired officers and soldiers”); see also A MANUAL FOR COURTS-MARTIAL, UNITED STATES para. 4(a) note (1920) (persons subject to the Articles of War include “the officers and enlisted men of the retired list”); A MANUAL FOR COURTS-MARTIAL, COURTS OF INQUIRY, AND OF OTHER PROCEDURE UNDER MILITARY LAW, UNITED STATES 3 note (1916) (members of the Regular Army subject to military jurisdiction includes “officers and enlisted men on the retired list”); A MANUAL FOR COURTS-MARTIAL, COURTS OF INQUIRY, AND RETIRING BOARDS, AND OF OTHER PROCEDURE UNDER MILITARY LAW, UNITED STATES 14 n.2 (rev. ed. 1901) [hereinafter 1901 MCM]; A MANUAL FOR COURTS-MARTIAL AND OF PROCEDURE UNDER MILITARY LAW, UNITED STATES 13 n.2 (2d ed. 1898).

56. Pearson v. Bloss, 28 M.J. 376, 379 n.4 (C.M.A. 1989).

57. Kenny, *supra* note 50, at 14. However, sailors with more than twenty years of service who were transferred to the Fleet Reserve were still subject to military jurisdiction. *Id.* (Article 2(6) was “an unqualified incorporation of existing law.”); see United States v. Fenno, 167 F.2d 593 (2d Cir. 1948).

58. 38 Ct. Cl. 511 (1903), *aff’d*, 39 Ct. Cl. 178 (1904).

59. *Id.* at 178, 183-84.

60. *Id.* at 180.

be considered part of the Regular Army if not subject to military duty.⁶¹ Further, the court refused to concede that retired soldiers were subject to court-martial jurisdiction and characterized a soldier's retired pay as compensation "not for services to be rendered in the future, but for services which he had faithfully rendered prior to his retirement."⁶²

In 1909, relying on the Court of Claims' decision in *Murphy*, the Navy posited "that a retired enlisted man is not amenable to trial by court-martial for violation of the laws and regulations governing the Navy."⁶³ In 1922, the Navy again took the same position, opining that retired men of the Navy were not subject to military jurisdiction, except when called to active duty during times of war or national emergency.⁶⁴ The Navy based its opinion on two grounds. First, naval courts-martial were courts of limited jurisdiction and had no legal authority to proceed except when "specially empowered by statute to do so."⁶⁵ Second, the Navy was unable to locate any statutory authority that "either directly or indirectly provides that retired enlisted men are subject to the rules and articles of the government of the Navy or that they are amenable to trial by a naval court-martial."⁶⁶ Because Congress had specifically provided that retired officers of the Navy were subject to military jurisdiction, the Navy concluded that the absence of specific legislation addressing retired Navy enlisted men meant that Congress did not intend that they be subject to military jurisdiction.⁶⁷ The Navy continued to adopt this legal position until 1951, when the UCMJ went into effect.⁶⁸

The UCMJ was the first legislation that expressly included retired personnel in the punitive articles as being subject to military law.⁶⁹ Since Army retirees were statutorily included as a component of the Regular Army, and because the Articles of War applied to all members of the Regular Army, a specific statutory provision extending military jurisdiction to Army personnel on the retired list was viewed as unnecessary.⁷⁰ The Army

61. *Id.* at 180-81.

62. *Id.* at 182.

63. C.M.O.9, 1922, at 11 (citing File No. 7657-57, 27 Aug. 1909).

64. *Id.* at 12 (File No. 7657-1387, J.A.G., 29 July 1922).

65. *Id.* at 11.

66. *Id.*

67. *Id.* at 12.

68. Kenny, *supra* note 50, at 14 ("As recently as a year ago [1949], the Judge Advocate General affirmed this opinion."); *see also* C.M.O.6, 1951, at 178, 179-80 ("Retired enlisted men of the Regular Navy under current provisions of law are not subject to court-martial jurisdiction. After 31 May 1951, however, all such retired personnel of a Regular component who are entitled to receive pay will be subject to court-martial jurisdiction.").

considered its enlisted retirees to be subject to military jurisdiction. The Navy, however, did not take the same position. Accordingly, the specific language of Article 2, UCMJ, resolved the jurisdictional issue of retired Navy enlisted personnel, clearly extending military jurisdiction to them.

Currently, Article 2, UCMJ, provides for jurisdiction over three classes of military retirees: (1) "Retired members of a regular component of the armed forces who are entitled to pay;" (2) "Retired members of a reserve component who are receiving hospitalization from an armed force;" and (3) "Members of the Fleet Reserve and Fleet Marine Corps Reserve."⁷¹ Jurisdiction over retirees of a regular component is triggered by *entitlement* to retired pay, rather than its actual receipt.⁷² Included within Article 2(4)'s ambit are service members retired for either a permanent or temporary disability.⁷³ In contrast, retired reservists are only subject to military jurisdiction when receiving hospitalization from the military, regardless of their entitlement to retired pay.⁷⁴ Finally, members of the Fleet Reserve and Fleet Marine Corps Reserve are subject to military

69. House, *supra* note 3, at 112-13 ("The first American Articles of War contained no specific reference to retired personnel, nor did the changes in the Articles of War enacted in 1806, 1874, 1916, 1920, or 1948."). Specific mention of retired personnel may be found in the various *Manuals for Courts-Martial*. See, e.g., 1901 MCM, *supra* note 55, at 14 n.2 (court-martial jurisdiction extends to "retired officers and soldiers").

70. House, *supra* note 3, at 114.

71. UCMJ art. 2(a)(4)-(6) (2002).

72. *Id.* art. 2(a)(4) ("who are *entitled* to pay") (emphasis added); see also *United States v. Bowie*, 34 C.M.R. 808, 811 (A.F.B.R. 1964), *aff'd*, 34 C.M.R. 411 (C.M.A. 1964); JAMES SNEDEKER, *MILITARY JUSTICE UNDER THE UNIFORM CODE* 127 (1953) ("The jurisdiction of the Uniform Code in such cases is continuous and remains uninterrupted so long as the retired regulars retain the right to receive pay. A retired regular who elects to receive other statutory benefits in lieu of retired pay is still a person legally entitled to receive such pay and his election does not remove him from the continuing jurisdiction of the Uniform Code.").

73. *United States v. Stevenson*, 53 M.J. 257, 259 (2000).

74. UCMJ art. 2(a)(5); see also SNEDEKER, *supra* note 72, at 128 ("Reservists, after retirement, are not, by virtue of such retirement, subject to the Uniform Code, whether or not they are entitled to receive pay."); ROBINSON O. EVERETT, *MILITARY JUSTICE IN THE ARMED FORCES OF THE UNITED STATES* 19 (1956) ("A retired reservist . . . is not within military jurisdiction, despite receipt of retirement benefits, unless he is being hospitalized in a military hospital."). One legal commentator noted that the exercise of military jurisdiction over retired reservists has historically been "comatose." Bishop, *supra* note 13, at 359.

jurisdiction simply by virtue of their status as such.⁷⁵ One peculiarity of retiree courts-martial is that enlisted retirees may not be reduced in rank.⁷⁶

A. Officers

The earliest reported case involving the court-martial of a retired officer was that of Army Major Benjamin P. Runkle. In 1870, Major Runkle retired from the Army, but in 1872 he was tried before a general court-martial, ordered to convene by President Grant, for misconduct occurring both before and after his retirement stemming from his actions as a dispersing officer.⁷⁷ Runkle was convicted and was sentenced to be “cashiered,” to pay a fine, and to be confined for four years.⁷⁸ Reflecting a unanimous recommendation by the members based upon Runkle’s war service, good character, and war wounds, the Secretary of War wrote on the record of trial that President Grant had remitted all of the sentence except the cashiering.⁷⁹ Four and a half years later, President Hayes reviewed the case, found the evidence insufficient, disapproved the conviction and sentence, and ordered the revocation of the War Department directive removing Runkle from the retired list.⁸⁰ After Runkle sued for longevity pay, the government counterclaimed for the back pay that had previously been ordered by President Hayes to be paid Runkle and for the retired pay Runkle had received after being returned to the retired list.⁸¹

The Court of Claims denied Runkle’s claim for longevity pay and the government’s counterclaim for return of his retired pay, but did grant the

75. UCMJ art. 2(a)(6) (“Members of the Fleet Reserve and Fleet Marine Corps Reserve”); see *United States v. Morris*, 54 M.J. 898, 900 (N-M. Ct. Crim. App. 2001) (“We find the provisions of Articles 2 and 3, UCMJ, standing alone, to be sufficient to establish jurisdiction in this case.”).

76. *Morris*, 54 M.J. at 904 (“error to impose a reduction to pay grade E-1 in this case”); see also *United States v. Sloan*, 35 M.J. 4, 11-12 (C.M.A. 1992); *United States v. Allen*, 33 M.J. 209, 216 (C.M.A. 1991). An enlisted retiree may not be reduced in grade or rate by either a “court-martial or by operation of Article 58a, UCMJ.” *Sloan*, 35 M.J. at 11.

77. *Runkle v. United States*, 19 Ct. Cl. 396, 398 (1884), *rev’d on other grounds*, 122 U.S. 543 (1887). The misconduct involved allegations of embezzlement and misappropriation of government funds. *Id.* at 400. Runkle was also charged with conduct unbecoming based on the same misconduct. *Id.*

78. *Id.* at 398-99. If Runkle did not pay the fine, he was to be confined until he did so, but not longer than eight years. *Id.* at 399.

79. *Id.* at 406.

80. *Id.* at 399-400.

81. *Id.* at 396.

government's counterclaim for return of the back pay.⁸² Further, in its opinion the court made a number of salient points affecting retired officers: (1) the President as Commander in Chief is authorized to convene a court-martial;⁸³ (2) a court-martial is a case "arising in the land or naval forces" for Fifth Amendment purposes;⁸⁴ (3) retirees are subject to military jurisdiction for "non-military" offenses;⁸⁵ and (4) a court-martial retains jurisdiction over offenses committed after retirement.⁸⁶ The Supreme Court reversed the Court of Claims, holding that Runkle's dismissal was a nullity, but only because President Grant had never approved Runkle's sentence.⁸⁷

Not long thereafter, Lieutenant General John M. Schofield, acting Secretary of War and commander of the Army, ordered the arrest and "confinement on charges" of retired Army Captain Armes after the retiree sent "an offensive letter" to the General.⁸⁸ The letter accused Schofield of "the manufacture of false testimony and various attempts to ruin and disgrace him (Armes), and demand[ed] an apology before [Schofield's] retirement."⁸⁹ Armes was charged with "'conduct to the prejudice of good order and military discipline,' and . . . of 'conduct unbecoming an officer and gentleman'"⁹⁰ Although Captain Armes's ultimate fate is unreported, the U.S. Court of Appeals for the District of Columbia upheld Schofield's orders, noting that as an Army officer on the retired list, Captain Armes was "subject as such to trial by court-martial for violation of the articles of war, and the charges against him being for offenses against those articles[,] . . . his arrest to answer those charges was right and proper."⁹¹

The oldest reported court-martial of a retired Naval officer dates from 1916. In that case, Boatswain William H. Morin was convicted of disobeying a lawful order of the Secretary of the Navy and three specifications of conduct unbecoming an officer and gentleman predicated on his failure to

82. *Id.* at 395.

83. *Id.* at 409.

84. *Id.* at 411.

85. *Id.* at 412.

86. *Id.* at 413-14.

87. 122 U.S. at 560-61.

88. *Closson v. Armes*, 7 App. D.C. 460 (D.C. 1896), *discussed in* *United States v. Hooper*, 26 C.M.R. 417, 422 (1958).

89. *Id.* at 461.

90. *Id.*

91. *Id.*

pay certain debts. Despite his retired status and the fact that he held the Medal of Honor, Morin was dismissed from the naval service.⁹²

The next reported case did not occur until 1931. In *United States v. Kearney*,⁹³ a retired Army Major⁹⁴ was convicted of one specification of conduct unbecoming an officer and gentleman by being drunk and disorderly in violation of the 95th Article of War (A.W.), and was sentenced to be dismissed from the service.⁹⁵ At about 0300, 10 August 1931, the manager of the Bernita Hotel in San Francisco was awakened by a woman's scream. Investigating the disturbance, she encountered a screaming woman—"a common woman, the kind not tolerated in that hotel"—who had just departed the accused's room and claimed she had been choked.⁹⁶ After ordering the hysterical woman from the hotel, the manager entered the accused's room, found him "not to be normal or in possession of his faculties," and summoned the city police, who removed Kearney from the premises.⁹⁷ An arresting officer testified that the accused was drunk, staggered, and had alcohol on his breath, but otherwise caused no disturbance in their presence.⁹⁸ No evidence was presented that anyone at the hotel ever saw the accused in a uniform, "but some of the hotel guests knew him to be an officer."⁹⁹

In its opinion, the Army Board of Review found insufficient evidence to support the allegation that Major Kearney was disorderly¹⁰⁰ and further

92. 1 COMPILATION OF COURT-MARTIAL ORDERS, U.S. DEP'T OF NAVY, 1916-1927, at 53 (1940).

93. 3 B.R. 63 (1931).

94. Kearney had retired under a retirement board system that placed Army officers into two categories. Class A officers were retained on active duty. Class B officers were required to undergo a second review. If the Class B status was due to "neglect, misconduct or avoidable habits" . . . he was discharged outright; if not he was retired with pay." Bishop, *supra* note 13, at 338 n.95. "Apparently, the Class B board had been merciful to Major Kearney." *Id.*

95. *Kearney*, 3 B.R. at 63.

96. *Id.* at 64. Upon cross-examination, the manager professed some uncertainty as to her recollection of events. *Id.* at 64-65.

97. *Id.* at 65. "[A]lthough she observed him very closely she was unable to determine whether his condition was one of drunkenness or illness." *Id.* Further, the manager admitted that she neither saw the accused take a drink nor have alcohol in his immediate possession. *Id.*

98. *Id.* There was conflicting testimony between the officer, who stated that Kearney had to be assisted out of the hotel, and the manager, who testified that Kearney "could walk all right." *Id.* at 65-66.

99. *Id.* at 66.

100. *Id.* at 73-74.

found that under the circumstances a charge of drunk to the disgrace of the service in violation of A.W. 95 could not be sustained; however, the court held that the evidence of the accused's drunkenness did support a conviction for conduct of a nature to bring discredit upon the military service, in violation of A.W. 96.¹⁰¹ Further, the court opined that any member of the Army, active duty or on the retired list, who is voluntarily intoxicated, is subject to court-martial under A.W. 96 for such conduct regardless of when or where the misconduct occurs.¹⁰² Finally, the court upheld a conviction under A.W. 96 and recommended that the President consider commuting the sentence of dismissal.¹⁰³

The Judge Advocate General (TJAG) concurred with the opinion of the court, but recommended that Kearney be dismissed from the Army. Given the circumstances surrounding Major Kearney's earlier convictions, the TJAG considered the accused "an undesirable type, unfitted to be carried on the rolls of the Army."¹⁰⁴ The Secretary of War, however, forwarded a letter of transmittal along with the record of trial to President

101. *Id.* at 74-75.

102. *Id.* at 75.

103. *Id.* at 75-76. Dismissal was mandatory upon a conviction of A.W. 95, but not so for a conviction under A.W. 96. *Id.* at 77. The record indicated, however, that the accused had prior convictions from a 1931 court-martial while on active duty for four specifications of drunkenness in violation of A.W. 96. *Id.* at 75-77.

104. *Id.* at 78. The TJAG reiterated the facts of the four offenses for which Kearney had been convicted in his earlier court-martial. First, the accused had been drunk in the presence of a junior officer and civilians at a "social 'penny ante'" poker game in which no alcohol had been served. *Id.* at 77. Second, Kearney was intoxicated while accompanying two ladies to a Girl Scout camp. *Id.* Third, he accompanied two other couples to a mountain cabin, where he became intoxicated

and immediately proceeded to take liberties with the ladies and to make remarks to which they objected. On one occasion he urinated just out of sight, but within hearing of the ladies. Finally, he went to sleep and when [a civilian], in packing up preparatory to leaving, took a blanket covering Kearney, he noticed that his pants were unbuttoned, and his private parts exposed.

Id. On the ride home, Kearney's continuous derogatory remarks concerning the ladies resulted in a fistfight between the accused and one of the male passengers. *Id.* at 78. Fourth, after the journey home continued, the party stopped for water, where the accused used "profane and obscene language in the presence of [a Reverend], his wife and another civilian." *Id.*

Hoover, objecting to the entire proceedings. The Secretary's letter stated, in part:

I . . . disagree entirely with the fundamental basis of this trial. To my mind, it establishes one of the most dangerous precedents that has confronted the Army in its many years of jurisprudence. It, in effect, extends the general court-martial system to retired officers to practically the same extent that it does to active officers and to the practical exclusion of the civil police powers. It has been the immutable custom of the service that officers when retired, unless some extra-ordinary circumstances were involved linking them to the military establishment or involving them in conduct inimical to the welfare of the nation, would be subject only to the police restrictions and jurisprudential processes as the ordinary civilian.¹⁰⁵

Apparently persuaded by the Secretary's impassioned letter, President Hoover disapproved the entire proceedings.¹⁰⁶

Less than a decade later another retired Army Major found himself standing trial before a court-martial. In *United States v. Casseday*,¹⁰⁷ the accused, who had retired after thirty years of service, was charged with thirty-six specifications of A.W. 95 (Conduct Unbecoming an Officer and Gentleman), ten specifications of A.W. 96 (General Article), and two specifications of A.W. 94 (Frauds Against the Government).¹⁰⁸ He was found guilty of all but six specifications of Charge I (A.W. 95) and one specification of Charge II (A.W. 96) and sentenced to dismissal and four years' confinement.¹⁰⁹ Casseday's misconduct involved embezzlement and misapplication of government funds, false swearing, soliciting and obtaining loans from government contractors, obtaining loans under false pretenses, mail fraud, dishonorable failure to pay debts, the majority of the misconduct occurring while Casseday was still on active duty.¹¹⁰ Casse-

105. *Id.* at 79.

106. *Id.* at 80. President Hoover's succinct statement, dated 30 December 1931, states: "In the foregoing case of Major Harvey C. Kearney, U.S. Army, Retired, the entire proceedings, including the sentence, are disapproved." *Id.*

107. 10 B.R. 297 (1940).

108. *Id.* at 297-315.

109. *Id.* at 316. The accused was found guilty, by exception and substitution, of several specifications. The Reviewing Authority approved the guilty finding of a single specification of A.W. 95 under Charge I. *Id.*

110. *Id.* at 317, 322, 326.

day's retired status was not the subject of any further legal discussion, other than a matter for consideration in sentencing. The Board of Review affirmed the findings and sentence, and the TJAG merely recommended a reduction in the period of confinement to reflect the circumstances surrounding the offenses, Casseday's prior service, "and the severity of the punishment involved in the sentence to dismissal."¹¹¹

In *Chambers v. Russell*,¹¹² a retired Navy Lieutenant Commander, who had completed thirty years of active service, was arrested by military authorities and charged under the UCMJ with sodomy, attempts, and conduct unbecoming an officer and gentleman.¹¹³ All charged misconduct occurred while Chambers was still on active duty,¹¹⁴ involved acts with active duty enlisted men,¹¹⁵ and the misconduct was also "cognizable and . . . triable in the appropriate civil courts."¹¹⁶ Chambers brought writs of habeas corpus and prohibition in federal district court, challenging the Navy's authority to court-martial him, after retirement, for misconduct occurring before he had been placed on the retired list.¹¹⁷ The court easily determined that as an officer on the retired rolls receiving pay, Chambers was subject to military jurisdiction pursuant to Article 2(4), UCMJ. The unsympathetic judge posited:

It is apparent to this court that an officer of the United States in a retired military status may reasonably be expected to maintain the essential dignity befitting his rank and status, the qualifications and standards of his rank, and hold himself ready and fit for recall to active duty, in so far as he is subject to an involuntary return to service in the event of war or national emergency. The interest of the Navy in policing its retired members is a legitimate one, since their commissions are not expired, but are merely dormant, pending call.

Where a retired officer has manifested his unfitness for a return to full time military service, and has failed to maintain proper qualifications in conformity with military ethics and standards,

111. *Id.* at 341, 343.

112. 192 F. Supp. 425 (N.D. Cal. 1961).

113. *Id.* at 426 (citing UCMJ Articles 125, 80, and 133).

114. *Id.*

115. Bishop, *supra* note 13, at 343.

116. *Russell*, 192 F. Supp. at 427.

117. *Id.* at 426-27.

it is not unreasonable to assume that the Navy may choose to terminate his status.¹¹⁸

In a more controversial court-martial, a retired Navy Rear Admiral was convicted and dismissed from the service for misconduct occurring long after he had retired. In *United States v. Hooper*,¹¹⁹ the accused was convicted, more than seven years after his retirement, of violating Articles 125, 133, and 134, UCMJ.¹²⁰ The convictions were based on allegations of homosexual conduct that occurred at an off-post, private residence,¹²¹ but which included enlisted personnel from the Navy and Marine Corps.¹²² Hooper's misconduct violated California law, but the State took no legal action.¹²³ The court-martial was conducted without Admiral Hooper having been recalled to active duty, a point that formed a basis for Hooper's subsequent appeal.¹²⁴

The United States Court of Military Appeals (COMA) rejected Hooper's contention that a retiree had to be recalled to active duty before military jurisdiction could attach,¹²⁵ posited that a retired officer was part of the "land or naval forces" for purposes of the Fifth Amendment,¹²⁶ and rejected the contention that retired officers were "mere pensioners."¹²⁷ Significantly, the COMA addressed the nature of the charges in light of the

118. *Id.* at 428.

119. 26 C.M.R. 417 (C.M.A. 1958).

120. *Id.* at 419. The Article 133 charge alleged that the accused "publicly associate[d] with persons known to be sexual deviates, to the disgrace of the armed forces." *Id.* at 426-27. Proof of the charge included testimony that such persons were homosexuals. *Id.* Other than the principals involved, the association apparently was only observed by government agents and an unidentified "female." *Id.* at 427.

121. *Hooper v. United States*, 326 F.2d 982, 983-84 (Ct. Cl. 1964).

122. Bishop, *supra* note 13, at 340. The Navy obtained evidence for the court-martial, in part, by using the services of at least "four agents of the Office of Naval Intelligence, two of them commissioned officers, [who] established a stakeout on the roof of a neighboring house, whence they could observe, with the aid of binoculars, the goings on in the Admiral's bedroom." *Id.* at 341 n.101.

123. *Id.* at 340-41.

124. *Hooper*, 326 F.2d at 984.

125. *Hooper*, 26 C.M.R. at 421.

126. *Id.* at 422. The pertinent portion of the Fifth Amendment states, "No person shall be held to answer for a[n] . . . infamous crime, unless on a presentation or indictment of a Grand Jury, *except in cases arising in the land or naval forces* . . ." U.S. CONST. amend. 5 (emphasis added).

127. *Hooper*, 26 C.M.R. at 425 ("The salaries they receive are not solely recompense for past services, but a means devised by Congress to assure their availability and preparedness in future contingencies.").

fact that Hooper was not on active duty at the time of the challenged conduct, but quickly disposed of the issue in a few sentences. The COMA stated:

Left for determination is the applicability of the Articles herein involved to one in a retired status. Certainly conduct unbecoming an officer and gentleman—the same subject of Charge II—and conduct of a nature to bring discredit upon the armed forces—the subject of Charge II—are offenses which do not depend upon the individual's duty status. Sodomy, the subject of Charge I, is an offense involving moral turpitude, and without doubt applies to all subject to military law without regard to the individual's duty status.¹²⁸

Ultimately the COMA held that the court-martial possessed jurisdiction over the accused.¹²⁹ In January 1961, President Kennedy approved Hooper's conviction and sentence, and the Admiral's retirement pay was terminated.¹³⁰

Hooper brought suit before the United States Court of Claims, challenging the termination of his retired pay and arguing that Article 2(4), UCMJ, was unconstitutional. The plaintiff's legal attack was "premised solely on the contention that court-martial jurisdiction is strictly limited to those persons who bear such a proximate relationship to the Armed Forces and their functions as to be reasonably treated as 'in' the Armed Forces."¹³¹ The court believed that the critical inquiry was whether a retired officer was part of the land and naval forces. If so, then Article 2(4) would fall under Congress's authority, contained in Article I, section 8 of the Constitution, "[t]o make Rules for the Government and regulation of the land and naval Forces."¹³² Although retaining "certain doubts," the court held that the court-martial's jurisdiction over Hooper was "constitutionally valid."¹³³ The court reasoned that the retired admiral was part of the land or naval forces because he retained a "direct connection" to the military through his retired pay: "because the salary he received was not solely recompense for past services, but a means devised by Congress to

128. *Id.*

129. *Id.* A defective post-trial review by the Staff Judge Advocate, however, required that the record of trial be returned to another reviewing authority. *Id.* at 428.

130. *Hooper v. United States*, 326 F.2d 982, 984 (Ct. Cl. 1964).

131. *Id.*

132. U.S. CONST. art. I, § 8, *quoted in Hooper*, 326 F.2d at 986.

133. *Hooper*, 326 F.2d at 987.

assure his availability and preparedness in future contingencies.”¹³⁴ Although recognizing the validity of Article 2(4) and Congress’s power to enact such a provision, the court nevertheless expressed its concern with the exercise of such power in a case like Hooper’s.¹³⁵

A more recent and highly publicized court-martial of a retired officer involved Major General David Hale. In February 1998, shortly after coming under investigation for sexual misconduct, Hale retired.¹³⁶ On 9 December 1998, after a lengthy investigation, the Army charged General Hale with two specifications of obstruction of justice, six specifications of making false official statements, and nine specifications of conduct unbecoming an officer and gentleman.¹³⁷ As part of a plea bargain, General Hale pled guilty to seven specifications of conduct unbecoming an officer and gentleman and one specification of making a false official statement.¹³⁸ The military judge sentenced General Hale to be reprimanded, forfeit \$1000 per month for twelve months, and to a fine of \$10,000.¹³⁹ Once court-martialed, General Hale became only the second Army general

134. *Id.*

135. *Id.* (“We add that we are concerned in this case only with the power of Congress to provide that a retired officer can be dismissed from the service by a court-martial for offenses against the Uniform Code of Military Justice.”).

136. Rowan Scarborough, *General Allowed to Retire Despite Probe*, WASH. TIMES, Mar. 27, 1998, at A1; see also Jane McHugh, *Hale Hit with 17 Charges of Improper Conduct*, ARMY TIMES, Dec. 21, 1998, at 6. The Army investigation was precipitated by the complaint of the wife of one of General Hale’s former subordinate officers, who alleged that Hale forced her into a sexual relationship with him in 1997. *Id.*

137. McHugh, *supra* note 136, at 6.

138. Rene Sanchez, *Retired General to Plead Guilty*, WASH. POST, Mar. 17, 1999, at A1, A15. The eight instances of misconduct included making a false statement to the Department of Defense’s Deputy Inspector General, having an improper relationship with a woman not his wife while married, having improper relationships with the wives of three subordinate officers, lying to a subordinate officer about his relationship with that officer’s wife, failing to comply with a duty to inform his superior of his intended leave address, and “[w]illfully failing to comply with his duty to explain candidly to the inspector general . . . the true nature of a personal relationship.” Jane McHugh, *Slap on Wrist*, ARMY TIMES, Mar. 29, 1999, at 12.

139. McHugh, *supra* note 138, at 12. Hale’s defense attorney pointed out that the accused “admitted only to consensual affairs with the wives of officers under his command.” Sanchez, *supra* note 138, at A15. Major General Hale was later administratively reduced in rank to Brigadier General. *Adulterous General Demoted in Retirement*, ATLANTA J. CONST., Sept. 3, 1999, at A6.

officer prosecuted under the UCMJ and the first Army retired general officer ever to be tried by court-martial.¹⁴⁰

B. Enlisted Personnel

As noted earlier, in contrast to the Army, the Navy did not consider its enlisted members on the retired list to be subject to military jurisdiction before the enactment of the UCMJ. However, the Navy distinguished between sailors on the retired list and those sailors who had been transferred to the Fleet Reserve after serving more than twenty years on active duty. The latter remained subject to military law.¹⁴¹ Even with the authority to exercise jurisdiction over its enlisted retirees, Army courts-martial were exceedingly rare, as were Navy courts-martial of the semi-retired members of the Fleet Reserve. Indeed, the authors were able to locate only a handful of cases.

An 1896 Opinion from the Judge Advocate General opined that a retired soldier could be court-martialed for not paying his debts,¹⁴² but the ultimate disposition of the soldier's fate is not reported. In 1918, the Army court-martialed a retired musician, employed as a shoe repairman, for contemptuous speech directed against President Wilson and the Government, and for pro-German comments. The errant former soldier is reported to have stated, in part, that the President "and the government [were] subservient to capitalists and 'fools to think they can make a soldier out of a man in three months and an officer in six.'"¹⁴³ The trial resulted in an acquittal.¹⁴⁴

In *United States v. Fenno*,¹⁴⁵ a sailor with twenty-five years of active service had been transferred to the Fleet Reserve following World War II, only to be recalled to active duty two years later to face a court-martial.¹⁴⁶

140. Sanchez, *supra* note 138, at A15; Bradley Graham, *Retired General Faces Misconduct Charges*, WASH. POST, Dec. 11, 1998, at A2. In 1952, Major General Robert Grow was found guilty of "dereliction of duty and security infractions, reprimanded and suspended from command for six months." Sanchez, *supra* note 138, at A15.

141. See, e.g., *United States v. Fenno*, 167 F.2d 593 (2d Cir. 1948).

142. Retirement, Op. OTJAG, Army (1912), as digested in Dig. Ops. JAG 1912, sec. II B.3a, at 1001 (citing C.2716, Nov. 2, 1896).

143. John G. Kester, *Soldiers Who Insult the President: An Uneasy Look at Article 88 of the Uniform Code of Military Justice*, 31 HARV. L. REV. 1697, 1727 (1968) (citing *United States v. Salvagno*, CM 113926 (1918)).

144. *Id.*

145. 167 F.2d 593 (2d Cir. 1948).

Fenno stole government property while employed as a civilian worker at the U.S. Naval Submarine Base, New London, Connecticut.¹⁴⁷ After Fenno was convicted in federal district court and placed on probation, the Navy recalled Fenno to active duty to stand trial by court-martial for charges directly related to the theft for which he had been convicted in federal court.¹⁴⁸ After his court-martial conviction, Fenno filed a petition for a writ of habeas corpus, the dismissal of which was reviewed on appeal by the U.S. Court of Appeals for the Second Circuit.¹⁴⁹

The federal appellate court affirmed. In its opinion the court held that as a member of the Fleet Reserve, Fenno could be recalled to active duty solely for purposes of standing trial before a court-martial¹⁵⁰ and was subject to military jurisdiction at the time he engaged in the thievery.¹⁵¹ Further, the court held that Fleet Reservists were members of the naval forces for Fifth Amendment purposes¹⁵² and that military jurisdiction over Fenno was not defeated merely because another court of competent jurisdiction had exercised its jurisdiction over Fenno and placed him on probation.¹⁵³

Several courts-martial of retired enlisted personnel have been reported under the UCMJ. The first such case involved an Air Force Staff Sergeant on the Temporary Disability Retired List (TDRL). In *United States v. Bowie*,¹⁵⁴ the accused challenged his conviction for "making and uttering four worthless checks with intent to defraud, in violation of Article 123a," in part, by arguing that he was not subject to military jurisdiction.¹⁵⁵ The Air Force Court of Military Review held that a service member on the TDRL was subject to military jurisdiction, pursuant to Article 2(4), UCMJ.¹⁵⁶ Significantly, the court posited that jurisdiction was not defeated by the mere fact that the accused was not receiving retired pay, so long as he was entitled to it.¹⁵⁷ Further, the Air Force appellate court characterized a TDRL retiree as being no different, for jurisdictional purposes,

146. *Id.* Chief Motor Machinists Mate Fenno was originally transferred to the Fleet Reserve in 1939 after twenty years of service, but was recalled to active duty in 1940. *Id.*

147. *Id.*

148. *Id.* at 593-94 ("tried by a general court-martial on charges of bribery and conduct prejudicial to good order and discipline").

149. *Id.* at 594. The district court decision is reported at CMO 11-1947, at 373-87.

150. *Fenno*, 167 F.2d at 594.

151. *Id.* at 594-95.

152. *Id.* at 595.

153. *Id.* at 595-96.

154. 34 C.M.R. 808 (A.F.C.M.R. 1964), *aff'd*, 34 C.M.R. 411 (C.M.A. 1964).

155. 34 C.M.R. at 810.

156. *Id.* at 812.

than any other service member retired for age or length of service.¹⁵⁸ In a slightly more abbreviated discussion of the status of TDRL retirees, the U.S. Court of Military Appeals affirmed, confirming that the UCMJ did not distinguish between disability and nondisability retirees for jurisdictional purposes.¹⁵⁹

In the first nondisability retiree case, *United States v. Overton*,¹⁶⁰ the accused challenged the authority of the Navy to court-martial him pursuant to Article 2(a)(6), UCMJ. After twenty-two years in the Marine Corps, Gunnery Sergeant Overton transferred to the Fleet Marine Corps Reserve and received “retainer pay” while in that status.¹⁶¹ While working as a civilian employee of the Navy in the Philippines, Overton was apprehended while in his car, which contained merchandise stolen from a Navy Exchange.¹⁶² After the Secretary of the Navy approved bringing Overton to trial, his case was referred to a general court-martial.¹⁶³

At trial, the accused had unsuccessfully challenged military jurisdiction over him, arguing that although a member of the Fleet Marine Corps Reserve drawing retainer pay, he had done nothing “to keep his military status current.”¹⁶⁴ On appeal, Overton posited that Article 2(a)(6) was an unconstitutional exercise of congressional power.¹⁶⁵ The COMA quickly disposed of his argument, noting that Congress’s grant of jurisdiction over members of the Fleet Marine Corps Reserve was “neither novel nor arbitrary,” and further stated that “[t]his type of exercise of court-martial jurisdiction has been continually recognized as constitutional.”¹⁶⁶ Further, the

157. *Id.* at 811. Bowie was “receiv[ing] compensation from the Veteran’s Administration in lieu of retired pay from the Air Force . . .” *Id.*

158. *Id.* (adopting a legal opinion of The Judge Advocate General of the Air Force). The court also viewed Bowie’s status as being no different than the status of Rear Admiral Hooper, a nondisability retiree. *Id.* (citing *United States v. Hooper*, 26 C.M.R. 417 (C.M.A. 1958)).

159. *Bowie*, 34 C.M.R. at 412.

160. 24 M.J. 309 (C.M.A. 1987).

161. *Id.* at 310. “Enlisted Navy and Marine Corps members with less than 30 years service are transferred to the Fleet Reserve/Fleet Marine Corps Reserve and their pay is referred to as ‘retainer pay.’” DFAS-CL 1352.2 PH, *supra* note 17, para. 2(C)(1).

162. *Overton*, 24 M.J. at 310. The stolen goods were believed to be destined for sale on the black market. *Id.*

163. *Id.*

164. *Id.* Overton pointed out that he had not attended drills or training, had not been recalled to active duty, and had not taken any correspondence courses. *Id.*

165. *Id.* at 311.

166. *Id.* (citations omitted).

COMA held that the offenses themselves were properly tried by a court-martial under either the *O'Callahan* or *Solorio* standards.¹⁶⁷

In *Pearson v. Bloss*,¹⁶⁸ the Air Force court-martialed a retired Master Sergeant for misconduct occurring both before and after his retirement. The charges all related to the theft of military property.¹⁶⁹ Rejecting Pearson's jurisdictional challenge based largely on pre-UCMJ cases that discussed whether retired enlisted men were members of the military, the court held that the clear language of Article 2(4) subjects retired enlisted members of a regular component who receive retired pay to military jurisdiction.¹⁷⁰ Further, relying on its earlier decision in *Overton*, the COMA upheld the constitutionality of Article 2(a)(4) as it applied to the accused.¹⁷¹ As one legal commentator opined, this decision made it clear that the COMA saw "no constitutional impediment to the exercise of UCMJ jurisdiction over retirees, whether they be officer or enlisted."¹⁷²

In *United States v. Allen*,¹⁷³ a retired Navy Radioman Senior Chief was convicted of several espionage-related offenses.¹⁷⁴ He was sentenced to eight years' confinement and to pay a \$10,000 fine, but not to any form of punitive discharge, reduction in rank, or loss of pay.¹⁷⁵ Pursuant to Arti-

167. *Id.* at 312 (citing *O'Callahan v. Parker*, 395 U.S. 258 (1969) (service connection required); *Solorio v. United States*, 107 S. Ct. 2924 (1987) (military status standard)).

168. 28 M.J. 376 (C.M.A. 1989).

169. The Air Force preferred charges

alleging two offenses of conspiracy to commit larceny; three offenses of conspiracy to dispose of military property without authority; four offenses of unauthorized disposition of military property; four offenses of larceny of military property; and one offense of concealing stolen military property, in violation of Articles 81, 108, 121, and 134, UCMJ . . . respectively.

Id. at 377.

170. *Id.* at 378-79 ("While the original exercise of court-martial jurisdiction over retired regulars of the Army may have been expressly restricted to officers, that situation clearly changed in 1950 with the introduction of the broad, yet more direct, language of Article 2(4).").

171. *Id.* at 379-80. As a member of the Regular Air Force with more than twenty, but less than thirty, years of active service, the accused had been transferred to the Air Force Reserve and the Retired Reserve. *Id.* at 379-80 & n.5. *Overton's* status was comparable to that of Pearson's for jurisdictional purposes. *Id.* at 379.

172. Major Gary J. Holland, *Criminal Law Notes: Courts-Martial Jurisdiction over Enlisted Retirees?—Yes, but a Qualified Yes in the Army!*, ARMY LAW., Oct. 1989, at 31.

173. 28 M.J. 610 (N.M.C.M.R. 1989), *on appeal after remand*, 31 M.J. 572 (N.M.C.M.R. 1990), *aff'd*, 33 M.J. 209 (C.M.A. 1991).

cle 58a, the Navy administratively reduced Allen to the lowest enlisted pay grade.¹⁷⁶ Further, all charged misconduct had occurred while Allen was in a retired status, working overseas as a civilian employee of the Navy, and the Navy had not recalled him to active duty for the court-martial.¹⁷⁷

With respect to issues pertinent to this article, the COMA rejected Allen's argument that "because he was not paid the full pay and allowances of a senior chief petty officer while confined awaiting trial, he has suffered pretrial punishment in violation of Article 13"¹⁷⁸ The court determined that Allen's pay entitlements were statutorily determined and that as a retiree who had not been recalled to active duty for court-martial, Allen was only entitled to retired pay. Accordingly, because Allen was entitled only to retired pay while in pretrial confinement, he was not subjected to pretrial punishment violative of Article 13.¹⁷⁹

Allen also challenged his reduction in rate pursuant to Article 58a. Significantly, the COMA agreed with Allen and held that because he "was tried as a retired member, he could not be reduced for these offenses by the court-martial or by operation of Article 58a."¹⁸⁰ The COMA based its decision on three factors: (1) the conclusion of an academic that forfeiture of pay and reduction in grade was not required to satisfy military interests in court-martial of retirees and reservists;¹⁸¹ (2) consistency "with the long-standing proposition that a transfer of a servicemember to the retired list is conclusive in all aspects as to grade and rate of pay based on . . . years of service;"¹⁸² and (3) a Comptroller General opinion holding that a mem-

174. A Navy court-martial convicted Allen of

seven specifications of disobeying a general order involving security regulations in violation of Article 92[,] . . . two specifications alleging espionage activity in violation of Article 106a[,] . . . and one specification of violating the federal espionage statute of 18 U.S.C. § 793(d) alleged under Clause 3 of Article 134

Id. at 611.

175. *Id.*

176. *Allen*, 33 M.J. at 210 & n.2.

177. *Allen*, 28 M.J. at 611 n.1; 31 M.J. at 582. Allen was employed "as a civilian reproduction clerk at the Naval Telecommunications Command Center, Naval Base, Subic Bay, Republic of the Philippines (NTCC)." *Allen*, 31 M.J. at 582.

178. *Allen*, 33 M.J. at 214.

179. *Id.* at 215.

180. *Id.* at 216.

181. *Id.* (citing Bishop, *supra* note 13, at 356-57).

182. *Id.* (citing 10 U.S.C. § 6332).

ber of the Fleet Reserve who, while on active duty, was reduced in rating as the result of court-martial action, should be paid at his higher rating once returned to an inactive status.¹⁸³

While on appeal before the Navy-Marine Court of Military Review (NMCMR), Allen asserted that his convictions for disobeying security regulations, in violation of Article 92, should be dismissed “because as a retired member of the regular Navy he is not subject to the orders of an active duty flag officer.”¹⁸⁴ Focusing on Allen’s susceptibility to military jurisdiction as a retired member of the regular Navy, the NMCMR found no merit to Allen’s argument.¹⁸⁵ The COMA did not review this issue on appeal.

A Coast Guardsman, who alleged that he should have been placed on the TDRL rather than retained on active duty, challenged the exercise of military jurisdiction over him after being convicted of the wrongful use of cocaine. In *United States v. Rogers*,¹⁸⁶ the accused argued that he had been placed on the TDRL by the Chief, Office of Personnel and Training, but that someone without authority had modified the effective date of his retirement so that he was not properly on active duty at the time of his court-martial.¹⁸⁷ The court rejected the argument, adopting the government’s position “that a member remains on active duty subject to jurisdiction for trial by Court-Martial absent delivery of a discharge certificate.”¹⁸⁸ Alternatively, the court pointed out that the military would have retained jurisdiction over Rogers as a retiree pursuant to Article 2, UCMJ.¹⁸⁹

In *United States v. Sloan*,¹⁹⁰ a retired Army Sergeant Major pled guilty to charges of carnal knowledge and committing indecent acts with a child (his daughter). The misconduct occurred while Sloan was still on active duty.¹⁹¹ The accused challenged the Army’s jurisdiction, arguing that the convening authority lacked the authority to refer his case to court-

183. *Id.* (citing *Pay-Retainer-Effect of Active Duty Pay Reduction Etc.*, by Court-Martial Sentence, 20 Comp. Gen. 76, 78 (1940)).

184. *Allen*, 31 M.J. at 636.

185. *Id.* at 636-37.

186. 30 M.J. 824 (C.G.C.M.R 1990).

187. *Id.* at 827-28.

188. *Id.* at 828 (citations omitted).

189. *Id.*

190. 35 M.J. 4 (C.M.A. 1992).

191. *Id.* at 5. Charges were preferred against Sloan a month before his retirement, but efforts to revoke Sloan’s retirement were unsuccessful. *Id.*

martial absent the approval of Headquarters, Department of the Army, and the Secretary of the Army. Sloan argued that by "Army regulation and policy, 'Army retirees have an additional protection not afforded the retirees from the other services,'" and that authority had been withdrawn to the Secretarial level to dispose of cases involving retirees.¹⁹² The COMA rejected Sloan's position, reasoning that (1) the applicable regulation became effective after Sloan's court-martial; (2) even if the regulation merely codified existing Army policy, there was no evidence that the proper authority had withdrawn court-martial authority; (3) policy did not rise to the level of law; (4) the accused could not assert the regulatory constraints against the Army unless the regulation was promulgated to protect his rights, which it was not; and (5) the policy's language was "by its own terms hortatory, rather than mandatory."¹⁹³ Clearly, the COMA saw no safe harbor for a retired accused in the Army's regulation and policy restricting the exercise of military jurisdiction over this class of service members.

In *Sands v. Colby*,¹⁹⁴ a retired Army Sergeant Major employed by the United States in Saudi Arabia was ordered to active duty to stand trial for allegedly murdering his wife in their government quarters.¹⁹⁵ Before taking action, the United States negotiated the jurisdiction issue with Saudi officials.¹⁹⁶ Denying the accused's petition for a writ of mandamus on jurisdictional and speedy trial grounds, the ACMR merely reiterated the well-established law in this area; holding, in relevant part, that because Sands was a retired member of the Regular Army receiving pay, he was subject to court-martial jurisdiction, and the Army was authorized to recall him to active duty to stand trial.¹⁹⁷

A more recent case was that of *United States v. Stevenson*.¹⁹⁸ In that case a Navy Corpsman on the TDRL, charged with rape, successfully suppressed at trial DNA evidence obtained from blood taken from him while a patient at a Veterans Administration hospital. After an unsuccessful appeal to the Navy-Marine Court of Criminal Appeals, the government filed an Article 67(a)(2) certification of the issue with the Court of Appeals for the Armed Forces (CAAF).¹⁹⁹ Reversing the lower court, the CAAF

192. *Id.* at 7.

193. *Id.* at 8-9.

194. 35 M.J. 620 (A.C.M.R. 1992).

195. *Id.* at 620-21.

196. *Id.* at 620.

197. *Id.* at 621.

198. 53 M.J. 257 (2000).

held that Military Rule of Evidence 312(f)²⁰⁰ applies to retirees on the TDRL, paving the way for the admission of the DNA evidence. Explaining the status of such a retiree, the CAAF characterized the TDRL as “a ‘temporary’ assignment, not a permanent separation from active duty,” and “underscore[d] the continuing military status of a member on the TDRL, even if the member is not then performing regular duties.”²⁰¹ Further, the court noted that even if a service member on the TDRL is eventually determined to be unfit for active duty and retired, disability retirees still retain their military status and remain subject to recall.²⁰²

The most recent published case discussing military jurisdiction over retirees is *United States v. Morris*,²⁰³ which involved the prosecution of a Marine noncommissioned officer (NCO) who had been transferred to the Fleet Marine Corps Reserve upon the completion of twenty years of active duty. Nearly three years after Morris’s transfer to the Fleet Marine Corps Reserve, the Secretary of the Navy approved a Marine Corps request to recall the accused to active duty for court-martial.²⁰⁴ Eventually, Staff Ser-

199. *Id.*

200.

Nothing in this rule [dealing with admissibility of evidence obtained from “body views and intrusions”] shall be deemed to interfere with the lawful authority of the armed forces to take whatever action may be to preserve the health of a servicemember. Evidence or contraband obtained from an examination or intrusion conducted for a valid medical purpose may be seized and is not evidence obtained from an unlawful search or seizure within the meaning of Mil. R. Evid. 311.

Id. at 259.

201. *Id.*

202. *Id.* at 260.

203. 54 M.J. 898 (N-M. Ct. Crim. App. 2001). On 12 July 2002, the Navy-Marine Court of Criminal Appeals issued an opinion addressing court-martial jurisdiction over a retired first class petty officer, but subsequently vacated its decision on 29 August 2002. In *United States v. Huey*, 2002 CCA LEXIS 156 (N-M. Ct. Crim. App. July 12, 2002), the retired petty officer, who had been a Navy civilian employee in Okinawa at the time of the charged misconduct, challenged his convictions for rape, forcible sodomy, and indecent assault, arguing in part that the exercise of court-martial jurisdiction violated his rights under the Due Process Clause of the Fifth Amendment. *Id.* at *2-4. Rejecting Huey’s assertion that because the likelihood of being recalled to active duty was so remote that he was effectively in a civilian status, the court dismissed Huey’s factual position as neither persuasive nor dispositive and reiterated a court-martial’s “power to try a person receiving retired pay.” *Id.* at *4. However, the court subsequently vacated its opinion, and the advance sheet was withdrawn from publication. *Huey v. United States*, 2002 WL 1575234 (N-M. Ct. Crim. App. Aug. 29, 2002).

geant Morris pled guilty to sexual misconduct involving his juvenile daughter.²⁰⁵

On appeal, Morris challenged military jurisdiction over him, arguing in part that the omission of his reserve obligation termination date on his Certificate of Release or Discharge from Active Duty (DD Form 214) meant that he could not be recalled for court-martial.²⁰⁶ The court summarily rejected the defense position that the omission on Morris's DD Form 214 had any impact on his susceptibility to military jurisdiction.²⁰⁷ The court posited that Articles 2 and 3, UCMJ, were sufficient by themselves to establish military jurisdiction.²⁰⁸ Finally, the court held that Rule for Courts-Martial 204(b)(1), which requires that "[a] member of a reserve component must be on active duty prior to arraignment at a general . . . court-martial,"²⁰⁹ did not apply to retirees and members of the Fleet Reserve or Fleet Marine Corps Reserve.²¹⁰

IV. The Pension Question

The characterization of military retired pay as either "property" or as "reduced pay for reduced services" has been an issue relevant to military divorce proceedings,²¹¹ and as this article addresses, remains an issue with respect to the continued extension of military jurisdiction over retired

204. *Morris*, 54 M.J. at 899.

205. *Id.* at 898. Morris "plead guilty to carnal knowledge, sodomy, indecent acts, and indecent liberties . . . against his daughter, who was under the age of 16 at the time of the offenses." *Id.*

206. *Id.* at 899.

207. *Id.* Morris also argued that he had not received retainer pay and was not on active duty at the time of the court-martial, but the court found neither argument to be supported by the evidence. *Id.*

208. *Id.* at 900. Article 3(a) provides that

a person who is in a status in which the person is subject to this chapter and who committed an offense against this chapter while formerly in a status in which the person was subject to this chapter is not relieved from amenability to the jurisdiction of this chapter for that offense by reason of a termination of that person's former status.

UCMJ art. 3(a) (2002). In short, Morris did not escape military jurisdiction for crimes committed on active duty merely by his transfer to the Fleet Marine Corps Reserve.

209. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 204(b)(1) (2002) [hereinafter MCM].

210. *Morris*, 54 M.J. at 901.

members of the regular components.²¹² For purposes of asset division in divorce proceedings, this issue has been largely resolved through the enactment of the Uniformed Services Former Spouses' Protection Act (USFSPA)²¹³ and the Supreme Court decision in *Barker v. Kansas*.²¹⁴ The modern treatment of military retired pay as something akin to a mere pension, however, calls into question one rationale justifying the exercise of court-martial jurisdiction over military retirees, that is, the characterization of military retired pay as reduced pay for reduced services.²¹⁵ This rationale for the exercise of court-martial jurisdiction over retired members of the regular components maintains that if a retiree is receiving military retired pay, albeit for reduced services, the retiree should be subject to the Uniform Code of Military Justice. In short, proponents maintain that a military retiree is not merely a pensioner, but is an integral—albeit dormant—member of the armed forces available to be recalled to active duty in times of war or national emergency. Retired pay is not like a civilian pension; it is more akin to a form of retainer pay. Recent changes to military retired pay statutes and the USFSPA, however, have undermined this rationale for the continued exercise of court-martial jurisdiction over military retirees.

A. Historic Treatment of Retired Pay

Before the Civil War, retired officers did not receive retired pay unless their retirement was attributable to disability.²¹⁶ In 1861, the first Army

211. See Major Mary J. Bradley, *Calling for a Truce on the Military Divorce Battlefield: A Proposal to Amend the USFSPA*, 168 MIL. L. REV. 40 (2001), for a detailed study of the Uniformed Services Former Spouses' Protection Act and the current debate to amend it.

212. See 10 U.S.C.A. § 802(a)(4) (West 1998 and 2001 Supp.); *supra* note 72.

213. Uniformed Services Former Spouses' Protection Act, Pub. L. No. 97-252, 96 Stat. 730 (1982) (codified as amended at 10 U.S.C. §§ 1072, 1076, 1086, 1408, 1447-1448, 1450-1451 (2000)).

214. 503 U.S. 594 (1992).

215. See, e.g., *Hooper v. United States*, 326 F.2d 982, 987 (Ct. Cl. 1964). In *Hooper*, the court held the exercise of military jurisdiction over a retired naval officer to be constitutionally valid because Hooper was part of the land and naval forces of the United States. *Id.* (citing U.S. CONST. art. I, § 8). In reaching its conclusion, the court reasoned: "We say this because the salary [Hooper] received was not solely recompense for past services, but a means devised by Congress to assure his availability and preparedness in future contingencies. He had a direct connection with the operation of the 'land and naval forces.'" *Id.*

216. See Marjorie Rombauer, *Marital Status and Eligibility for Federal Statutory Income Benefits: A Historical Survey*, 52 WASH. L. REV. 227, 228-29 (1977).

retired list was established for officers.²¹⁷ The characterization of military retired pay as “reduced pay for reduced services” can be traced to a post-Civil War case, *United States v. Tyler*.²¹⁸ Captain Richard W. Tyler entered the Army as an enlisted soldier in 1861, was appointed as a lieutenant in 1864, and retired in 1870 due to injuries. In 1880, Captain Tyler petitioned the U.S. Court of Claims to increase his retired pay based upon statutes that provided pay increases for longevity of military service. Tyler asserted that the applicable statutes made no distinction regarding pay increases for longevity between active duty officers and retired officers.²¹⁹ The Court of Claims held that the applicable pay statutes²²⁰ allowing longevity pay for every five years of service did apply to retired officers because they “do not cease to be in service by the mere fact of being placed on the retired list and relieved from active duties.”²²¹ Accordingly, the Court of Claims held that Captain Tyler was entitled to judgment in the amount of \$1203.14 for additional longevity pay, including the approximately ten years of service as a retired officer.²²²

On appeal, the U.S. Supreme Court examined the applicable statutes and determined that there was a “manifest difference in the two kinds of retirement, namely, retiring from active service and retiring wholly and altogether from the service.”²²³ Officers wholly retiring from the service received a lump sum payment of one year’s pay and allowances of the highest rank they held and their connection to the government was ended.²²⁴

The ultimate issue in *Tyler* was whether an officer retired from active service was “considered in the service within the meaning of sect[ion]

217. See House, *supra* note 3, at 113 (citing Act of Aug. 3, 1861, 12 Stat. 289, 290, which applied to both officers of the Army and the Marine Corps).

218. 105 U.S. 244 (1881).

219. *Tyler v. United States*, 16 Ct. Cl. 223 (1880).

220. The government attorney unsympathetically characterized retirement pay as a “pure gratuity, and most of those who receive it have been practically forced out of their positions in the active service, because they are, as they have been formally declared to be, incompetent, and unable longer to perform duty.” *Id.* at 235.

221. *Id.* at 234.

222. *Id.* at 238.

223. *United States v. Tyler*, 105 U.S. 244 (1881).

224. REVISED STATUTES, *supra* note 5, § 1275. Section 1275 of the Revised Statutes provides that “officers wholly retired from the service shall be entitled to receive upon their retirement one year’s pay and allowances of the highest rank held by them, whether by staff or regimental commission, at the time of their retirement.” *Id.*, quoted in *Tyler*, 105 U.S. at 245.

1262.”²²⁵ In reaching the conclusion that “retired officers are in the military service of the government,” the Supreme Court was persuaded by statutes that permitted retired officers to wear the uniform²²⁶ and to be assigned to duty at the Soldiers’ Home,²²⁷ detailed to serve as professors in any college,²²⁸ listed as part of the organization of the Army,²²⁹ and subject to the rules and articles of war.²³⁰ Although the Supreme Court did not expressly characterize the retired pay received by an officer retired from active service as “reduced pay for reduced service,” the Court did state that the “compensation [retired pay] is continued at a reduced rate, and the connection [with the government] is continued.”²³¹

Although the *Tyler* decision was a post-Civil War military pay case based upon an interpretation of then-applicable pay statutes, the military relied upon *Tyler* as support to extend military jurisdiction to military retirees. In a case of first impression, Rear Admiral Selden G. Hooper, a retired officer of the Regular Navy, challenged the exercise of court-martial authority by naval authorities against him for violations of the Uniform Code of Military Justice.²³² The authority to subject a retiree to court-martial derives from Article I, section 8 of the Constitution, which provides that “Congress shall have the power “[t]o make Rules for the Government and Regulation of the land and naval Forces.”²³³ The question in *Hooper* was whether the retired Admiral was part of the “land and naval forces”

225. *Tyler*, 105 U.S. at 245. The Act of July 15, 1870, 16 Stat. 320, ch. 294, § 1262 (1870), provides, “There shall be allowed and paid to each commissioned officer below the rank of brigadier-general, including the chaplains, and others having assimilated rank or pay, ten per centum of their current yearly pay for each term of five years’ service.” *Id.*

226. *Tyler*, 105 U.S. at 245. Revised Statute § 1256 provides that the “officers retired from active service shall be entitled to wear the uniform of the rank on which they may be retired.” REVISED STATUTES, *supra* note 5, § 1256.

227. *Tyler*, 105 U.S. at 245. Revised Statute § 1259 provides that “they may be assigned to duty at the Soldiers’ Home.” REVISED STATUTES, *supra* note 5, § 1259.

228. *Tyler*, 105 U.S. at 245. Revised Statute § 1260 provides that “they may be detailed to serve as professors in any college.” REVISED STATUTES, *supra* note 5, § 1260.

229. *Tyler*, 105 U.S. at 245. Revised Statute § 1094, states “specifically by a catalogue of twenty-eight items, of what the army of the United States consists, and the twenty-seventh item of this enumeration is ‘the officers of the army on the retired list.’” REVISED STATUTES, *supra* note 5, § 1094. Current statutes also provide that the Regular Army includes retired officers. 10 U.S.C.A. § 3075(b)(3) (West 1998 and 2001 Supp.); *see supra* note 8.

230. *Tyler*, 105 U.S. at 245.

231. *Id.*

232. *United States v. Hooper*, 26 C.M.R. 417 (C.M.A. 1958) (citing *United States v. Tyler*, 105 U.S. 244, 245-46 (1881)).

233. U.S. CONST. art. I, § 8.

and thus subject to court-martial jurisdiction for illegal acts committed after retirement. In resolving this question, the Court of Claims looked to Supreme Court precedent for support that a retiree is considered a part of the land and naval forces,²³⁴ and as such, is subject to military jurisdiction. Relying upon *United States v. Tyler*,²³⁵ the court decided that Admiral Hooper was a part of the land and naval forces, reasoning that

the salary he received was not solely recompense for past services, but a means devised by Congress to assure his availability and preparedness in future contingencies. He had a direct connection with the operation of the “land and naval forces.” Thus, he formed a part of the vital element of our national defense and it naturally follows that he should be subject to military discipline.²³⁶

In civil cases, the courts also treated military retired pay as “reduced pay for reduced services” rather than as a mere pension for past services rendered. In *Lemly v. United States*,²³⁷ a Naval Reserve Officer challenged the denial of disability-retired pay by the Navy. In addressing its jurisdiction over claims for retirement pay matters, the Claims Court distinguished between a pension and retirement pay. A pension is “paid after the service has been performed without any regard to the actual performance of service as a gratuitous recognition of a moral or honorary obligation of the government.”²³⁸ As such, the government has no control over a person receiving a pension.²³⁹ Conversely, retirement pay is a “continuation of active pay on a reduced basis” paid to “an officer [still] in the service of his country even though on the retired list.”²⁴⁰

Over a decade later, in *Hostinsky v. United States*,²⁴¹ a retired officer of the Regular Navy sought to retain his military retired pay in addition to receiving pay from a temporary appointment as a fire and damage control superintendent with the Department of Commerce, despite a statute that

234. See *Hooper v. United States*, 326 F.2d 982, 985, 987 (Ct. Cl. 1964).

235. 105 U.S. at 244.

236. *Hooper*, 326 F.2d at 987.

237. 109 Ct. Cl. 760, 763 (1948).

238. *Id.* at 762.

239. *Id.* (“When a person is pensioned ‘off’ by the government, that government no longer has any control over his services. He is actually all through serving the government and yet he receives his pension as long as he lives.”).

240. *Id.* at 763.

241. 154 Ct. Cl. 443 (1961).

prohibited payment to any person holding two public offices simultaneously.²⁴² The court determined that the statute prohibited the retired officer from receiving compensation from both offices. Specifically, the court stated that an “officer in the Navy, though retired, is still an officer. He continues to draw pay as a retired officer; he draws it because he is still an officer. . . . He is still subject to naval discipline.”²⁴³

Post-Vietnam era civil cases continued to treat military retired pay as “reduced pay for reduced services.” In *Costello v. United States*,²⁴⁴ the Ninth Circuit reaffirmed the holdings of *United States v. Tyler*²⁴⁵ and *Lemly v. United States*.²⁴⁶ In *Costello*, military retirees challenged the retroactive application of a statutory amendment that linked increases in retired pay to a cost of living index rather than to increases in the active duty pay scales. Plaintiffs asserted that military retired pay is deferred compensation for past services, which cannot be altered prospectively. The Ninth Circuit dismissed this position as contrary to the long established position stated in *Tyler* in 1881 that retired pay is “reduced pay for reduced services.”²⁴⁷ Furthermore, the Ninth Circuit distinguished retired pay from bonus payments made to soldiers in *United States v. Larionoff*.²⁴⁸ In *Larionoff*, the Court stated that a variable re-enlistment bonus is not a pay raise earned as service is performed, but rather is a bonus payment earned when the soldier agrees to extend his active service. Retirement pay, on the other hand, “does not differ from active duty pay in its character as pay for continuing service.”²⁴⁹ Almost one hundred years after the decision in *Tyler*, the Supreme Court would again be confronted with the unre-

242. The Act of July 31, 1894, 28 Stat. 162, 205, *as amended by* Act of May 31, 1924, 43 Stat. 245, 5 U.S.C. § 62, provides, in pertinent part, that: “No person who holds an office the salary or annual compensation attached to which amounts to the sum of two thousand five hundred dollars shall be appointed to or hold any other office to which compensation is attached unless specially heretofore or hereinafter specially authorized thereto by law.” *Id.*

243. *Hostinsky*, 154 Ct. Cl. at 446.

244. 587 F.2d 424, 426 (1978), *cert. denied*, 442 U.S. 929 (1979).

245. 105 U.S. 244 (1881).

246. 109 Ct. Cl. 760 (1948). *See also* *Berkey v. United States*, 361 F.2d 983, 987 n.9 (Ct. Cl. 1966) (retired pay has generally not been considered a pension, grant, or gratuity, but as something the serviceman earns and has earned).

247. *Costello*, 587 F.2d at 426.

248. 431 U.S. 864 (1977).

249. *Costello*, 587 F.2d at 427.

solved issue of whether military retired pay is “reduced pay for reduced services” in the seminal case of *McCarty v. McCarty*.²⁵⁰

B. Impact of *McCarty v. McCarty*

At the time of the *McCarty* decision in 1981, three basic forms of military retirement existed.²⁵¹ Today, an eligible officer may submit a voluntary retirement request after serving twenty years of military service to receive retired pay. Military retired pay is unlike a typical civilian pension in many respects. Unlike a civilian pension plan, a soldier does not make periodic contributions to fund his retirement plan, but is funded by the annual appropriations approved by Congress.²⁵² Further, military retired pay does not vest until the soldier has served at least twenty years of active service or is entitled to receive retired benefits for disability.²⁵³ Upon the death of the military member, the retired pay terminates and does not pass to the heirs of the soldier.²⁵⁴

McCarty became a landmark decision concerning the treatment of military retired pay upon divorce. Before the *McCarty* decision, some state courts considered military retired pay as a marital asset subject to division upon divorce.²⁵⁵ These state courts applied their respective state laws in determining the apportionment and division of retired military pay. Other states followed the “reduced pay for reduced compensation” charac-

250. 453 U.S. 210 (1981).

251. The three basic types of military retirement are disability retirement, reserve retirement, and nondisability retirement. This article focuses on the treatment of nondisability retirement pay. At the time of the *McCarty* decision, voluntary nondisability retirement pay was governed by 10 U.S.C.A. § 3911 (West 1981).

252. *Barker v. Kansas*, 503 U.S. 594, 598 (1992).

253. 10 U.S.C.A. § 3911 (West 2001). To supplement military retired pay, Section 661 of the National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65, 113 Stat. 512, amended 37 U.S.C. § 211 to provide a Thrift Saving Plan for military personnel. Unlike military retired pay, tax deferred contributions and income that accrue to a military member’s Thrift Savings Plan vest upon payment and its value can readily be determined.

254. If a retiree purchased the Survivor Benefit Plan (SBP) annuity, the beneficiary will receive periodic payments upon the death of the retiree. In 1972, Congress enacted the Survivor Benefit Plan (SBP), Pub. L. No. 92-425, 86 Stat. 706 (codified at 10 U.S.C.A. §§ 1447-1455 (West 1976)). Under the SBP, a retiree is automatically enrolled unless he affirmatively disenrolls from the plan with the consent of the spouse. 10 U.S.C.A. § 1448 (West 1998 and 2001 Supp.). The SBP is partially funded by the government, but does require contributions by the retiree.

terization and ruled that military retired pay was not marital property subject to dissolution upon divorce.²⁵⁶

Colonel McCarty, an Army physician, had served about eighteen years of active military service at the time he filed for divorce in California. In California, state community property laws provided that a state court must divide the community property and quasi-community property of the parties.²⁵⁷ Community property consists of all property owned in common by husband and wife that was acquired during the marriage by means other than an inheritance or a gift to one spouse.²⁵⁸ Quasi-community property is "all real or personal property, wherever situated heretofore or hereafter acquired . . . [by] either spouse while domiciled elsewhere which would have been community property if the spouse who acquired the property had been domiciled in California at the time of its acquisition."²⁵⁹ Each spouse is deemed to contribute equally to the marital assets, and likewise, should share equally in the marital property upon divorce.²⁶⁰

McCarty listed his "military retirement benefits" as his separate property, whereupon his wife countered that such property was "quasi-community property" and thereby subject to division by the state court. The California Superior Court determined that military retired pension and

255. See, e.g., *Chisnell v. Chisnell*, 267 N.W.2d 155 (Mich. Ct. App. 1978), *cert. denied*, 442 U.S. 940 (1979) (a military pension treated as deferred compensation for services rendered before retirement and, as such, is considered a marital asset by virtue of the spouse's contribution to the marriage); *In re Marriage of Coram*, 408 N.E.2d 418 (Ill. App. Ct. 1978) (recognizing a marital property interest in military retirement benefits where the rights thereto were acquired during marriage whether the interest was vested or not and contributory or noncontributory).

256. See *In re Marriage of Ellis*, 538 P.2d 1347 (Colo. Ct. App. 1975); *United States v. Williams*, 370 A.2d 1134 (Md. 1977); *Elmwood v. Elmwood*, 244 S.E.2d 668 (N.C. 1978); *Ables v. Ables*, 540 S.W.2d 769 (Tex. Civ. App. 1976).

257. *McCarty v. McCarty*, 453 U.S. 210, 216 (1981) (citing CAL. CIV. CODE ANN. § 4800 (a) (1981)).

258. *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 578 (1979) (citing CAL. CIV. CODE ANN. § 687 (1954)). Community property contrasts with separate property, which includes assets owned by a spouse before marriage or acquired separately by a spouse during marriage through gift. In community property states, ownership turns on the method and timing of acquisition, while the traditional view in common law states is that ownership depends on title. Under community property laws, property that is classified as separate property is not considered part of the marital estate and belongs to its owner upon dissolution of the marriage and is not apportioned. *Id.*

259. *McCarty*, 453 U.S. at 217 (citing CAL. CIV. CODE ANN. § 4803).

260. *Id.* at 216 (citing *Hisquierdo*, 439 U.S. at 577-78).

retirement benefits were subject to division as quasi-community property upon dissolution of marriage.²⁶¹

On appeal to the Supreme Court, Colonel McCarty made two compelling arguments. He asserted that because “military retired pay in fact is current compensation for reduced, but currently rendered, services . . . [such] pay may not be treated as community property to the extent that it is earned after the dissolution of the marital community.”²⁶² In support of this position, Colonel McCarty cited to *Tyler* and *Hooper*. Military retired pay should not be considered as part of the marital community, he argued, because it is not a pension, but rather future income earned by future reduced services. As such, military retired pay is earned after the dissolution of the marital community.²⁶³ In dicta, the Court appeared to agree with Colonel McCarty’s characterization of military retired pay; however, it did not decide the case upon this issue.²⁶⁴ Instead, the Court focused on Colonel McCarty’s second argument, that federal statutory law preempts the application of state community property law. Specifically, Colonel McCarty argued that the “application of community property law conflicts with the federal military retirement scheme regardless of whether retired pay is defined as current or as deferred compensation.”²⁶⁵

After a detailed examination of federal retirement plans, the Court concluded that a conflict existed between the federal retirement scheme intended by Congress and state community property laws.²⁶⁶ Congress intended the military retired system to provide for retirees and to meet the personnel management needs of the active military force, and to attract and retain personnel for the military.²⁶⁷ To permit state community property laws to divide military retired pay “threatens grave harm to clear and sub-

261. The California Court of Appeals affirmed, relying on *In re Marriage of Fithian*, 517 P.2d 449 (Cal. 1974), *cert. denied*, 419 U.S. 825 (1974) (military retirement pay is properly subject to division as community property upon divorce).

262. *McCarty*, 453 U.S. at 221.

263. *Id.*

264. The Court cited factors that distinguish military retired pay from a typical pension, such as remaining a member of the Army, being subject to the Uniform Code of Military Justice, potential to forfeit all retired pay if engaged in certain activities, and being subject to recall to active duty. “These factors have led several courts, including this one, to conclude that military retired pay is reduced compensation for reduced current services.” *Id.* at 221-22.

265. *Id.* at 223.

266. *Id.* at 232.

267. *Id.* at 232-33.

stantial federal interests.”²⁶⁸ The Court concluded that applying the state community property laws to military retired pay “sufficiently injure[s] the objectives of the federal program to require nonrecognition”²⁶⁹ of the state community property laws. The Court determined that upon balancing the threatened objectives of the federal program involved to the state interests, federal preemption applied. It held that military retired pay was not subject to division upon divorce as community property.²⁷⁰

The Court did recognize that the “plight of an ex-spouse of a retired service member is often a serious one,” deserving of congressional remedy.²⁷¹ Justice Blackmun stated:

Congress may well decide, as it has in the Civil Service and Foreign Service contexts, that more protection should be afforded a former spouse of a retired service member. This decision, however, is for Congress alone. We very recently have reemphasized that in no area has the Court accorded Congress greater deference than in the conduct and control of military affairs.²⁷²

C. Impact of the Uniform Services Former Spouses’ Protection Act (USFSPA), 10 U.S.C. § 1408 (2000)

In 1982, Congress enacted the Uniformed Services Former Spouses’ Protection Act (USFSPA), 10 U.S.C. § 1408, in response to the *McCarty* decision.²⁷³ The USFSPA permits state courts to treat disposable retired pay²⁷⁴ as marital property when apportioning the marital estate between divorcing parties, and provides a method for enforcement of court orders through the Department of Defense.²⁷⁵ The USFSPA does not provide to the former spouse an automatic entitlement of a portion of a member’s pay, but does provide state courts the right to distribute military retired pay according to state marital law. Further, Congress placed some limits on the division of retired pay by state courts. States can only divide “disposable retired pay,” not gross pay,²⁷⁶ former spouses cannot assign their right to retired pay,²⁷⁷ courts cannot order a member to retire to begin payment of retired pay to the former spouse,²⁷⁸ and the maximum amount of retired pay payable is limited to fifty percent of disposable retired pay.²⁷⁹

268. *Id.* at 232.

269. *Id.*

270. *Id.* at 236.

271. *Id.* at 235-36.

272. *Id.*

Although the enactment of the USFSPA was designed to create a fair and equitable process to divide military retired pay upon divorce, the USFSPA has required amendment several times to address various perceived inequities in its application.²⁸⁰

1. Impact of USFSPA

Although the USFSPA gives state domestic courts the authority to divide military retired pay upon divorce, the determination of a fair and equitable division of military retired pay is no easy task. Unlike a vested civilian retirement plan or 401(k) stock plan, the military retirement pension is noncontributory, payments terminate upon the death of the soldier, and accumulate no cash value. The amount of payments made to a military

273. Department of Defense Authorization Act, 1983, Pub. L. No. 97-252, 96 Stat. 718, 730 (1982). The USFSPA was signed into law on 8 September 1982, and became effective 1 February 1983, applying retroactively to the date of the *McCarty* decision, 26 June 1981. 10 U.S.C. § 1408 (c)(1) (2000). It is evident from the legislative history that Congress intended to abrogate all effects of the *McCarty* decision and place state courts into a pre-*McCarty* position.

The purpose of this provision is to place the courts in the same position that they were in on June 26, 1981, the date of the *McCarty* decision, with respect to treatment of nondisability military retired or retainer pay. The provision is intended to remove the federal pre-emption found to exist by the United States Supreme Court and permit State and other courts of competent jurisdiction to apply pertinent State or other laws in determining whether military retired or retainer pay should be divisible. Nothing in this provision requires any division; it leaves that issue up to the courts applying community property, equitable distribution or other principles of marital property determination and distribution. This power is returned to the courts retroactive to June 26, 1981. This retroactive application will at least afford individuals who were divorced (or had decrees modified) during the interim period between June 26, 1981 and the effective date of this legislation the opportunity to return to the courts to take advantage of this provision.

S. REP. NO. 97-502 (1982), *reprinted in* 1982 U.S.C.C.A.N. 1596, 1611. *See, e.g.*, *Keen v. Keen*, 378 N.W.2d 612, 614 (Ct. App. Mich. 1985) (the object of the USFSPA was to retroactively subject the disposition of military pensions in divorce actions to state law as it existed before that date); *Koppenhaver v. Koppenhaver*, 678 P.2d 1180 (N.M. App. 1984); *Castiglioni v. Castiglioni*, 471 A.2d 809 (N.J. Super. Ct. 1984); *Menard v. Menard*, 460 So. 2d 751 (La. App. 1984); *Harrell v. Harrell*, 684 S.W.2d 118 (Tex. App. 1984); *Faught v. Faught*, 312 S.E.2d 504 (N.C. App. 1984); *Coates v. Coates*, 650 S.W.2d 307, 311 (Mo. App. 1983); *Smith v. Smith*, 458 A.2d 711 (Del. Fam. Ct. 1983).

retiree will fluctuate based upon the number of years that the member sur-

274. The definition of disposable retired pay has changed several times since the enactment of the USFSPA. Initially, disposable retired pay included gross nondisability retired pay less amounts which "are owed by that member to the United States," tax payments, SBP premiums, and offsets due to the receipt of Veteran's Administration disability benefits. Pub. L. No. 97-252, § 1002(a), 96 Stat. 730, 731. Since then, Congress has amended the definition several times. *See* Pub. L. No. 99-661, § 644, 100 Stat. 3887 (1986); Pub. L. No. 100-26, § 7(h)(1), 101 Stat. 273 (1987); Pub. L. No. 101-189, § 653(a)(5)(A), 103 Stat. 1462 (1989); Pub. L. No. 101-510, § 555(b)(1), 104 Stat. 1569 (1990); Pub. L. No. 104-193, § 362, 110 Stat. 2246 (1996). The current definition of disposable retired pay includes pre-tax gross retired pay less amounts that

(A) are owed by that member to the United States for previous overpayments of retired pay and for recoupments required by law resulting from entitlement to retired pay;

(B) are deducted from the retired pay of such member as a result of forfeiture of retired pay ordered by a court-martial or as a result of a waiver of retired pay required by law in order to receive compensation under title 5 or title 38;

(C) in the case of a member entitled to retired pay under chapter 61 of this title, are equal to the amount of retired pay of the member under that chapter computed using the percentage of the member's disability on the date when the member was retired (or the date on which the member's name was placed on the temporary disability retired list); or

(D) are deducted because of an election under chapter 73 of this title [10 U.S.C. §§ 1431-1446] to provide an annuity to a spouse or former spouse to whom payment of a portion of such member's retired pay is being made pursuant to a court order under this section.

10 U.S.C. § 1408(a)(4) (2000).

275. 10 U.S.C. § 1408(c)(1), (d)(1).

After effective service of process on the Secretary concerned of a court order providing for the payment of child support or alimony or, with respect to a division of property, specifically providing for the payment of an amount of the disposable retired pay from a member to the spouse or a former spouse of the member, the Secretary shall make payments . . . from the disposable retired pay of the member to the spouse or former spouse.

Id. § 1408(d)(1).

276. *Id.* § 1408(a)(4), (c)(1).

277. *Id.* § 1408(c)(2).

278. *Id.* § 1408(c)(3).

279. *Id.* § 1408(e)(1).

vives after retirement. Although it is possible to estimate the “present cash value” of a military pension based upon actuarial tables, such figures are dependent upon the member fulfilling the assumptions of the actuary, i.e., living as long as the projected national average. The USFSPA does not provide a specific formula for state courts to follow regarding the division of disposable retired pay. Generally, the parties use state law formulas to divide the military pension.²⁸¹ Some states have adopted a “reserved jurisdiction approach,” while others have adopted an “immediate offset” method to determine the division of the military pension.²⁸²

2. *Post USFSPA Cases*

The USFSPA clearly indicates Congress’s intent to abrogate all the applications of the *McCarty* decision,²⁸³ and thus recognized the “long-standing doctrine that family law matters are the special province of state courts.”²⁸⁴ Despite the USFSPA’s treatment of military retired pay as “property,” subsequent decisions by some federal courts indicate that the enactment of the USFSPA did not alter the *characterization* of military retired pay as “reduced pay for reduced services.”²⁸⁵ In *United States v.*

280. Uniformed Services Former Spouses’ Protection Act, Pub. L. No. 97-252, 96 Stat. 730 (1982) (codified as amended at 10 U.S.C. §§ 1072, 1076, 1086, 1408, 1447-1448, 1450-1451). The most recent proposed amendment was introduced by Congressman Cass Ballenger during the 107th Congress, 2001. House Bill 1983 (H.R. 1983), the Uniformed Services Former Spouses Equity Act of 2001, seeks to amend 10 U.S.C. § 1408(c) to terminate military retired payments to a former spouse upon remarriage, calculate retired payments based upon the retiree’s length of service and pay grade at the time of divorce, and impose a statute of limitations for seeking division of retired pay. The proposed amendment was not enacted.

281. See ADMINISTRATIVE & CIVIL LAW DEP’T, THE JUDGE ADVOCATE GENERAL’S SCHOOL, U.S. ARMY, JA 274, UNIFORMED SERVICES FORMER SPOUSES’ PROTECTION ACT app. P (1 July 1995), available at <http://www.jagcnet.army.mil>.

282. The “reserved jurisdiction approach” provides that the spouse reserves a portion of the retiree’s military pension as it is received, whereas the “immediate offset” generally requires the retiree to pay the spouse the calculated present cash value of the military pension based upon actuarial tables or provide other marital property of like value. See *In re Marriage of Korper*, 475 N.E. 2d 1333 (Ill. App. 1985).

283. See Explanatory Statement of the Com. of Conf. on Pub. L. No. 97-252, H.R. CONF. REP. NO. 97-749, at 166-68 (1982), reprinted in 1982 U.S.C.C.A.N. 1570-73.

284. See *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979); *United States v. Yazell*, 382 U.S. 341 (1966); *Ex parte Burrus*, 136 U.S. 586 (1890).

285. See *Cornetta v. United States*, 851 F.2d 1372, 1382 (Fed. Cir. 1988) (citing *Hotinsky v. United States*, 292 F.2d 508, 510 (Ct. Cl. 1961); *United States v. Tafoya*, 803 F.2d 140, 142 (5th Cir. 1986)).

Tafoya,²⁸⁶ the defendant appealed from a court order withholding a portion of his military retirement pay to repay the government for services rendered by a public defender regarding a criminal tax charge. The Fifth Circuit Court of Appeals noted that by “some quirk of history, Tafoya’s retirement pay is actually not ‘retirement pay’; it is, instead ‘current pay’ designed in part to compensate Tafoya for his continuing readiness to return to duty should his country have need to call upon him.”²⁸⁷ In *Cornetta v. United States*,²⁸⁸ the U.S. Court of Appeals for the Federal Circuit likewise held, despite the enactment of the USFSPA six years earlier, that “[r]etired pay is reduced pay for reduced current services.”²⁸⁹ The Federal Circuit noted that because retired pay differs in significant respects from a typical pension or retirement plan,²⁹⁰ military retired pay is reduced compensation for reduced services.²⁹¹

Even bankruptcy courts have treated military retired pay as reduced compensation for future reduced services. In *In re Siverling*,²⁹² creditors objected to the debtor’s claim that his military retirement pay was not property of the estate under 11 U.S.C. § 541(a)(6) (1988). This statute provides that the bankruptcy estate consists of “all legal or equitable interests of the debtor in property as of the commencement of the case.”²⁹³ However, “earnings from services performed by an individual debtor after the commencement of the case” are not property of the estate.²⁹⁴ In citing *Tyler* and *McCarty*, the bankruptcy court determined that military retirement pay is “reduced compensation for reduced current services” and not part of the bankruptcy estate.²⁹⁵

286. 803 F.2d 140, 142 (5th Cir. 1986).

287. *Id.* at 143.

288. 851 F.2d 1372 (Fed. Cir. 1988).

289. *Id.* at 1382 (citations omitted). *See* *Loeh v. United States*, 53 Fed. Cl. 2, 5 (2002) (“‘Retirement’ in the context of the military is something of a misnomer—retired pay, unlike a typical pension, is not simply compensation for past services, but also ‘reduced compensation for reduced current services.’”) (citation omitted).

290. Some of the distinguishing factors between a military retirement plan and a civilian pension include the retired officer remaining a member of the Army, remaining subject to the UCMJ, forfeiture of all or part of his retired pay if he engages in certain activities, and being subject to recall to active duty. *Cornetta*, 851 F.2d at 1382.

291. *Id.*

292. 72 B.R. 78 (Bankr. W.D. Mo. 1987).

293. 11 U.S.C. § 541(a)(6) (1988).

294. *Id.*

295. *In re Siverling*, 72 B.R. at 78-79.

D. Impact of *Barker*

While the *McCarty* decision may have created confusion among various state and federal courts over whether retired pay should be characterized as “reduced pay for reduced services,” the Supreme Court clarified the issue in *Barker v. Kansas*.²⁹⁶ In *Barker v. Kansas*, the Supreme Court examined a Kansas state income tax provision that taxed military retired pay but did not tax the retired pay of state and local government employees.²⁹⁷ Three years earlier in *Davis v. Michigan Dep’t of Treasury*, the Supreme Court had struck down a Michigan state income tax provision that taxed federal civil service retirees but not Michigan state and local government employees.²⁹⁸ In *Barker*, over 14,000 military retirees taxed under Kansas’s state income tax law from 1984 to 1989 sought declaratory relief that Kansas income tax discriminated against them in favor of state and local government retirees, in violation of 4 U.S.C. § 111²⁹⁹ and the constitutional principles of intergovernmental tax immunity.³⁰⁰

Affirming the trial court’s determination that Kansas’s state tax law was constitutional, the Kansas Supreme Court distinguished the *Barker* case from the *Davis* case by finding that there are substantial differences between the two classes (military retirees and state and local government

296. 503 U.S. 594 (1992).

297. KAN. STAT. ANN. § 79-3201 et seq. (1989). Kansas statutes exempted federal civil service retirement system benefits from state tax as well as retired railroad employees. *See id.* §§ 79-32,117(c) (vii)-(viii) (Supp. 1990). However, the Kansas state tax laws did not exempt military retired pay, certain employees of the Central Intelligence Agency, officials serving in the National Oceanic and Atmospheric Association or the Public Health Service, and retired federal judges. *See Barker*, 503 U.S. at 596 n.1.

298. *Davis v. Michigan Dep’t of Treasury*, 489 U.S. 803 (1989). In *Davis*, a Michigan resident, who was a retired federal government employee, alleged that the Michigan statute that exempted state retirement benefits from state income tax discriminated against federal retirees in violation of 4 U.S.C. § 111. *See id.*

299. 4 U.S.C. § 111 provides,

The United States consents to the taxation of pay or compensation for personal service as an officer or employee of the United States, a territory or possession or political subdivision thereof, the government of the District of Columbia, or an agency or instrumentality of one or more of the foregoing, by a duly constituted taxing authority having jurisdiction, if the taxation does not discriminate against the officer or employee because of the source of the pay or commission.

4 U.S.C. § 111 (2000).

300. *Barker*, 503 U.S. at 301.

retirees) justifying the disparate tax treatment.³⁰¹ Comparing *Tyler* and *McCarty*, the Kansas Supreme Court concluded that the ultimate distinguishing factor between military retirees and state and local government retirees justifying a disparate taxation policy was that “military retirement pay is reduced current compensation for reduced current service.”³⁰² The U.S. Supreme Court unanimously agreed in *Barker*³⁰³ that military retired pay is *not* reduced pay for reduced services, but is deferred compensation.³⁰⁴ The Court agreed military retirees differ in many respects from

301. *Barker v. Kansas*, 815 P.2d 46 (Kan. 1991), *rev'd*, 503 U.S. 594 (1992). “The crucial issue in the case at bar [*Barker*] is whether the inconsistent taxation of federal military retirement benefits is ‘directly related to, and justified by, significant differences’ between federal military retirees and state and local government retirees.” *Id.* at 52. The defendants (the State of Kansas, the Department of Revenue, and two state officials) averred that the plaintiffs (military retirees), differ significantly from state and local government retirees under the Kansas Income Tax Act [KAN. STAT. ANN. § 79-3201 et seq.] and hence, disparate tax treatment is permissible. Specifically, the State asserted that

(1) federal military retirees remain members of the armed forces of the United States after they retire from active duty; they are retired from active duty only; (2) federal military retirees are subject to the Uniform Code of Military Justice (UCMJ) and may be court-martialed for offenses committed after retirement; (3) they are subject to restrictions on civilian employment after retirement; (4) federal military retirees are subject to involuntary recall; (5) federal military retirement benefits are not deferred compensation but current pay for continued readiness to return to duty; and (6) the federal military retirement system is noncontributory and funded by annual appropriations from Congress; thus, all benefits received by military retirees have never been subject to tax.

Id. at 52. The Kansas Supreme Court opined that military pensions are subject to state taxation because, *inter alia*, military retired pay is reduced pay for reduced current services that has never been taxed. In contrast, state and local government retirees are completely severed from employment and have no continuing connection with government employers, are not subject to government personnel procedures or disciplinary rules, and there are no restrictions on their post-retirement activities. State and local government employee retirement benefits are deferred compensation, not current pay that has been funded from contributions subject to taxation in the year in which the contributions were made. *Id.*

302. *Barker*, 815 P.2d at 58.

303. 503 U.S. 594 (1992).

304. *Id.* at 605 (“[The characterization of] military retirement benefits . . . as current compensation for reduced current services does not survive analysis . . .”).

state and local retirees, but these differences do not “justify the differential tax treatment” imposed by the Kansas Income Tax Act.³⁰⁵

In reaching the conclusion that military retired pay is not reduced pay for reduced services, the Supreme Court first examined the manner in which retired pay is calculated and paid. A military retiree’s pay is calculated based on a percentage of base pay commensurate with the rank and creditable years of service calculated at the time of retirement.³⁰⁶ If retirees of the same rank received reduced pay for reduced continuing service, their pay would be equal since they would be performing the same reduced service. However, such is not the case. Military retired pay is calculated “not on the basis of the continuing duties [the retiree] actually performs, but on the basis of years served on active duty and the rank attained prior to retirement.”³⁰⁷ Based on this formula, this creates disparities in retired pay received by members of the same retired rank that “cannot be explained on the basis of ‘current pay for current services.’”³⁰⁸ In this respect, “retired [military] pay bears some of the features of deferred compensation.”³⁰⁹

Second, the Court distinguished the *Tyler* and *McCarty* opinions. In *Tyler*, the Court addressed the issue of whether an Army Captain, retired in 1870 due to war wounds, was entitled to the same increases in pay that Congress intended for active-duty officers.³¹⁰ In holding that certain retired officers were entitled to the increases in pay, the Court based its decision upon its analysis of the post-Civil War statutory provisions that applied to different types of retirees.³¹¹ Those “retiring wholly and altogether from the service”³¹² under Revised Statue Section 1275 were entitled to receive a one-time payment of one year’s pay and allowances upon retirement. Their eligibility for any pay increase had been terminated because their connection to the service had been completely terminated.³¹³ Presumably, such retirees were not subject to the same post-retirement restrictions applicable to those retiring from active service.³¹⁴ These post-retirement restrictions led to the Court’s conclusion that such officers are still in the military service.³¹⁵ The interpretation of the post-Civil War statutory provisions applicable to the “uniform treatment of active-duty officers and the one class of retired officers was crucial to the decision”³¹⁶ in

305. *Id.* at 599.

306. *Id.*; see 10 U.S.C. § 1409 (2000).

307. *Barker*, 503 U.S. at 599 (citing *McCarty v. McCarty*, 453 U.S. 210 (1981)).

308. *Id.*

309. *Id.*

310. *Tyler v. United States*, 105 U.S. 244, 245 (1982).

Tyler. Thus, *Tyler* “cannot be taken as establishing that retirement benefits are for all purposes the equivalent of current compensation for reduced current services.”³¹⁷

In *McCarty*, the Court did not determine that military retired pay is reduced pay for reduced services, but decided the case upon the federal preemption doctrine. The *McCarty* opinion held that “the application of [state] community property law conflicts with the federal military retirement scheme regardless of whether retired pay is defined as current or as deferred compensation.”³¹⁸ The Court did not adopt “*Tyler*’s description of military retirement pay”³¹⁹ and reserved the question of whether retired pay is reduced pay for reduced services for another case.³²⁰ In cautioning states’ treatment of military retired pay, the Court stated in dicta that “the possibility that Congress intended military retired pay to be in part current compensation for those risks and restrictions suggests that States must tread with caution in this area, lest they disrupt the federal scheme.”³²¹

Finally, the *Barker* opinion examined whether congressional intent provided any support to the reduced pay argument. Immediately after the *McCarty* decision was issued, Congress enacted the USFSPA, which

311. The applicable statutory provisions provided for two different kinds of retirement schemes, namely those officers “retiring from active service and [those officers] retiring wholly and altogether from the service.” *Id.* Officers retired from active service received 75% of the pay of the rank upon which they were retired. *See id.* REVISED STATUTES, *supra* note 5, § 1276. Additionally, officers retired from active service were eligible to receive retired pay increases of 10% of their current yearly pay for every five years of retirement. *See* REVISED STATUTES, *supra* note 5, § 1262. Officers who were “incapable of performing the duties of [their] office” were wholly retired from the service and their connection with the U.S. Army was ended. *Id.* § 1245. Such officers were entitled to receive, in addition to the retired pay previously paid them, a one-time payment of one year’s pay and allowances. *Tyler*, 105 U.S. at 245. As the Court stated, there was a “manifest difference in the two kinds of retirement, namely, retiring from active service and retiring wholly and altogether from the service.” *Id.*

312. *Tyler*, 105 U.S. at 245.

313. *Barker*, 503 U.S. at 602.

314. Various statutory provisions at the time imposed post-retirement restrictions on those retiring from active service. *See supra* notes 224-29.

315. *Tyler*, 105 U.S. at 246.

316. *Barker*, 503 U.S. at 602.

317. *Id.*

318. *McCarty v. McCarty*, 453 U.S. 210, 223 (1981).

319. *Id.*

320. *Id.*

321. *Id.* at 224.

“negated *McCarty*’s holdings by giving the States the option of treating military retirement pay ‘either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court.’”³²² In reviewing the impact of the USFSPA on the reduced pay issue, the Court stated that “Congress clearly believed that payment to military retirees is in many respects not comparable to ordinary remuneration for current services.”³²³ The Court noted that it would be inconsistent to treat military retired pay as part of the marital estate under the USFSPA with “the notion that military retirement pay should be treated as indistinguishable from compensation for reduced current services.”³²⁴ The Court noted that Congress enacted other statutes that treat military retired pay as deferred compensation.³²⁵

The Supreme Court concluded that Kansas’s characterization of military retired pay as current compensation for taxation purposes “does not survive analysis in light of the manner in which these benefits are calculated, our prior cases, or congressional intent as expressed in other provisions treating military retired pay.”³²⁶ At least for purposes of taxation, the *Barker* holding provides that military retired pay is not reduced pay for reduced services, but rather deferred compensation.

E. Conclusion: Receipt of Retired Pay Is a Questionable Justification for Court-Martial Jurisdiction

In *Hooper*, the military court reasoned that Admiral Hooper was subject to the court’s jurisdiction, and was part of the land and naval forces, in part because the retired pay he received was not solely recompense for past services, but a means devised by Congress to assure his availability and preparedness in future contingencies.³²⁷ In short, Hooper was not a mere pensioner, but was still a member of the armed forces receiving a reduced

322. *Barker*, 503 U.S. at 603.

323. *Id.*

324. *Id.*

325. For federal individual retirement accounts, military retirement pay is considered “deferred compensation,” which precludes it from consideration for making deductible contributions to an IRA. *See id.* at 604.

326. *Id.*

327. *United States v. Hooper*, 26 C.M.R. 417, 425 (C.M.A. 1958).

sum of military pay to reflect his reduced military duties. The reduced duties were primarily his continued availability for military service.

This historic justification for the extension of court-martial jurisdiction over military retirees based upon the characterization of military retired pay as “reduced pay for reduced services,” however, is now of questionable validity. Further, the enactment of the USFSPA to abrogate the *McCarty* decision clearly reflects modern congressional intent that retired pay should be treated as a form of property divisible upon divorce according to state marital property laws. With the 1992 decision in *Barker v. Kansas*,³²⁸ the Supreme Court has finally nullified any vestiges of the Civil War era decision of *United States v. Tyler* and its progeny that characterized retired pay as “reduced pay for reduced services.” The 1992 decision of *Barker*, coupled with the USFSPA,³²⁹ appears to have removed at least one legal pillar used to support continued jurisdiction over military retirees.

V. Additional Problem Areas with the Exercise of Court-Martial Jurisdiction over Retirees

A. Offenses

1. General

As a general statement of law, it is clear that anyone subject to the UCMJ—including retirees—may prefer charges against anyone else subject to the UCMJ—again, including retirees.³³⁰ Retirees of any regular component who are entitled to pay, including members of the Fleet Reserve and Fleet Marine Corps Reserve entitled to retainer pay, are subject to military law and may be prosecuted for crimes committed either

328. 503 U.S. 594 (1992).

329. Another recent congressional enactment has chipped away at the limitations placed upon military retirees that have existed for many years. In October 1999, Congress enacted the National Defense Authorization Act for 2000, S. 106-1059, at 651 (1999). This legislation repealed the Dual Compensation Act, 5 U.S.C. § 5532(b) (1994), which had required retired regular officers in the federal civil service to forego a percentage of their military retired pay as a condition of federal employment. Military retirees who subsequently work for the federal civil service are now permitted to retain their full military retired pay.

330. UCMJ art. 30(a) (2002) (“Charges and specifications shall be signed by a person subject to this chapter . . .”).

while on active duty or while in a retired status.³³¹ Indeed, it appears that retirees may be prosecuted for any UCMJ offense committed while on active duty, subject only to the statute of limitations,³³² and for any offense committed in a retired status for which the retiree's duty status is immaterial.³³³ In theory, nonjudicial punishment may even be imposed on retirees, subject to service restrictions and the exercise of such authority by an appropriate "commander."³³⁴

The duty status immaterial category of offenses subject to court-martial appears to be the only legal—as opposed to policy/discretionary—limitation on offenses for which a retiree may be court-martialed. Unfortunately, the parameters of this limitation are largely undefined. Existing case law suggests that jurisdiction extends to all conventional, nonmilitary types of crimes, such as sex crimes,³³⁵ other crimes of "moral turpitude,"³³⁶ homicide,³³⁷ bad check offenses,³³⁸ and property crimes.³³⁹ National security violations also fall within the UCMJ's ambit.³⁴⁰ It is equally clear, however, that this category of offenses is not limited to nonmilitary types of crimes, given that the failure to obey a general order or regulation, Article 92(1),³⁴¹ conduct unbecoming an officer and a gentleman, Article 133,³⁴² and conduct of a nature to bring discredit upon the armed forces, Article 134,³⁴³ have served as the basis for charges against military personnel on the retired list for misconduct committed after their retirement. Albeit not as clear, some legal precedence exists to support the position that retirees may be prosecuted for violating the contemptuous speech prohibitions of Article 88.³⁴⁴

331. TILLOTSON, *supra* note 53, at 6 ("Retired officers of the Regular Army are subject to military law and to trial by court-martial for offenses committed either before or after retirement"); U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 5-2(b)(3) (6 Sept. 2002) [hereinafter AR 27-10] ("Retirees . . . may be tried by courts-martial for violations of the UCMJ that occurred while they were on active duty or, while in a retired status."); *see, e.g.*, Pearson v. Bloss, 28 M.J. 376 (C.M.A. 1989) ("offenses allegedly committed both before and after his separation from active duty"). Compare Sands v. Colby, 35 M.J. 620 (C.M.A. 1992) (murder committed while retired) and Hooper, 26 C.M.R. at 417 (all misconduct committed after retirement), with Chambers v. Russell, 192 F. Supp. 425, 426 (N.D. Cal. 1961) ("all of the acts are alleged to have occurred prior to . . . the effective date of petitioner's retirement from the United States Navy").

332. The statute of limitations is contained in Article 43, UCMJ.

333. *See Hooper*, 26 C.M.R. at 425 (noting that all charges were offenses that "do not depend upon the individual's duty status").

2. *The Hooper Exception*

Although the COMA's opinion in *Hooper* is devoid of guidance as to what offenses it was addressing, a retiree's duty status should be considered material for jurisdictional purposes in at least cases involving alleged violations of Article 89, Disrespect to a Superior Commissioned Officer, and Article 90(2), Willfully Disobeying a Superior Commissioned Officer. To illustrate, using the scenario discussed in the introductory paragraph, assume a retired Army Lieutenant Colonel works as a GS federal employee and that he is known throughout the organization to be a retired Lieutenant Colonel. His organizational chief is an active duty Army Colo-

334. Article 15 of the UCMJ contains no specific prohibition against its application to retired personnel other than "such regulations as the President may prescribe, and under such additional regulations as may be prescribed by the Secretary concerned" UCMJ art. 15. Accordingly, Service regulations determine the applicability of this provision of the Code to retirees. See Court-Martial, Op. OTJAG, Army (29 June 1956), as digested in 7 Dig. Ops. JAG 1957-1958, sec. 45.8, at 108 ("It is the opinion of the Judge Advocate General that retired personnel not on active duty are not subject to the jurisdiction of local commanders for the administration of disciplinary action pursuant to the provisions of UCMJ, Art. 15, under current regulations.") (emphasis added).

Other than stating the general amenability of retired personnel to the UCMJ, *Army Regulation 27-10, Military Justice*, makes only a single permissive reference to retired personnel in the Article 15 context. See AR 27-10, *supra* note 331, para. 5-2(b)(3) ("Retired members of a regular component of the Armed Forces who are entitled to pay are subject to the UCMJ." (citing UCMJ art. 2(a)(4)). The Army regulation permits "[application of] forfeitures imposed under Article 15 . . . against a soldier's retirement pay." *Id.* para. 3-19(b)(7)(b). Earlier opinions of the Judge Advocate General, however, opined that retirees, not on active duty, were not amenable to the Article 15 authority of local commanders under then existing regulations. Court-Martial, Op. OTJAG, Army (29 June 1956), as digested in 7 Dig. Ops. JAG 1957-1958, sec. 45.8, at 108.

The Coast Guard's *Military Justice Manual* states that "[a] retiree may not be recalled to active duty solely for the imposition of NJP." U.S. DEP'T OF TRANSPORTATION, UNITED STATES COAST GUARD, COMDTINST M5810.1D, MILITARY JUSTICE MANUAL, sec. 1.A.4.g, at 1-4 (17 Aug. 2000) [hereinafter USCG MJM]. The Navy and the Air Force make no specific provision concerning imposing nonjudicial punishment over retirees. U.S. DEP'T OF NAVY, JAGINST 5800.7C, MANUAL OF THE JUDGE ADVOCATE GENERAL ch.1, pt. B (Nonjudicial Punishment) (3 Oct. 1990) (C3, 27 July 1998) [hereinafter JAGMAN]; U.S. DEP'T OF AIR FORCE, INSTR. 51-202, NONJUDICIAL PUNISHMENT (1 Oct. 1996). The JAGMAN serves as the Secretary of the Navy's, and The Judge Advocate General's, implementing and supplemental regulations for the UCMJ and MCM, respectively. JAGMAN, *supra*, sec. 0101. *Air Force Instruction 51-202* implements Article 15, UCMJ. AFI 51-202, *supra*, at 1.

335. *United States v. Sloan*, 35 M.J. 4 (C.M.A. 1992) (carnal knowledge and indecent acts with a child); *Hooper*, 26 C.M.R. at 425 (sodomy); see *United States v. Stevenson*, 53 M.J. 257 (2000) (rape; TDRL retiree).

nel; an active duty Army Captain and a retired Army NCO work within the same organization, but not directly for the retired officer. Can the retired officer be court-martialed for disrespect to the Colonel and conversely, can the Captain and retired NCO be court-martialed for disrespect to the retired Lieutenant Colonel? As absurd as it sounds, existing law appears to support such UCMJ action.

Article 89 reaches “[a]ny person subject to [the UCMJ] who behaves with disrespect toward his superior commissioned officer”³⁴⁵ To achieve a conviction, a trial counsel must prove that the accused (1) did or

336. Although addressing the specific crime of sodomy, the COMA appeared to include within the ambit of punishable offenses all “offense[s] involving moral turpitude” *Hooper*, 26 C.M.R. at 425. Military law has considered a wide range of offenses to fall within the category of crimes of moral turpitude. *United States v. Hutchins*, 19 C.M.R. 143, 145 (C.M.A. 1955) (“Larceny is indisputably an offense involving moral turpitude.”); *United States v. Wrenn*, 36 M.J. 1188, 1193 (N.M.C.M.R. 1993) (“attempted larceny . . . larceny and wrongfully obtaining services through false pretenses”); *United States v. Greene*, 34 M.J. 713, 714 (A.C.M.R. 1992) (false swearing); *United States v. Hayes*, 15 M.J. 650, 651 (N.M.C.M.R. 1983) (adultery); *United States v. Light*, 36 C.M.R. 579, 584 (A.B.R. 1965) (crimes generally “involv[ing] a degree of moral turpitude” include: selling passes, wrongfully receiving money for transporting a civilian female in a government vehicle,” cheating on an examination . . . [and] receiving money for calling false numbers at a bingo game”) (citations omitted)); *United States v. Weaver*, 1 M.J. 111, 115 (C.M.A. 1975) (burglary is “a crime involving moral turpitude” or one that affects witness credibility for impeachment purposes); *cf. Hutchins*, 19 C.M.R. at 145 (“The offense of ‘fraudulently making and uttering bad checks’ has been deemed to involve moral turpitude by some authorities.”). *But cf. Light*, 36 C.M.R. at 584 (borrowing money by itself does not involve moral turpitude).

337. *Sands v. Colby*, 35 M.J. 620 (A.C.M.R. 1992) (murder; Article 118).

338. *United States v. Bowie*, 34 C.M.R. 411 (1964) (“issuing bad checks”; TDRL retiree).

339. *Pearson v. Bloss*, 28 M.J. 376, 377 (C.M.A. 1989) (offenses related to theft of military property); *United States v. Overton*, 24 M.J. 309, 312 (C.M.A. 1987) (theft of goods from Navy Exchange).

340. *United States v. Allen*, 33 M.J. 209, 210 n.1 (C.M.A. 1991) (violating security regulations in violation of Article 92, violating federal espionage law (18 U.S.C. § 793(d)) assimilated by Article 134, and engaging in espionage in violation of Article 106a).

341. *United States v. Allen*, 31 M.J. 572, 636-37 (N.M.C.M.R. 1990) (security regulations), *aff’d on other grounds*, 33 M.J. 209 (C.M.A. 1991).

342. *United States v. Hooper*, 26 C.M.R. 417, 425 (C.M.A. 1958) (association with sexual deviants); *see also Closson v. Armes*, 7 App. D.C. 460 (D.C. 1896).

343. *Hooper*, 26 C.M.R. at 425.

344. *See United States v. Salvagno*, CM 113926 (1918); *supra* notes 143-45 and accompanying text; *see also HANDBOOK FOR RETIRED SOLDIERS*, *supra* note 19, para. 4-7(b) (advising that Article 88 applies to “retired Regular army commissioned officers”).

345. UCMJ art. 89 (2002).

said something concerning a commissioned officer; (2) that was directed at that officer; (3) who was “the superior commissioned officer of the accused;” (4) the accused knew of the officer’s status; and (5) the conduct was disrespectful under the circumstances.³⁴⁶ All potential accused—the retired officer, the active duty Captain, and the retired NCO—are subject to the UCMJ, and all three officers involved are “commissioned” officers.³⁴⁷ The plain language of this punitive article contains no limitations on its application with respect to the duty status of the victim or accused.³⁴⁸ Further, there is no requirement “that the ‘superior commissioned officer’ be in the execution of office at the time of the disrespectful behavior.”³⁴⁹ The pivotal legal question in this scenario is whether the Colonel vis-à-vis the retired LTC, and the retired LTC vis-a-vis the Captain and retired NCO, qualify as a superior commissioned officer.

The *MCM* notes that if, as here, “the accused and the victim are in the same armed force, the victim is a ‘superior commissioned officer’ of the accused when either superior in rank or command to the accused; however, the victim is not a ‘superior commissioned officer’ of the accused if the victim is inferior in command, even though superior in rank.”³⁵⁰ Clearly, a Colonel is superior in rank³⁵¹ to a Lieutenant Colonel, and a Lieutenant

346. *MCM*, *supra* note 209, pt. IV, ¶ 13(b).

347. *Chambers v. Russell*, 192 F. Supp. 425, 428 (N.D. Cal. 1961) (“commissions [of retired officers] are not expired, but are merely dormant, pending call”); *cf.* *Hostinsky v. United States*, 154 Ct. Cl. 434, 446 (1961) (“we think that an officer in the Navy, though retired, is still an officer”).

348. *Cf.* 2001 RETIRED MILITARY ALMANAC, *supra* note 19, at 72 (“Retirees . . . are entitled to the same respect and courtesy shown active duty members. Their status is similar in many ways to active duty members.”).

349. *MCM*, *supra* note 209, pt. IV, ¶ 13(c)(1)(c).

350. *Id.* pt. IV, ¶ 13(c)(1)(a).

351. Rank merely refers to “the order of precedence among members of the armed forces.” 10 U.S.C. § 101(b)(8) (2000). A service member’s “grade” refers to the “step or degree, in a graduated scale of office or military rank, that is established and designated as a grade by law or regulation.” *Id.* § 101(b)(7). Subject to certain time in grade restrictions, officers who retire do so in the highest grade held satisfactorily. AFI 36-3203, *supra* note 23, para. 7.2.1. For example, “lieutenant colonel” and “colonel” are grades. 10 U.S.C. §§ 633-634. The definitions of grade and rank in 10 U.S.C. § 101, however, came after the enactment of the UCMJ and “differ from usage of the same terms in the code and current and prior Manual provisions.” *MCM*, *supra* note 209, R.C.M. 103 discussion, at II-3. Accordingly, for purposes of determining the application of the UCMJ to military retirees, as either victims or accused, “rank, as commonly and traditionally used, and grade refer to the current definition of ‘grade.’” *Id.*

Colonel is superior in rank to a Captain and NCO. Accordingly, under a literal reading of the *MCM*, that element would be satisfied.

Reported case law has never addressed this punitive article in the retiree context, but cases dealing with military prisoners, subject to the UCMJ pursuant to Article 2(7), provide a close analogy. In *United States v. Hunt*,³⁵² the Air Force Board of Review held that Articles 89 and 90³⁵³ applied to a civilian when a senior-subordinate relationship existed between the superior officer and the accused/civilian.³⁵⁴ In this particular case, the superior-subordinate relationship arose by virtue of command because the officer, an Air Force Captain, actually possessed command authority over the civilian, a military prisoner confined in an Army disciplinary facility.³⁵⁵ Further, the court also posited that when a punitive article begins with “Any person subject to this Code,” that Congress intended that it apply to *anyone* subject to the UCMJ.³⁵⁶ Both Articles 89 and 90 contain similar language, which would be indicative of congressional intent that they apply to retired members of the armed forces as defined in Articles 2(4), (5), and (6).

Arguably the factual basis for the court’s application of Articles 89 and 90 to military prisoners is distinguishable when the punitive articles are applied to retirees. In support of its decision that the Air Force Captain was the prisoner’s superior officer, the court noted that military jurisdiction over a “discharged general prisoner” for violations of Articles 89 and 90 was “no novel legal theory of law,” pointing to specific *Manual* provisions providing that this class of civilians was subject to these articles and further pointing to a 1913 federal court decision upholding the application of Article 90(2)’s predecessor to a civilian.³⁵⁷ In contrast, no such *Manual* provisions exist specifically linking retirees to Articles 89 and 90. However, there still remains the *Armes* decision, which albeit involving charges under what would now be Articles 133 and 134, suggests that the retired officer in that case could have been charged with an offense of disrespect to General Schofield, an active duty officer superior in rank,³⁵⁸ given that

352. 22 C.M.R. 814 (A.F.B.R. 1956).

353. The definition of superior commission officer for purposes of Article 89 is identical for Article 90(2). *MCM*, *supra* note 209, pt. IV, ¶ 14(c)(1)(a)(i).

354. *Hunt*, 22 C.M.R. at 819.

355. *Id.* at 816, 819. Although the accused was formerly a member of the Air Force before his punitive discharge, the court analyzed the situation as if he were a member of a different component of the armed forces. *Id.* at 819.

356. *Id.* at 818 (emphasis added).

357. *Id.* at 819.

the basis of the charges was Armes's "direct personal insult to his commanding officer" ³⁵⁹

In *United States v. Nelson*,³⁶⁰ the COMA also upheld the conviction of a military prisoner, whose punitive discharge had been executed, for violating Article 90. Using language and reasoning that could easily be extended to retirees, the COMA noted that a military prisoner with an executed punitive discharge serving a period of confinement was not fully a civilian because he had not "severed all relationship with the military and its institutions."³⁶¹ His discharge from the military "is expressly conditioned by, and subject to," Article 2 of the UCMJ.³⁶² Although the accused no longer enjoyed "active membership in the armed forces" and he is "deprive[d] of the privileges and rights incident to such membership," this loss of privileges was "not necessarily determinative of amenability to the Uniform Code."³⁶³

Further, the COMA addressed the accused's argument that as a discharged prisoner, the accused was a civilian and no relationship of command or rank could exist between him and the confinement officer, a commissioned officer. The court stated that to be a "'superior commissioned officer' of the accused, the victim needed only to be 'superior in rank or command.'"³⁶⁴ Focusing solely on the issue of command, the COMA opined that the term command merely meant the "authority to exercise control over the conduct and duties of another."³⁶⁵ Congress knew that certain persons subject to Article 90 would be without military rank and "must have contemplated that all such persons would be liable for misconduct in violation of the Article, on the basis of superiority of command."³⁶⁶ Otherwise, Congress would have limited application of Article 90 to those "persons who are actually and actively members of the armed forces," which it did not.³⁶⁷ Accordingly, the COMA concluded "that a commissioned officer vested with the authority to direct and control the

358. See *supra* notes 88-91 and accompanying text.

359. *Closson v. Armes*, 7 App. D.C. 460, 477 (D.C. 1896).

360. 33 C.M.R. 305 (C.M.A. 1963).

361. *Id.* at 306.

362. *Id.*

363. *Id.*

364. *Id.* at 307.

365. *Id.*

366. *Id.*

367. *Id.*

conduct and duties of a person subject to the Code is the latter's 'superior commissioned officer' within the meaning of Article 90."³⁶⁸

The decisions in *Hunt* and *Nelson* combined clearly indicate that Articles 89 and 90 apply to retirees because they are subject to the Code and Congress did not intend that those not on active duty, such as retirees, be exempt from the reach of these two punitive articles. The COMA's conclusion in *Nelson* appears to directly support the applicability of Article 90 (and Article 89) to the scenario discussed above in which the retired LTC works for an active duty Colonel. Further, under this expansive reading of command authority for purposes of Article 90, if the retired LTC occupied a supervisory position over the active duty Captain and retired NCO—such as their Branch Chief—the retired officer would possess the requisite superior-subordinate relationship required by Articles 89 and 90.

3. Potential Defenses: Divestiture and Capacity

The military would not have jurisdiction over Article 89 and 90 offenses if they constitute the offenses referenced in *Hooper* in which the retirees' status is material. Does the fact that the retired LTC is not on active duty, that he is in affect in a "dormant"³⁶⁹ status, effect court-martial jurisdiction? Albeit no case, legal treatise, or passage from the UCMJ's legislative history appear to support this proposition directly—and the decision in *Nelson* undercuts it—the authors posit that Articles 89 and 90(2) should fall within that category of offenses that falls outside the reach of military jurisdiction over retirees.

Absent statutory or regulatory changes limiting jurisdiction over retired personnel for violations of these two articles, two potential arguments—albeit uncertain ones—may be made to achieve this result: divestiture by analogy and capacity. Clearly Articles 89 and 90(2) are status offenses, at least with respect to the status of the victim. It is a defense that the accused was unaware of the victim's status as a superior commissioned officer.³⁷⁰ Further, the divestiture defense applies whereby "the victim through words or actions may have abandoned his status as a superior."³⁷¹ By analogy, military officer retirees could be treated like

368. *Id.* at 308.

369. *Chambers v. Russell*, 192 F. Supp. 425, 428 (N.D. Cal. 1961).

370. MCM, *supra* note 209, pt. IV, ¶¶ 13(c)(2) (art. 89), 14(c)(2)(e) (art. 90(2)); *see also* DAVID A. SCHLUETER, *MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE* sec. 2-3(C), at 71 (4th ed. 1996) ("lack of knowledge of the victim's status is a defense").

those officers who have divested themselves of their protected status for purposes of these articles by virtue of their abandonment of active duty status. Protected status associated with superior rank may be lost by conduct falling short of misconduct.³⁷² Unfortunately, the obvious problem with this novel argument is that the divestiture doctrine has never been applied in this context.

Second, the status of the retiree may be deemed material or, alternatively, a separate defense may exist, if the retiree were acting in a *capacity* that overshadows or takes precedence over his status as a retired member of the armed forces at the time of the misconduct. For example, the fictitious retired Lieutenant Colonel in the scenario discussed earlier was acting in his capacity as a federal civilian employee at the time of the disrespect/disobedience. Although hardly a legal treatise, the Army's retirement handbook appears to contemplate the awkwardness of this type of situation and supports this concept of precedential capacity in at least the federal employee/retired military context. Specifically, the handbook counsels:

In a military office, retired soldiers using military titles on the telephone could lead to confusion and unwitting misrepresentation, conveying the impression of active duty status. In any case, common sense is the guide when a retired soldier works for the Government. No reasonable retired officer would invite awkwardness when employed in a military office by insisting on being called by military title, if such title outranks the retired soldier's active duty chief. The retired soldier's use of his rightful title in government employment is guided by his acceptance of his *civilian status* and loyal conformance to the established channels of command. Local customs, practices, and conditions of employment are the primary influencing factors.³⁷³

In a similar vein, the Comptroller General has recognized a capacity distinction when military retirees are employed by the government. In a

371. SCHLUETER, *supra* note 370, sec. 2-3(C), at 70; *see also* MCM, *supra* note 209, pt. IV, ¶ 13(c)(5) ("A superior commissioned officer whose conduct in relation to the accused under all the circumstances departs substantially from the required standards appropriate to that officer's rank or position under similar circumstances loses the protection of this article. That accused may not be convicted of being disrespectful to the officer who has so lost the entitlement to respect protected by Article 89.").

372. *United States v. Noriega*, 21 C.M.R. 322, 324 (C.M.A. 1956) (officer in "appearance and in conduct . . . was simply a bartender").

1936 opinion, the Comptroller General discussed the status of two Naval officers, retired for disability, but employed as civilian instructors at the United States Naval Academy.³⁷⁴ The two retired officers sought to take advantage of legislation providing for retirement annuities to “civilian members of the teaching staffs at the United States Naval Academy and the Postgraduate School, United States Naval Academy.”³⁷⁵ The Comptroller General posited that retired officers were intended to be excluded from the legislation, reasoning in part that “[t]he retired officers so employed are employed *on a civilian status or in a civilian capacity*, but it is not clear that they are ‘civilian members of the teaching staffs’”³⁷⁶

Unfortunately, military law appears to treat the capacity in which the superior officer was acting as largely irrelevant for purposes of at least Article 89.³⁷⁷ The explanatory language of the *MCM* points out that it is “immaterial whether [the disrespectful conduct] refer to the superior as an officer or as a private individual.”³⁷⁸ Further, in *United States v. Montgomery*,³⁷⁹ an Army Lieutenant was convicted of disrespect to an Army Major based on the Lieutenant’s misconduct during a poker game. Without specifically addressing a capacity defense, the Board noted that the junior officer was entitled to a certain degree of familiarity necessitated by the casual circumstances, but his misconduct was not otherwise excused.³⁸⁰

In *United States v. Spirer*,³⁸¹ an Army doctor in the grade of First Lieutenant was convicted of using threatening and disrespectful language

373. HANDBOOK FOR RETIRED SOLDIERS, *supra* note 19, para. 3-7(f) (emphasis added). See 2001 RETIRED MILITARY ALMANAC, *supra* note 19, at 73 (“Retirees who are employed as civil service employees should not use their retired grade in the performance of their civilian duties.”). Of course the retiree enjoys no such “civilian status,” but may be employed in a civilian capacity.

374. Retirement Annuities—Retired Naval Officers Appointed As Naval Academy Teachers—Act, January 16, 1936, 15 Comp. Gen. 1099 (1936).

375. *Id.* (citing Pub. L. No. 417, 49 Stat. 1092 (1936)) (emphasis added).

376. *Id.* at 1102 (emphasis added). In drawing the civilian versus civilian status/capacity distinction, the Comptroller General noted various legal authorities holding that a retired officer is not a civilian. See *id.*

377. “Term ‘superior officer’ applies, but is not limited, to every officer of a higher rank than accused. Therefore, it is no defense for accused to state he did not know the *capacity* in which officer was acting, or his *identity*. It is sufficient if he recognized the officer as a superior.” CONRAD D. PHILOS, HANDBOOK OF COURT-MARTIAL LAW para. 168(7), at 382 (1951) (citing 10 E.T.O. 213; II Bull. JAG 340).

378. *MCM*, *supra* note 209, pt. IV, ¶ 13(c)(3).

379. 11 C.M.R. 308 (A.B.R. 1953).

380. *Id.* at 313.

381. 10 B.R. (E.T.O.) 207 (1944).

toward his superior officer, an Army Captain and the senior officer present at the unit. The Captain had ordered the accused to leave a tent functioning as a command post during a rainstorm and to return to the accused's aid station.³⁸² The accused replied, "Let me get a good look at your face, if you come to my aid station with a sore toe I will cut off your leg."³⁸³ When the superior commander grabbed the accused and repeated the order, the accused responded that he wanted "to get a good look" at the officer's face because "I want to be sure and know you when you get to my aid station."³⁸⁴ The accused conceded he recognized the superior officer by virtue of viewing Captain's bars on that officer's helmet, but could not see the officer's face.³⁸⁵ Further, the accused defended his conduct by arguing that he was unaware of the Captain's "name or 'capacity.'"³⁸⁶ Upholding Spirer's conviction, the Army Board of Review held that "superior officer" meant either the accused's commander or any commissioned officer superior in rank, and that substantial evidence in the record supported the factual finding that the accused knew the Captain was, in fact, his superior officer at the time of Spirer's misconduct.³⁸⁷

The *Manual's* explanatory language as well as the Boards' opinions in *Montgomery* and *Spirer* can—and should—be distinguished when military retirees are involved. First, both *Montgomery* and *Spirer* involved disrespect by one active duty officer to another, superior, active duty officer. Second, Article 89 was designed to punish misconduct that undermines lawful authority or otherwise interferes with the maintenance of discipline.³⁸⁸ When the victim is a retiree, the threat to military discipline appears nonexistent. When the disrespect is committed by a retiree toward a superior active duty officer, the circumstances in which military discipline is threatened or the superior's authority undermined are limited and the magnitude of the threat is certainly reduced. In his 1912 testimony before a Congressional Committee about retirees and military law, Major General Enoch H. Crowder, the Army TJAG, conceded "that 'the act of a

382. *Id.* at 209.

383. *Id.*

384. *Id.*

385. *Id.* at 211.

386. *Id.* at 213.

387. *Id.*

388. *United States v. Sorrells*, 49 C.M.R. 44, 45 (A.C.M.R. 1974) ("The gravamen of an Article 89 offense is not merely insult, but the undermining of lawful authority.") (citation omitted); see SCHLUETER, *supra* note 370, at 68 ("Disrespect of the [superior-subordinate] relationship or disobedience of orders coming from a superior is considered a potential threat to military discipline.").

man on the retired list, away from the military post, cannot reasonably be said to affect military discipline.’”³⁸⁹ Further, alternative—and more appropriate—disciplinary systems are available to deal with disrespectful federal employees in military offices where the disrespectful employee is a military retiree.³⁹⁰

4. *The Constitutionality of Article 88’s Application to Retired Personnel*

An open question remains as to the legality of Article 88’s application to retirees in the face of a First Amendment challenge. Whereas the law views the active duty service member as more soldier than citizen, with concomitant restrictions on First Amendment liberties,³⁹¹ the converse appears true for retirees.

Unfortunately, interpretive case law is sparse. The authors were able to locate only two references to the application of Article 88, or its predecessors, to a retired member of the armed forces. As discussed earlier, the sole court-martial resulted in an acquittal.³⁹² Although this court-martial of a retired Army enlisted man was prosecuted under Article 88’s predecessor, it is of questionable precedential value because of its age, the lack of appellate review, and Article 88’s current limitation on its prohibitions to officers.³⁹³ The second case involved a retired Army Lieutenant Colonel who was charged under Article 62 (Article 88’s predecessor) after making a speech “impugning the loyalty” of President Franklin D. Roosevelt,

389. Bishop, *supra* note 13, at 333 (citing *Hearings on the Revisions of the Articles of War Before the House Comm. on Military Affairs*, 62d Cong 83, 84-85 (1912)).

390. See generally ADMINISTRATIVE & CIVIL LAW DEP’T, THE JUDGE ADVOCATE GENERAL’S SCHOOL, U.S. ARMY, JA 210, LAW OF FEDERAL EMPLOYMENT ch. 4 (Sept. 2000) (discussing permissible forms of employee discipline).

391. *United States v. Moore*, 38 M.J. 490, 493 (C.M.A. 1994) (“The need for obedience and discipline within the military necessitates an application of the First Amendment different from that in civilian society.”) (citing *Parker v. Levy*, 417 U.S. 733, 759 (1974)); see *Able v. United States*, 155 F.3d 628, 633 (2d Cir. 1998) (“In full recognition that within the military individual rights must of necessity be curtailed lest the military’s mission be impaired, courts have applied less stringent standards to constitutional challenges to military rules, regulations and procedures than they have in the civilian context.”).

392. See *supra* notes 143-44 and accompanying text.

but the Army eventually dismissed the charge before trial “because of possible publicity accruing to his views.”³⁹⁴

Further, only two reported cases involving Article 88 or its predecessors have addressed First Amendment challenges, and both cases involved active duty soldiers during periods of armed conflict. The first case involved Army Private Hugh Callan,³⁹⁵ who was convicted at a World War II court-martial of two specifications under A.W. 62 for (1) referring to President Roosevelt as “a dirty politician, whose only interest is gaining power as a politician and safeguarding the wealth of the Jews;” and (2) stating that “President Roosevelt and his capitalistic mongers are enslaving the world by their actions in Europe and Asia, by their system of exploiting.”³⁹⁶ Also, Callan was convicted of three specifications under A.W. 96 for making statements in support of Germany and Japan.³⁹⁷ Callan’s First Amendment arguments failed at his court-martial, “and the reviewing judge advocate was offended that such a claim should even be raised.”³⁹⁸

Appealing his court-martial convictions, Callan argued, in part,³⁹⁹ that he had merely “used respectful language in setting forth his criticisms of the President and of the United States and in expressing his views before enlisted men and officers of the United States Army.”⁴⁰⁰ The U.S. Court

393. *United States v. Howe*, 37 C.M.R. 429, 436 (C.M.A. 1967) (“it applies to officers only”); *see also* Kester, *supra* note 143, at 1718 (“And the draftsman at the same time drastically reduced the likelihood of prosecutions under the article by limiting it so as to apply only to commissioned officers.”). Because Congress elected to restrict Article 88’s application to officers only, the presumption doctrine, MCM, *supra* note 209, pt. IV, ¶ 60(c)(5)(a), should preclude Article 134 from being applied to enlisted personnel for similar misconduct. *See* Kester, *supra* note 143, at 1735 (“of questionable legality has been the Army’s occasional resort to the general article to punish enlisted men, whom Congress in 1950 exempted from article 88, for statements disrespectful of the President”).

394. Kester, *supra* note 143, at 1733 n.225.

395. *Sanford v. Callan*, 148 F.2d 376 (5th Cir. 1945). Callan’s case was the first one in which the First Amendment was raised as a defense. Kester, *supra* note 143, at 1731-32.

396. *Callan*, 148 F.2d at 376.

397. *Id.* at 376-77. The Ninety-Sixth Article of War—the General Article—punished “Disorders and Neglects to the Prejudice of Good Order and Military Discipline” and “Conduct of a Nature to Bring Discredit upon the Military Service.” A MANUAL FOR COURTS-MARTIAL, U.S. ARMY 187-88 (1927).

398. Kester, *supra* note 143, at 1732 (citing *Callan*, CM 223248 (1942)).

399. Callan also unsuccessfully argued that the military was without jurisdiction because he had not taken an oath as part of his induction. *Callan*, 148 F.2d at 377. The court held that Callan waived his oath by voluntarily entering active duty with the Army. *Id.*

400. *Id.* at 377.

of Appeals for the Fifth Circuit made short shrift of that argument, and in a stinging rebuke, characterized his appellate brief as one “bristl[ing] with the idea that he should be permitted to denounce the Government and lend aid and comfort to the enemies of the Republic in time of war, and that such conduct is one of his freedoms.”⁴⁰¹

The only reported case addressing Article 88 since the UCMJ became effective, *United States v. Howe*,⁴⁰² involved an active duty officer during a period in which America’s forces were engaged in combat operations in Vietnam. Army Second Lieutenant Henry Howe was convicted of violating Article 88 for carrying a cardboard sign during an antiwar demonstration that read on one side “‘Let’s Have More Than a Choice Between Petty, Ignorant, Fascists in 1968;’ and on the other side . . . ‘End Johnson’s Fascist Aggression in Vietnam.’”⁴⁰³ Howe had not helped to organize the demonstration, participated in it while off-duty and in civilian garb, and his military status was unknown to both demonstrators and spectators.⁴⁰⁴ Notwithstanding Howe’s limited protest participation and his unknown military status, his conviction was upheld against unsuccessful arguments that his conduct constituted a permissible political discussion,⁴⁰⁵ that Article 88 was void for vagueness,⁴⁰⁶ and that its application to him violated his First Amendment rights.⁴⁰⁷

Depending upon the specific circumstances, the success of a First Amendment challenge to Article 88 by a retired officer for inappropriate speech made after retirement during a period of relative peace remains uncertain. The standard by which a retiree’s challenged statements would be measured, for First Amendment purposes, is contained within the clear and present danger doctrine.⁴⁰⁸ This standard examines “whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive

401. *Id.*

402. 37 C.M.R. 429 (C.M.A. 1967).

403. *Id.* at 432-33.

404. *Id.* at 433; ROBERT SHERRILL, *MILITARY JUSTICE IS TO JUSTICE AS MILITARY MUSIC IS TO MUSIC* 178-79 (1970). Howe was reported to military authorities by a gas station attendant who noticed Army decals on the car and the offending cardboard sign in the vehicle. SHERRILL, *supra*, at 179-80.

405. *Howe*, 37 C.M.R. at 444 (The COMA posited that the political discussion exception to Article 88 as envisioned in the *Manual* “cannot be equated to the contemporaneous language prohibited by this Article.”).

406. *Id.* at 442-43.

407. *Id.* at 434-38.

408. *Id.* at 436; see *Priest v. Sec’y of Navy*, 570 F.2d 1013, 1017 (D.C. Cir. 1977).

evils that Congress has a right to prevent. It is a question of proximity and degree.”⁴⁰⁹ Within the military context, the government’s burden is satisfied if the “the speech interferes with or prevents the orderly accomplishment of the mission or presents a clear danger to loyalty, discipline, mission or morale of the troops”⁴¹⁰ or presents a clear danger to civilian supremacy.⁴¹¹ Whether the challenged speech is constitutionally unprotected is “measured by ‘its tendency,’ not its actual effect.”⁴¹²

In *Howe*, the COMA identified the substantive evils that Congress intended to protect through Article 88 as the “impairment of discipline and the promotion of insubordination by an officer of the military service”⁴¹³ Further, the COMA easily dispatched *Howe*’s First Amendment challenge, noting that “hundreds of thousands” of service members were involved in combat operations in Vietnam as a prelude to the COMA’s conclusion that “*in the present times and circumstances* such conduct by an officer constitutes a clear and present danger to discipline within our armed forces”⁴¹⁴

While the suggestion that a coup sponsored or actively supported by military retirees is farcical,⁴¹⁵ senior officers from the retired community are becoming increasingly more vocal on both policy and political issues⁴¹⁶ and can have a profound impact on the political landscape of this country. For example, the endorsement of presidential candidate William Clinton in 1992 by retired Admiral William Crowe and other retired officers helped the Clinton campaign weather allegations that he had deliberately avoided military service during the Vietnam War.⁴¹⁷ Prominent

409. *Howe*, 37 C.M.R. at 436 (citing *Schenck v. United States*, 248 U.S. 47 (1919)); see also *Priest*, 570 F.2d at 1017.

410. *United States v. Brown*, 45 M.J. 389, 395 (1996); see also Captain John A. Carr, *Free Speech in the Military Community: Striking a Balance Between Personal Rights and Military Necessity*, 45 A.F. L. REV. 303, 306 (1998) (“It appears, therefore, that the military may impose restrictions on the speech of military personnel whenever the speech poses a significant threat to discipline, morale, esprit de corps, or civilian supremacy.”). In *Howe*, the COMA stated that the substantive evil envisioned by Article 88 was the “impairment of discipline and the promotion of insubordination by an officer of the military service” *Howe*, 37 C.M.R. at 437.

411. *Brown*, 45 M.J. at 396-97; Carr, *supra* note 410, at 306.

412. *United States v. Hartwig*, 39 M.J. 125, 130 (C.M.A. 1994) (citing *United States v. Priest*, 45 C.M.R. 338, 345 (C.M.A. 1972)).

413. *Howe*, 37 C.M.R. at 437.

414. *Id.* at 437-38 (emphasis added).

415. The concern giving rise to Article 88’s original predecessor was one of a military coup. SHERRILL, *supra* note 404, at 182 (“In the early days of our new nation the rationale behind Article 88 was an imminent fear . . . that the generals might pull a coup.”).

retired military officers publicly endorsed President Bush during the last election.⁴¹⁸ This departure from the historic political neutrality of the military,⁴¹⁹ albeit by retired members of that community,⁴²⁰ has proven controversial both within and outside the military.⁴²¹ Both defenders and critics of the endorsement of President Bush during the last presidential election passionately defend their respective positions.⁴²²

Historically, military retirees have not been totally absent from the political scene. Indeed, General Eisenhower was elected President after he retired from the Army,⁴²³ retired Navy Captain John McCain is now a U.S. Senator,⁴²⁴ and Army General Colin Powell was not the first retired officer to be appointed to a cabinet position.⁴²⁵ However, when retirees invoke their military status, implicitly or explicitly, and then enter the political fray in that capacity, then the military as an institution should experience a significant measure of discomfort. Under such circumstances, the military retiree, normally more citizen than soldier, begins to take on more of the characteristics of his former military self.

Richard H. Kohn, the former chief of Air Force history for the USAF, articulated the concern best: “four-stars never really ‘retire’ but like

416. Thomas E. Ricks, *“I Think We’re Pretty Disgusted”*; *Challenging of Overseas Ballots Widens Divide Between Military, Democrats*, WASH. POST, Nov. 21, 2000, at A18 (“retired senior military officers have become more active in electoral politics”); cf. Ricks, *supra* note 43, at A1, A15 (“Retired generals often say in public what the active-duty leadership is thinking but can’t utter.”). Senior military officers have reportedly used retirees to influence both Congress and public opinion. Richard H. Kohn, *The Erosion of Civilian Control of the Military in the United States Today*, NAVAL WAR C. REV., Summer 2002, at 8, 16, 37 n.1.

417. Richard H. Kohn, *General Elections: The Brass Shouldn’t Do Endorsements*, WASH. POST, Sept. 19, 2000, at A23 (“The change began in 1992, when retired Joint Chiefs Chairman William Crowe and a handful of other retired flag officers endorsed Bill Clinton, defusing his draft dodging as an issue.”); see also Steven Lee Myers, *When the Military (Ret.) Marches to Its Own Drummer*, N.Y. TIMES (Oct. 1, 2000) (“In 1992, President Clinton eagerly accepted the support of Adm. William J. Crowe, . . . at a time when his campaign was dogged by questions over the steps he took to avoid the draft during the Vietnam War.”), <http://ebird.dtic.mil/Oct2000/e20001002when.htm>; Rowan Scarborough, *Media Hit Endorsements for Bush by Ex-Military Officers*, WASH. TIMES, Oct. 4, 2000, at A1 (“In 1992, Mr. Clinton . . . organized the public endorsements of 21 retired admirals and generals, including Adm. William Crowe . . .”).

418. Franklin Margiotta, *Retired Military’s Right to Speak Out*, WASH. TIMES, Oct. 22, 2000, at B4 (noting that “85 senior retired military officers publicly endorsed George W. Bush”); see also Thomas E. Ricks, *Bush’s Brass Band Raises Some Questions*, WASH. POST, Sept. 22, 2000, at A23 (noting “[t]he endorsement of Texas Gov. George W. Bush for president by scores of former generals and admirals”).

princes of the church, embody the core culture and collectively represent the military community as authoritatively as the active duty leadership.”⁴²⁶ What is not objectionable is that senior retired officers enter the political arena as vocal private citizens or even as candidates,⁴²⁷ but such officers enter into the realm of objectionable behavior when they use their “mili-

419. Kohn, *supra* note 416, at 27 (“Before the present generation, American military officers (since before the Civil War) had abstained as a group from party politics, studiously avoiding any partisanship of word or deed, activity, or affiliation.”); Professor Don M. Snider, *West Point’s Renewal of Officership and the Army Profession*, ASSEMBLY, July/Aug. 2001, at 65 (“Officers strictly observe the principle that the military is subject to civilian authority and do not involve themselves or their subordinates in domestic politics or policy beyond the exercise of the basic rights of citizenship.”); LIEUTENANT COLONEL (RET.) KEITH E. BONN, ARMY OFFICER’S GUIDE 80 (48th ed. 1999) (“It is traditional, and also required by law, that soldiers avoid partisan politics. This is particularly important for officers.”); *cf.* LYON, *supra* note 29, at 69 (noting that as a Major, “Eisenhower honored the tradition of the officer corps that required the army to stay out of politics, at least when on duty . . . [, and] felt that army officers should keep [their political] views bottled up except when they were alone together far from civilians, or at least from civilians they could not thoroughly trust”); ROBERT WOOSTER, THE MILITARY & UNITED STATES INDIAN POLICY 1865-1903, at 75 (1988) (“Influenced by [General William T.] Sherman’s opposition to overt political involvement [during the post-Civil War period] except in cases of absolute necessity, most officers avoided public pronouncements regarding the presidency.”).

The military’s traditional political neutrality is a function of the bedrock principle that the military remain subservient to the civilian control of the country’s elected civilian leadership. This “principle of civilian control is sacrosanct” JAMES H. TONER, TRUE FAITH AND ALLEGIANCE, THE BURDEN OF MILITARY ETHICS 36 (1995). *But cf.* Kohn, *supra* note 416, at 26 (“Reversing a century and a half of practice, the American officer corps has become partisan in political affiliation, and overwhelmingly Republican.”); THOMAS E. RICKS, MAKING THE CORPS 279-83 (1997) (The modern officer corps is increasingly becoming more politically conservative and partisan; and more active at least with respect to voting.). The Army’s regulatory restrictions on active duty soldiers are contained in U.S. DEP’T OF ARMY, REG. 600-20, COMMAND POLICY para. 5.3 & app. B 15 July 1999; *accord* U.S. DEP’T OF DEFENSE, DIR. 1344.10, POLITICAL ACTIVITIES BY MEMBERS OF THE ARMED FORCES ON ACTIVE DUTY (15 June 1990) (C2, 17 Feb. 2000).

420. Tom Bowman, *Retired Military Officers at Odds over Propriety of Their Politics*, BALT. SUN, Sept. 22, 2000, at *1 (“The retired officers [who endorsed George W. Bush for President] contend that they are merely exercising their constitutional rights, but their support has led to concern that they are going against the tradition of a politically neutral officer corps providing professional advice to civilian leaders.”), *available at* <http://ebird.dtic.mil/Sep2000/s20000925odds.htm>; Ricks, *supra* note 418, at A23 (asserting that some in the military “worry that [the endorsements of a presidential candidate] runs counter to the U.S. military tradition of refraining from public participation in elections”); Kohn, *supra* note 417, at A23 (“Before [the 1992 presidential] election, for over two centuries, professional soldiers occasionally sought high office or in retirement assailed some policy—almost always in areas where they could claim experience or expertise. But few ever tried to use the public’s esteem to push a candidate.”).

tary credentials as a platform for endorsement of candidates.”⁴²⁸ Further, such endorsements influence not only the American public, but active duty personnel as well.⁴²⁹ As noted by retired Army General Wesley Clark:

421. See, e.g., Myers, *supra* note 417, at *1 (“[T]he recent announcement that a group of military veterans—including senior officers who until recently served under President Clinton—had endorsed Gov. George W. Bush is raising concerns inside and outside the Pentagon about the growing politicization of the ranks.”); Ricks, *supra* note 418, at A23 (“The endorsement of Texas Gov. George W. Bush for President by scores of former generals and admirals earlier this week is raising some eyebrows inside the military community.”); Elain M. Grossman, *Retired Military Brass Sharply Divided over Political Endorsements*, INSIDE THE PENTAGON, Sept. 21, 2000, at 1; Eliot A. Cohen, *Twilight of the Citizen-Soldier*, PARAMETERS, Summer 2001, at 28 (characterizing as part of a “worrisome trend,” the “assertion of all rights of citizenship by professional soldiers, most notably in the open participation of recently retired general officers in electoral politics by endorsing presidential candidates”).

422. Compare S. Jay Turnbull, *Generals out of Line*, WASH. POST, Oct. 11, 2000, at A30 (“Military custom and regulation forbid [active and retired] officers from taking part in political activities, including supporting one candidate or another.”); Myers, *supra* note 417, at *2 (“‘It casts a shadow back into the institution,’ said Gen. Wesley K. Clark . . .”) (“‘I really believe it is a disservice if senior military officers, even if retired, get drawn into the political process,’ said Gen. John M. Shalikashvili . . . who has, however, advised the Gore campaign.”); Vance Gordon, *Military Campaigner*, WASH. POST, Sept. 23, 2000, at A22 (“No one could object to Mr. Krulak’s opinions, nor would they be much noted, but for his dressing them up in his general’s suit; it is the use of his military title to amplify his political voice, not his partisanship, that insults his service.”); Bowman, *supra* note 420, at *1 (Retired General George A. Joulwan “questions his former colleagues for jumping into the political fray.”); Ricks, *supra* note 418, at A23 (citing E-mail from Marine Lt. Gen. Bernard E. Trainor, stating in part: “A senior officer should realize that by lending his name or title, he or she is being ‘used’ by a politician”); Kohn, *supra* note 417, at A23 (“a major step toward politicizing the American military”); with Margiotta, *supra* note 418, at B4 (retired Air Force Colonel argues: “retired officers never swore to give up First Amendment rights of speech”); Sean T. Cate, *Military Customs*, WASH. POST, Oct. 16, 2000, at A26 (No “‘custom’ or ‘regulation’ . . . prevents retired military personnel from taking part in political activities, including supporting a particular candidate” and “[p]articipation in the political process for active duty and retired military personnel of all ranks is vital to our democracy.”); Philip Gold, *Politics and the Military*, WASH. TIMES, Oct. 6, 2000, at A19 (“‘Veterans for Bush’ is right to organize and act, despite all the legalistic guff about senior officers never ‘really’ retiring.”); Bowman, *supra* note 420, at *2 (Military sociologist David Segal opined, “Once they’re out of uniform, they’re American citizens.”); General (Ret.) Charles C. Krulak, *Veteran’s Right to Endorse*, WASH. POST, Sept. 24, 2000, at B6 (“In fact, to suggest that, having officially taken off our uniforms for the last time, we somehow are not entitled to the same right to enjoy full and active participation in the selection of our elected officials as other citizens . . . is an insult to our service.”) (“We cannot stand silently by. We cannot expose those still wearing the uniform to the perils of future wars and conflicts for which we are not fully trained, equipped and prepared. Our silence, not our voices, would do the greater harm.”).

“You have junior people still in the service who value what these people say.”⁴³⁰

Regardless, for purposes of this article, politically related or politically motivated remarks⁴³¹ by a retiree may pass beyond the point of institutional discomfort and enter the realm of criminal misconduct, even when subjected to the harsh light of First Amendment scrutiny. The increasingly active role that retired senior military officers are taking in partisan politics and/or policy disputes may provide the basis for an expanded application of Article 88 to a portion of the military largely untouched throughout history by its application. To illustrate, should a senior military officer publicly endorse a political candidate in his capacity as a retired military officer and while doing so, treat a sitting President, Vice President, or other

423. Margiotta, *supra* note 418, at B4. However, “Gen. Dwight D. Eisenhower’s political views were so opaque that both Democrats and Republicans courted him after he stepped down” Myers, *supra* note 417, at *1. Additionally, retired General Curtis LeMay and Admiral James Stockdale were vice presidential candidates. Margiotta, *supra* note 418, at B4.

424. Margiotta, *supra* note 418, at B4; see ROBERT TIMBERG, *THE NIGHTINGALE’S SONG* 298-99 (1995) (Navy Captain John McCain retired in 1981 with the intention of entering politics).

425. Steven Mufson, *An Army Background Is Not Unique at State*, WASH. POST, Dec. 19, 2000, at A37 (retired Army Generals George C. Marshall and Alexander Haig also served as Secretary of State).

426. Kohn, *supra* note 417, at A23; see also Ricks, *supra* note 418, at A23 (A retired Army Colonel opined: “A retired four-star general represents the institution that produced him—and by definition should remain apolitical.”); Grossman, *supra* note 421, at 1 (A “retired senior military officer” stated: “‘I think when you’re a retired four-star and had the position that Chuck Krulak or Tony Zinni had, you’re never truly retired,’”); see Myers, *supra* note 417, at *1-2 (Critics argue that “the endorsements gave the impression . . . that it was the military itself, not simply a handful of veterans, that supported Mr. Bush’s candidacy.”).

427. See, e.g., Craig Timberg, *Retired General Eyes Warner’s Senate Seat*, WASH. POST, July 19, 2001, at B4 (Retired Lieutenant General Claudia J. Kennedy considers running “as a Democratic challenger to U.S. Sen. John W. Warner (R) next year.”). Eventually LTG Kennedy elected not to run against Senator Warner. Craig Timberg, *General Retreats from Senate Bid*, WASH. POST, Sept. 26, 2001, at B4; see also Lori Montgomery, *Retired Admiral Enlists for Md. Race*, WASH. POST, June 28, 2002, at 1 (Retired Admiral Charles R. Larson enters Maryland’s race for Lieutenant Governor).

428. Grossman, *supra* note 421, at 1 (citing Kohn and a “retired senior military leader”).

429. *Id.* (“In the minds of some in the active-duty military or in the public, such an endorsement could convey an indication of the political leanings of those still leading the military, said this former officer and others. And, they said, it could put pressure on those still in uniform to side with one political camp or another.”).

430. Myers, *supra* note 417, at *2.

protected person or entity with obvious contempt, then military jurisdiction might properly be invoked, if the facts are sufficiently egregious. Further, should that same officer publicly offer criticism in a contemptuous manner of a controversial presidential or congressional decision affecting the military, such as the use of military force or the implementation of a particular social policy, then again Article 88 may have legitimate application.

Key to Article 88's application would be the retiree's invocation of his military status, speech or other communication so contemptuous that the communication leaves the safe harbor of "political discussion," and the communication's tendency to prevent the military mission or clearly endanger the "loyalty, discipline, mission or morale of the troops."⁴³² At least with respect to the personage in the First Amendment calculus, a well-known and popular retired general or flag officer should be viewed as posing as great, if not greater, a threat than the junior officer in civilian garb in *Howe*, the seaman apprentice in *Priest v. Levy*,⁴³³ or the dermatol-

431. Article 88 contains a "political discussion" safe harbor. MCM, *supra* note 209, pt. IV, ¶ 12c ("If not personally contemptuous, adverse criticism of one of the officials or legislatures named in the article in the course of a *political discussion*, even though emphatically expressed, may not be charged as a violation of the article."). The political discussion exception, however, is extremely narrow. Richard W. Aldrich, *Article 88 of the Uniform Code of Military Justice: A Military Muzzle or Just a Restraint on Military Muscle?*, 33 U.C.L.A. L. REV. 1189, 1206 (1986) ("Article 88's exception for political discussion has been interpreted so that it appears in fact to exempt nothing."); *see also* Lieutenant Colonel Michael J. Davidson, *Contemptuous Speech Against the President*, ARMY LAW., July 1999, at 7 ("Taken together[, *United States v. Howe*, 37 C.M.R. 429 (C.M.A. 1967), and *United States v. Poli*, 22 B.R. 151 (1943),] indicate that the political discussion defense will fail as a safe harbor for any service member who uses words contemptuous on their face, even if uttered in heated political debate and even if the accused did not intend the words to be personally contemptuous.") ("unless the official and personal capacities of the official are clearly severable, the courts will treat the offensive words as personally contemptuous"); *cf.* JOSEPH W. BISHOP, JR., JUSTICE UNDER FIRE (1974) (The COMA, "though it has stated eloquently that servicemen are protected by the First Amendment, has in practice been very ready to find their utterances are so dangerous as to be removed from that protection, at least where their speech was politically inspired.") (discussing *Howe*).

432. *United States v. Brown*, 45 M.J. 389, 395 (1996); *United States v. Hartwig*, 39 M.J. 125, 130 (C.M.A. 1994); *Howe*, 37 C.M.R. at 437.

433. 570 F.2d 1013 (D.C. Cir. 1977). Rejecting a First Amendment challenge, the U.S. Court of Appeals for the District of Columbia upheld Priest's court-martial conviction of violating Article 134 for distributing a "Serviceman's Newsletter" to active duty personnel that called for resistance to the Vietnam War and encouraged desertion to Canada. *Id.* at 1014-15. The court applied the clear and present danger standard. *Id.* at 1017.

ogist in *Parker v. Levy*.⁴³⁴ Although the scales of justice are more inclined to tip against the exercise of First Amendment rights during periods of actual or imminent hostilities,⁴³⁵ the UCMJ retains viability when confronted with First Amendment challenges even when the country is at peace.⁴³⁶

B. Discretionary Exercise of Court-Martial Authority

Another area of uncertainty is the circumstances under which the military will exercise its discretion to subject a retiree to court-martial jurisdiction. Albeit all the Services have exercised this discretion sparingly, no uniform standard exists within the armed forces; and the various Service standards, although similar in some respects, are vague and provide no meaningful gauge by which to measure the appropriateness of the exercise of court-martial jurisdiction over a retiree.

Within the Army, prior approval must be obtained from the Criminal Law Division, Office of the Judge Advocate General, before the referral of charges, and requests to recall a retiree to active duty for court-martial must be approved by the Office of the Assistant Secretary of the Army (Manpower and Reserve Affairs).⁴³⁷ Retirees need not be recalled to

434. 417 U.S. 733 (1974). The Supreme Court rejected Captain Levy's First Amendment over breadth challenge. *Id.* at 761 ("His conduct, that of a commissioned officer publicly urging enlisted personnel to refuse to obey orders which might send them into combat, was unprotected under the most expansive notions of the First Amendment."); *see also Brown*, 45 M.J. at 398 ("The importance of the United States' role in the Gulf War cannot be over-emphasized.").

435. *Priest*, 570 F.2d at 1018 (the context in which the statements are said determine whether they enjoy First Amendment protection). *Priest*, *Levy*, and *Howe* all engaged in misconduct during the Vietnam War. *Id.* at 1014 (in the pentagon); *Levy*, 417 U.S. at 735-36 (Levy made statements to military personnel at Fort Jackson, South Carolina.); *Howe*, 37 C.M.R. at 432 (Howe protested in El Paso, outside Fort Bliss, Texas.).

436. *See Goldman v. Weinberger*, 475 U.S. 503 (1986) (upholding Air Force regulation that prohibited wear of yarmulke; Goldman had been threatened with a court-martial if he failed to obey the regulation); *cf. Cooper v. Marsh*, 807 F.2d 988, 990 (Fed. Cir. 1986) (noting unsuccessful First Amendment challenge to fraternization charge at court-martial).

437. AR 27-10, *supra* note 331, para. 5-2(b)(3).

active duty, however, to court-martial them.⁴³⁸ Further, before an Army retiree may be prosecuted under the UCMJ, Army policy requires the existence of “extraordinary circumstances.”⁴³⁹

Unfortunately, the phrase “extraordinary circumstances” is undefined and has suffered from this shortcoming for almost half a century or longer.⁴⁴⁰ Previously, such circumstances had to link retirees “to the military establishment or involving them in conduct inimical to the welfare of the nation.”⁴⁴¹ Almost a decade ago, one Army legal commentator examined post-UCMJ retiree courts-martial and opined that jurisdiction was most likely to be exercised in two circumstances: when the misconduct (1) “excited direct military interests, involving offenses such as espionage against the United States or the larceny of property belonging to the federal government;” or (2) occurred overseas, particularly when the criminal jurisdiction of the United States did not reach the accused.⁴⁴²

Regulatory restrictions of the other Services for prosecuting retirees vary, but are similarly skeletal in the amount of guidance they provide as to the appropriateness of exercising military jurisdiction. Charges against Navy or Marine Corps retired personnel may not be referred to trial absent

438. Lieutenant Colonel Warren Foote, *Courts-Martial of Military Retirees*, ARMY LAW., May 1992, at 55 n.8 (“Significantly, a retired soldier may be tried in his or her retired status without ever being ordered to active duty.”); *see also* United States v. Morris, 54 M.J. 898, 900 (N-M. Ct. Crim. App. 2001); United States v. Hooper, 26 C.M.R. 417 (C.M.A. 1958), *as digested in* 8 Dig. Ops. JAG 1958-1959, sec. 45.8, at 77 (“Jurisdiction over retired members of a regular component of the armed forces who are entitled to pay attaches by virtue of UCMJ Art. 2, without the necessity of an order effecting return of such persons to active duty.”).

439. AR 27-10, *supra* note 331, para. 5-2(b)(3). The authors were unable to locate any articulation of the extraordinary circumstances giving rise to the recent court-martial of Major General David Hale.

440. *See* United States v. Sloan, 35 M.J. 4, 9 (C.M.A. 1992) (noting that the term, as discussed in a 1957-1958 Army TJAG opinion, was “undefined”) (citing Courts-Martial, Op. OTJAG, Army (29 June 1956), *as digested in* 7 Dig. Ops. JAG 1957-1958, sec. 45.8, at 108). The same standard has existed since at least the 1930s. *See* United States v. Kearney, 3 B.R. 63, 79 (1931).

441. Courts-Martial, Op. OTJAG, Army (29 June 1956), *as digested in* 7 Dig. Ops. JAG 1957-1958, sec. 45.8, at 108; *see also* Kearney, 3 B.R. at 79 (“unless some extraordinary circumstances were involved linking [retired officers] to the military establishment or involving them in conduct inimical to the welfare of the nation”) (citing a 1932 transmittal letter from the Secretary of War to President Hoover); Holland, *supra* note 172, at 31 (citing U.S. DEP’T OF ARMY, PAM. 27-174, LEGAL SERVICES: JURISDICTION para. 4-5 (25 Sept. 1986)).

442. Foote, *supra* note 438, at 57.

the permission of the Secretary of the Navy.⁴⁴³ Further, retirees may not be recalled to active duty solely to stand trial, and Secretarial permission is required before the apprehension, arrest, or confinement of retired personnel.⁴⁴⁴ Within the Coast Guard, charges against a retiree may not be referred for trial without the approval of the Chief Counsel.⁴⁴⁵ Additionally, prior authorization must be obtained from the Chief Counsel before a retiree may be apprehended, arrested, or confined.⁴⁴⁶

The Air Force limits its jurisdiction over retirees to situations when “their conduct clearly links them with the military or is adverse to a significant military interest of the United States.”⁴⁴⁷ Unlike the other Services, which restrict the referral of charges, the Air Force imposes restrictions at the *prefferal* stage. Charges may not be preferred without the approval of the Secretary of the Air Force unless the statute of limitations is about to run, and then approval must be obtained as quickly thereafter as possible.⁴⁴⁸

Although all the Services have articulated restrictions of some kind on the exercise of jurisdiction over retired personnel, these restrictions provide little, if any, meaningful protection to the retiree community. In

443. JAGMAN, *supra* note 334, sec. 0123(a)(1) (“No case of a retired member of the regular component of the Navy or Marine Corps not on active duty but entitled to receive pay, a retired member of the Naval Reserve or Marine Corps Reserve not on active duty who is receiving hospitalization from an armed force, or a member of the Fleet Reserve or Fleet Marine Corps Reserve not on active duty will be referred for trial by court-martial without the prior authorization of the Secretary of the Navy.”).

444. *Id.* sec. 0123(a)(1), (c).

445. USCG MJM, *supra* note 334, para. 3.B.3.a (“No case of a retiree amenable to jurisdiction under Article 2(a)(4) or (5), UCMJ will be referred to trial by court-martial without the prior authorization of the Chief Counsel.”).

446. *Id.*

447. U.S. AIR FORCE, INSTR. 15-201, ADMINISTRATION OF MILITARY JUSTICE para. 2.9 (2 Nov. 1999) [hereinafter AFI 15-201]. An earlier policy directive stated that Air force retirees could not be prosecuted “unless the alleged misconduct is adverse to a significant military interest to the United States and [the Secretary of the Air Force] has approved starting a trial.” U.S. AIR FORCE, POLICY DIR. 51-2, ADMINISTRATION OF MILITARY JUSTICE para. 15 (7 Sept. 1993). The more restrictive term “significant military interest” was not contained in the 1990 Air Force regulation on point, which required that “their conduct clearly links them with the military or is adverse to the United States.” Foote, *supra* note 438, at 56 (citing U.S. AIR FORCE, REG. 111-1, MILITARY JUSTICE GUIDE para. 3-5 (9 Mar. 1990)). In 1961 the Air Force standard was slightly different: “conduct clearly links him to the military establishment or is inimical to the welfare of the United States.” House, *supra* note 3, at 120.

448. AFI 15-201, *supra* note 447, at 15, para. 2.9.

United States v. Sloan,⁴⁴⁹ a retired Sergeant Major challenged the exercise of court-martial jurisdiction over him based upon an alleged violation of applicable Army regulation and policy.⁴⁵⁰ The appeal caused the COMA to review the then-existing Army policy concerning the exercise of military jurisdiction of retirees and made a number of salient points. First, the COMA emphasized that a statement of policy, by itself, does not constitute a legal prohibition.⁴⁵¹ Next, the court noted that “even a *regulation*—which, as a general rule, often is said to bind the authority that promulgates it[,] . . . may be asserted by an accused only if it was prescribed to protect an accused’s rights.”⁴⁵² With respect to the language contained in the applicable Army regulation, which is identical to the language contained in the Army’s current regulation, the COMA opined that it was not designed to protect the accused’s rights, stating: “[h]ere it seems most likely that the policy was promulgated primarily for the purpose of assuring efficient allocation of prosecutorial resources by pursuing military-justice alternatives only when courts-martial—as opposed to some other remedy, such as civilian trial—is logically compelling.”⁴⁵³

Similarly, in *United States v. Morris*,⁴⁵⁴ the Navy-Marine Court of Criminal Appeals gratuitously addressed the effect of Naval Secretarial restrictions on the exercise of military jurisdiction over retirees. The court noted that the prohibition against “ordering a member of the Fleet Marine Corps Reserve to active duty solely for the purpose of exercising court-martial jurisdiction” was “not related to jurisdiction,” characterizing the prohibition as an apparent “fiscal consideration.”⁴⁵⁵ Further, the court posited that the prohibition was “merely policy and was not promulgated for the benefit of the accused.”⁴⁵⁶

It appears that existing Service constraints on the exercise of court-martial jurisdiction over retired members of the armed forces are merely unenforceable, policy-driven, self-imposed restrictions, which provide only uncertain protection to military retirees. Service regulations should clarify the circumstances under which jurisdiction will be exercised. Further, to serve as a check on the expansive reach of military jurisdiction over

449. 35 M.J. 4 (C.M.A. 1992).

450. *Id.* at 7.

451. *Id.* at 9 (“*policy* typically is not *law*”).

452. *Id.* (citations omitted).

453. *Id.*

454. 54 M.J. 898 (N-M. Ct. Crim. App. 2001).

455. *Id.* at 902 n.5.

456. *Id.*

retirees, these currently edentulous service constraints should be rewritten to clarify their prophylactic nature and be cast as a withdrawal of authority over a class of cases⁴⁵⁷ to ensure enforceability.

C. Military Jurisdiction over Contractors on the Battlefield

Clearly there will be circumstances when the exercise of court-martial jurisdiction over retirees is both necessary and appropriate. One such circumstance in which the retention of military jurisdiction appears not only appropriate, but necessary, is occasioned by the presence of contractors within a theater of operations during a period of actual hostilities that falls short of a declared war.⁴⁵⁸ To the extent the Services clarify the circumstances under which military jurisdiction will be exercised over retirees, the contractor on the battlefield scenario stands out as an excellent candidate for a policy favoring military jurisdiction.

The American military has historically relied on contractors to support its wartime operations.⁴⁵⁹ During the Vietnam War, U.S. civilian contractors employed approximately 9000 employees in Vietnam during 1969, at the height of the military contracting effort.⁴⁶⁰ In Operation Desert Storm, 950 contractor employees were employed in the Persian Gulf area, including thirty-four contractor employees who accompanied our forces into Iraq.⁴⁶¹ More recently, the military has relied on contractor

457. Rule for Courts-Martial 401 provides that “[a] superior competent authority may withhold the authority of a subordinate to dispose of charges in . . . types of cases” MCM, *supra* note 209, R.C.M. 401. See generally *United States v. Sloan*, 35 M.J. 4, 7-8 (C.M.A. 1992).

458. Article 2(a)(10), UCMJ, extends military jurisdiction “[in] time of war, [to] persons serving with or accompanying an armed force in the field.” UCMJ art. 2(a)(10) (2002). Application of this jurisdictional provision, however, is limited to times of a congressionally declared war. *United States v. Averette*, 41 C.M.R. 363, 365 (C.M.A. 1970).

459. Richard Hart Sinnreich, *Contracting Military Functions Raises Interesting Questions*, LAWTON CONST. (OKLA.), June 3, 2001, at 4 (Civilian teamsters were used for transportation during the Revolutionary War, the War of 1812, and the Mexican War; Union and Confederate forces relied “heavily on civilians for functions ranging from medical care to transportation”; and U.S. forces in Cuba during the Spanish American War were “heavily dependent on civilian contracting.”); see also Joe A. Fortner & Ron Jaeckle, *Institutionalizing Contractors on the Battlefield*, ARMY LOGISTICIAN, Nov.-Dec. 1998, at 11 (“Contracting for services is not new; the Army has been doing it since the American Revolution.”).

460. MAJOR GENERAL GEORGE S. PRUGH, VIETNAM STUDIES: LAW AT WAR: VIETNAM 1964-1973, at 88 (1991).

461. Major Susan S. Gibson, *Lack of Extraterritorial Jurisdiction over Civilians: A New Look at an Old Problem*, 148 MIL. L. REV. 114, 148 (1995).

support during numerous contingency operations,⁴⁶² including current operations in the Balkans⁴⁶³ and South West Asia.⁴⁶⁴ Presently, the trend appears to be one of increased reliance on civilian contractors.⁴⁶⁵ Indeed, while speaking before an October 2000 meeting of the Association of the United States Army, General John Coburn, commanding general of the Army Material Command, posited that “[c]ontractors will be all over the

462. Greg Schneider & Tom Ricks, *Profits in “Overused” Army*, WASH POST, Sept. 9, 2000, at A6 (“A long-time defense contractor, Brown & Root has deployed employees to Bosnia, Kosovo, Macedonia, Hungary, Albania, Croatia, Greece, Somalia, Zaire, Haiti, Southwest Asia and Italy to support Army contingency operations since 1992.”).

463. Gregory Piatt, *GAO Report: Balkans Contracts Too Costly*, EUR. STARS & STRIPES, Nov. 14, 2000, at 4 (Since 1995 the military has paid about \$2.2 billion “to Brown & Root, which feeds the troops, washes their uniforms, provides logistical support such as transportation, repairs buildings and has built base camps in Bosnia, Kosovo, Albania, Hungary and Macedonia.”); see also Charles Moskos, *What Ails the All-Volunteer Force: An Institutional Perspective*, PARAMETERS, Summer 2001, at 35 (“When American troops first entered Kosovo in August 1999, they were lustily greeted by Brown & Root employees who had preceded them into the strife-ridden region.”).

464. To illustrate, in 1999 the Army awarded a base support and combat support contract to support its operations at Camp Doha, Kuwait. ITT Fed. Serv. Int’l Corp., B-283307, 1999 U.S. Comp. Gen. LEXIS 196 (Nov. 3, 1999). The procurement required the contractor “[a]mong other things . . . to provide and maintain supplies and equipment for military exercises, and for contingency and combat operations, including heavy combat vehicles, tactical vehicles, and related armaments, ammunition, electronics and repair parts.” *Id.* at *3.

465. Major General Norman E. Williams & Jon M. Schandelmeier, *Contractors on the Battlefield*, ARMY, Jan. 1999, at 33 (“There is a trend toward using more contractors for sustainment.”); see also Earle Eldridge, *Civilians Put Expertise on the Front Line, Thousands Serve Their Country in War on Terror*, USA TODAY, Dec. 5, 2001, at B8 (“Reliance on civilians likely will grow, according to the Pentagon’s most recent defense reviews.”); see U.S. DEP’T OF ARMY, FIELD MANUAL 100-10-2, CONTRACTING SUPPORT ON THE BATTLEFIELD iv (4 Aug. 1999) [hereinafter FM 100-10-2] (“To bridge the gap before scheduled resources and CSS units arrive, or when other logistical support options do not provide the supplies and services needed, the Army is turning more frequently to contracting support to provide goods and services required.”); Sinnreich, *supra* note 459, at 4 (“During the past fifteen years, commercial contractors increasingly have become essential to the performance of basic military functions”) (“[T]he way things are going[, civilian contractors] will be even more ubiquitous in a future theater of war, if only to furnish the high technology expertise that the military services themselves are finding increasingly difficult to retain.”); cf. Colonel Ralph H. Graves, *Seeking Defense Efficiency*, 8 ACQUISITION REV. 47, 48 (Winter 2001) (“[a]lthough the outsourcing effort will continue”). The current potential for outsourcing or contracting out positions previously held by military or federal civilian employees is enormous. “Through fiscal year 2000, DoD has reviewed or is currently reviewing for potential outsourcing 181,000 positions, twice as many as were reviewed in the previous 17 years. The department expects a total of 245,000 to be reviewed by 2005.” *Id.* at 48.

battlefield of the future”⁴⁶⁶ Significantly for purposes of this article, a great percentage of overseas contractor employees are retired military.⁴⁶⁷

One reason offered to justify the exercise of court-martial jurisdiction over retirees is the general failure of domestic jurisdiction to reach crimes committed overseas.⁴⁶⁸ Most federal criminal statutes do not enjoy extra-territorial application.⁴⁶⁹ Two relatively new pieces of legislation have expanded U.S. extraterritorial jurisdiction and apply to civilians accompanying the force.

First, the War Crimes Act of 1996⁴⁷⁰ authorizes federal prosecution of any U.S. national or member of the U.S. armed forces who commits a war crime, or of any third country national who commits a war crime against a U.S. national or service member.⁴⁷¹ Clearly, the War Crimes Act reaches

466. Ken Swarner, *Contractors Go to War*, Military.com (Nov. 26, 2000), at <http://ebird.dtic.mil/Nov2000/s20001128contractors.htm>. General Coburn stated further that “[t]hey have always been there, but there will be even greater numbers in the future.” *Id.*

467. See Eldridge, *supra* note 465, at B8 (“many of them retired from the military”); Schneider & Ricks, *supra* note 462, at A6 (“As of this week, [Brown & Root] had 13,130 employees in the Balkans—about 90 percent of them local hires, the rest from the United States, often retired military.”); Ron Laurenzo, *Private Firm Continues Unrivaled Army Support*, DEF. WK., May 10, 1999, at 5 (“typically, logistics providers such as Brown & Root and DynCorp employ former officers—often retired Army Colonels—to run their foreign operations”); cf. Sinnreich, *supra* note 459, at 4 (“even commercial support of more generic military functions such as installation security, maintenance, and supply services typically is highly professional and . . . relies heavily on former military personnel”); Ron Laurenzo, *When Contractors Work the Front Lines*, DEF. WK., Apr. 5, 1999, at 8 (“a majority of the contractors are ex-military people”).

468. See Foote, *supra* note 438, at 57 (“[O]ffenses by retirees that occurred overseas were more likely to be referred to courts-martial. For example, the situs of both reported Navy cases was the Philippines, where domestic United States courts cannot exercise jurisdiction.”) (“Army judge advocates considered the inability of American courts to assert jurisdiction under title 18 to try an accused for the alleged murder of an American citizen in Saudi Arabia when they determined whether extraordinary circumstances existed that warranted exercising UCMJ jurisdiction over a retired soldier.”).

469. Major Tyler J. Harder, *Recent Developments in Jurisdiction: Is This the Dawn of the Year of Jurisdiction?*, ARMY LAW., Apr. 2001, at 12 (“most federal criminal statutes do not apply outside the territory of the United States or the special maritime and territorial jurisdiction of the United States”) (listing examples of federal statutes that do enjoy extra-territorial application).

470. 18 U.S.C.A. § 2441 (West 2000).

471. *Id.* § 2441(a)-(b). The Act reaches former members of the armed forces who commit war crimes while on active duty, but who are subsequently discharged. War Crimes Act of 1996, reprinted in 1996 U.S.C.C.A.N. 2166, 2172 (“would allow for prosecution even after discharge”).

misconduct committed by civilians accompanying U.S. forces overseas,⁴⁷² during both international and noninternational armed conflict.⁴⁷³ War crimes are defined in terms of violations of certain provisions of the Geneva and Hague Conventions, and the “Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended . . . when the United States is a party”⁴⁷⁴

Second, the Military Extraterritorial Jurisdiction Act of 2000⁴⁷⁵ extends federal criminal jurisdiction over misconduct committed outside the United States that would constitute a felony offense if committed “within the special maritime and territorial jurisdiction of the United States” to (1) persons “employed by or accompanying the Armed Forces outside the United States;” and (2) former members of the armed forces who committed the misconduct while subject to the UCMJ.⁴⁷⁶ The Act has only limited application to retired members of the armed forces. Retired personnel, subject to the UCMJ, may not be subject to prosecution under this Act unless the “indictment or information charges that the member committed the offense with one or more other defendants, at least one of whom is not subject to [the UCMJ].”⁴⁷⁷ Of significant note, the original Senate version of the bill would have also extended military jurisdiction to Department of Defense (DoD) employees and DoD contractor employees while serving with or accompanying U.S. forces overseas during a Secretary of Defense declared contingency operation.⁴⁷⁸

Even assuming the Department of Justice could surmount the problems associated with gathering evidence during or following a period of armed conflict⁴⁷⁹ and would be willing to devote the necessary prosecutorial resources to pursue these cases, however, a jurisdictional gap

472. *Id.* § 2441(c) (“[w]hoever, whether inside or outside the United States, commits a war crime”).

473. *Id.* § 2441(c)(3).

474. *Id.* § 2441(c).

475. Pub. L. No. 106-523, 114 Stat. 2488 (codified at 18 U.S.C. §§ 3261-3267 (2000)).

476. 18 U.S.C. § 3261. For a discussion of the new Act, see Captain Glenn R. Schmitt, *The Military Extraterritorial Jurisdiction Act: The Continuing Problem of Criminal Jurisdiction over Civilians Accompanying the Armed Forces Abroad—Problem Solved?*, ARMY LAW., Dec. 2000, at 1.

477. 18 U.S.C. § 3261(d). If for some reason the retiree is no longer subject to the UCMJ, the Act would also apply. *Id.* § 3261(d)(1).

478. Lieutenant Colonel Michael J. Davidson & Commander Robert E. Korroch, *Extending Military Jurisdiction to American Contractors Overseas*, 35 PROCUREMENT LAW. 1, 18 (Summer 2000).

remains. Such a gap exists over the commission of military offenses committed by most civilians accompanying the force that may have an adverse impact on the success of military operations against a hostile force. To illustrate, in the event of actual hostilities, civilian contractors and DoD civilians performing essential duties in support of military operations may simply abandon their work sites or refuse to deliver goods and services.⁴⁸⁰ Additionally, in future military operations contractor employees may be captured, interned with members of the U.S. armed forces, and then engage in misconduct that threatens both their own survival and that of their fellow prisoners. As a general rule, civilian contractors are not subject to military jurisdiction and present a disciplinary problem for commanders.⁴⁸¹

A historical anecdote from World War II serves to highlight the importance of maintaining discipline in such environments and supports the retention of military jurisdiction over retired service members serving as contractors as a disciplinary tool for military commanders. Shortly after their successful attack on Pearl Harbor, Japanese forces turned their atten-

479. For a discussion of the difficulties of prosecuting war crimes cases during a period of ongoing hostilities, see Gary D. Solis, *SON THANG: AN AMERICAN WAR CRIME* (1997).

480. See FM 100-10-2, *supra* note 465, at 3-8 (“commanders must understand that contractor personnel aren’t soldiers; they might refuse to deliver goods or services to potentially dangerous areas, or might refuse to enter a hostile area regardless of mission criticality”); Eric A. Orsini & Lieutenant Colonel Gary T. Bublitz, *Risks on the Road Ahead . . . Contractors on the Battlefield*, ARMY RD&A, Nov.-Dec. 1998, at 10 (“The issue of concern is not whether large Defense contractors will continue to service the contract, but whether they will be able to keep their employees on the battlefield when and where they are needed.”); Lou Marano, *Perils of Privatization: In a Crunch, Soldiers Can’t Count on Civilian Help*, WASH. POST, May 27, 1997, at A15; cf. Williams & Schandelmeier, *supra* note 465, at 35 (“Contractor personnel may not be prepared for the emotional and physical hardships of a wartime environment.”). In support of this concern, some commentators point to the DA civilian reaction to the increased hostilities in Korea following the tree-cutting incident in 1976, when North Korean soldiers attacked U.S. soldiers. Following the incident, U.S. forces raised the alert status, prompting “hundreds of requests for immediate transportation out of Korea from Department of Army (DA) civilians who had replaced military depot maintenance and supply workers.” Orsini & Bublitz, *supra*, at 10.

481. Sinnreich, *supra* note 459, at 4 (civilian contractors “are not subject to military discipline,” which normally is not a significant problem for commanders, but “in a shooting war, disciplinary relations get more complicated”); see also Gibson, *supra* note 461, at 114 (“military could not try civilians by military court-martial except during a declared war”). The Joint Chiefs of Staff opposed the 1999 draft guidelines from the Office of Management and Budget concerning military jobs that could be outsourced to contractors “because they want all combat support jobs to be filled by uniformed personnel who would be subject to military rules and discipline.” Moskos, *supra* note 463, at 35.

tion to Wake Island, which was defended by an American force of Marines and sailors.⁴⁸² Also trapped on the island were about 1200 civilian contractor employees performing construction work.⁴⁸³ At the battle's conclusion, 1146 civilian contractors were captured and held by the Japanese for the remainder of the war.⁴⁸⁴ Significantly, although the Marines and contractors captured at Wake were subjected to virtually identical mistreatment, the mortality rate of the Marines was only 3-4%, whereas the mortality rate for the contractors rose to 16%.⁴⁸⁵ Historian Gavan Daws in his book *Prisoners of the Japanese* attributes much of the Marines' survival success to their ability to maintain military discipline.⁴⁸⁶

In the absence of the extension of military jurisdiction to contractor employees, or a declaration of war, military commanders will find little within the military justice system to assist them in maintaining discipline over the U.S. civilian workforce. At least with respect to retirees among the civilian workforce, however, commanders retain one tool: the threat of a court-martial.

VI. Conclusion

Military jurisdiction over retired members of the armed forces enjoys a breadth of scope that is neither required nor appropriate in most circumstances. A literal reading of military law would subject members of the armed forces—both active duty and retired—to trial by court-martial for conduct that few would have envisioned as falling within the ambit of the

482. Major M.R. Pierce, *The Race for Wake Island*, MIL. REV., May-June 2000, at 85. Eventually, fifty-eight Marines and eleven sailors were killed in action. *Id.* at 88.

483. LIEUTENANT COLONEL FRANK O. HOUGH ET AL., *PEARL HARBOR TO GUADACANAL: HISTORY OF U.S. MARINE CORPS OPERATIONS IN WORLD WAR II*, at 95 (1958). The civilian construction workers were employees of Contractors Pacific Naval Air Bases, "a group of heavy construction companies building bases for the United States Navy on strategic islands in the Pacific." GAVAN DAWS, *PRISONERS OF THE JAPANESE* 35 (1994).

484. E. BARTLETT KERR, *SURRENDER & SURVIVAL: THE EXPERIENCES OF AMERICAN POWS IN THE PACIFIC 1941-1945*, at 37 (1985). The Japanese retained 100 civilians on the island to construct an airbase, but later executed them in anticipation of an American invasion. Pierce, *supra* note 482, at 88.

485. DAWS, *supra* note 483, at 360.

486. *Id.* ("The marines were younger and fitter than the contractors; and as a disciplined tribe of POWs, marines were the ultimate.").

UCMJ.⁴⁸⁷ The courtesies afforded to retired military officers may be mandated, rather than merely honorific, if military law is interpreted and applied literally.

One of the most emotional issues involved in determining the appropriate limitations on court-martial jurisdiction over military retirees is the threat that the exercise of such jurisdiction poses to retired pay. The military pension is widely viewed within the military and veteran's communities as an entitlement, sacrosanct and unforfeitable except in the most compelling of circumstances.⁴⁸⁸ The military appellate courts have tacitly acknowledged the special importance of retirement benefits, permitting evidence during sentencing of the impact of a punitive discharge or dismissal on retirement benefits.⁴⁸⁹ Indeed, the CAAF has characterized the effect of a punitive discharge on retirement benefits as a "crucial military concern" during sentencing,⁴⁹⁰ requiring an appropriate instruction for those service members at or near the retirement eligibility point.⁴⁹¹ The threat posed to the pension of a retirement eligible, or near retirement eli-

487. See, e.g., Thomas E. Ricks, *More Than Rank Splits Army's Stars and Bars*, WASH. POST, Nov. 19, 2000, at A2 (Asked about references critical of President Clinton in his study, a recently retired Army officer responded: "'I know it raises eyebrows.' But, he added, 'I'm a civilian now' . . .").

488. Cf. Bradley, *supra* note 11, at 41 ("To service members, military retired pay represents twenty or more years of patriotic, selfless service to their country. Military retired pay is what is owed to them in return for living a life where at a moment's notice they could be sent anywhere in the world, possibly in the line of hostile fire.").

489. *United States v. Washington*, 55 M.J. 441 (2001) (prejudicial error to exclude evidence of expected retirement pay when accused had over eighteen years of service and could retire during current enlistment); *United States v. Luster*, 55 M.J. 67 (2001) (prejudicial error when accused had eighteen years and three months of service and could retire during the current enlistment); *United States v. Becker*, 46 M.J. 141, 142 (1997) ("We hold that the military judge erred in refusing to admit defense mitigation evidence of the projected dollar amount of retirement income which appellant might be denied if a punitive discharge was adjudged."); see also *United States v. Sumrall*, 45 M.J. 207, 209 (1996) ("may present evidence of the potential dollar amount subject to loss").

490. *United States v. Greaves*, 46 M.J. 133, 139 (1997); see also *United States v. Hall*, 46 M.J. 145, 146 (1997) (officer dismissal; "the impact of an adjudged punishment on the benefits due an accused who is eligible to retire is often the single most important sentencing matter to that accused and the sentencing authority") (citation omitted).

491. U.S. DEP'T OF ARMY, PAM. NO. 27-9, MILITARY JUDGES' BENCHBOOK 66, para. 2-5-22 note (1 Apr. 2001) (citations omitted).

gible, service member and his family by a court-martial often invites partial or complete jury nullification.⁴⁹²

Congress should re-examine this area of military law⁴⁹³ to articulate the rights and authority of military retirees, and to determine what, if any, limitations should be placed on military jurisdiction over them. Articles 88, 89, and 90(2) stand out as likely candidates for reform, and should be generally inapplicable to retirees (victim or accused) for post-retirement conduct. Another possible reform is to follow the current trend of treating military pay as a pension, rather than reduced pay for reduced services, and severely curtail the circumstances in which a retiree may forfeit retired pay, even if the accused retiree is ultimately dismissed or punitively discharged. Further, in addition to or in lieu of further clarification of the *Hooper* exception, a capacity defense should be available in retiree-related courts-martial, at least with respect to violations of these same punitive articles. To illustrate, a disrespect charge should not loom as a legal possibility when a retiree employed as a federal civilian employee confronts an active duty service member or when a zealous active duty judge advocate crosses legal swords in an adversarial environment with a retired judge advocate of superior rank.

With respect to Article 88, a retiree running for political office or employed as an academic, radio talk show host, or political commentator, should be able to engage openly in criticism of our political leaders and legislative bodies, using language that could be viewed as contemptuous, without fear of potentially subjecting himself to a military court-martial.

492. Major Michael R. Smythers, *Equitable Acquittals: Prediction and Preparation Prevent Post-Panel Predicaments*, ARMY LAW., Apr. 1986, at 6 (noting that an accused with “a coveted retirement in the not too distant future” is a factor favoring an “equitable acquittal”); cf. GAO/NSAID-97-17, *supra* note 23, at 25 (“Two of our roundtable participants indicated that, even in the case of a serious breach of conduct, the decision to separate personnel not eligible for retirement is extremely difficult. They also said that many personnel with significant problems are kept until the 20-year point partly because of the implications of preretirement separation for their families.”).

493. Historically, Congress has not spent a great deal of time considering court-martial jurisdiction over retired personnel. Bishop, *supra* note 13, at 332 (from 1861 through 1916 “few subjects seem to have concerned Congress less than the constitutional rights of retired regulars”), 338 (Since the Wilson administration, “Congress has not . . . visibly troubled itself with the problem. In the congressional hearings on the Uniform Code, the Judge Advocate General of the Army . . . said nothing at all about retired personnel. The House and Senate Committees disposed of the problem with the terse and unilluminating statement that ‘paragraph (4) retains existing jurisdiction over retired personnel of a Regular component who are entitled to receive pay.’”).

It is only when a retiree publicly speaks or writes in his military capacity, or engages in misconduct directly implicating his military status,⁴⁹⁴ that Article 88 should be able to reach that individual. Absent this narrow exception, Article 88 should have no applicability to officers on the retired list.

Further, all the Services need to clarify the circumstances under which retirees may be subject to court-martial, and this standard should be a uniform one for the entire armed forces.⁴⁹⁵ The authors posit that all serious misconduct committed while on active duty should be considered for possible UCMJ action, but the armed forces should defer to civil authorities for nonmilitary crimes unless those forums are unable or unwilling to assume jurisdiction. Retirement should not be viewed as a version of a get out of jail free card, but a service member, and his family, should not risk forfeiture of a hard earned military retirement⁴⁹⁶ after enduring two or more decades of all the hardships associated with a military career, absent a compelling reason to do so.

Military jurisdiction should be exercised over retirees for post-retirement misconduct in the narrowest of circumstances, particularly given the modern day treatment of military retired pay as a mere pension. In addition to the narrow Article 88 scenario discussed above, offenses committed in an overseas theater of operations that directly impact on the success of American military operations or pose a direct threat to the safety or physical well-being of U.S. personnel or allied forces, during a period of *actual* hostilities, would also be appropriate for continued military jurisdiction. Additionally, when a military court-martial is the only forum available to bring a military retiree to justice for extremely serious misconduct—defined as offenses punishable by death—military jurisdiction may attach.⁴⁹⁷ Finally, absent these limited exceptions, military jurisdiction should presumably not be applicable to military retirees unless the retiree's misconduct was of such an egregious nature that the retiree would be

494. To illustrate, should a retired senior military officer appear before a national audience in uniform and using his military title, speak contemptuously of the President, Congress, or one of the enumerated persons protected by Article 88, then the exercise of military jurisdiction would be appropriate.

495. In particular, either by modification to the *MCM* or by regulation, guidance should be provided to clarify the political and private conversation safe harbor exceptions to Article 88.

496. "A retired officer may also forfeit his retired pay if court-martialed." *Loeh v. United States*, 53 Fed. Cl. 2, 5 (2002).

497. *See, e.g., Sands v. Colby*, 35 M.J. 620 (A.C.M.R. 1992).

unsuitable for continued military service even during periods of dire national emergency.⁴⁹⁸

498. In other words, were the armed forces scraping the bottom of the manpower barrel in a desperate attempt to put bodies in uniform because the nation's survival was imperiled, the misconduct of that retiree was so infamous, loathsome, or vile as to cause him to fall below this standard.

**THE POSSE COMITATUS ACT: SETTING THE RECORD
STRAIGHT ON 124 YEARS OF MISCHIEF AND MISUNDER-
STANDING BEFORE ANY MORE DAMAGE IS DONE**

COMMANDER GARY FELICETTI¹ & LIEUTENANT JOHN LUCE²

*Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.*³

I. Introduction

The United States is currently conducting a major reorganization of its civil and military agencies to enhance homeland security.⁴ The new

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3. Posse Comitatus Act, 18 U.S.C. § 1835 (2000).

military command, the Northern Command (NORTHCOM), will be responsible for all Department of Defense (DOD) participation in Homeland Security. In announcing the new military organization, Secretary Rumsfeld declared, “[T]he highest priority of our military is to defend the United States.”⁵

One might, therefore, reasonably believe that the world’s premier military force is, and will be, fully engaged in protecting the United States homeland from approaching foreign terrorist threats. This may not always be the case, however, since a significant part of the homeland security mission is considered a “law enforcement” function, especially as threats get closer to America’s shores and borders. Our enemies, of course, do not recognize the artificial construct between law enforcement and national defense. The artificial distinction nonetheless remains important due to the widespread belief that a nineteenth century law called the Posse Comitatus Act⁶ strictly limits most DOD participation in the “law enforcement” function.⁷ The Act, unfortunately, is widely misunderstood.⁸ So while national debate about changing the Act is growing,⁹ many of the perceived problems are based upon a profound misunderstanding of this law. Policymakers must understand the Act before they can “fix” it.

This article seeks to set the record straight on the Posse Comitatus Act. To do so, the article distinguishes clearly between the Act and (1) other laws and constitutional provisions that keep the military from being

4. See, e.g., OFFICE OF HOMELAND SECURITY, NATIONAL STRATEGY FOR HOMELAND SECURITY (2002); Tom Bowman & Karen Hosler, *President Keeps His Focus on Security; Bush Urges Congress to Carry Out His Plans for New Cabinet Department*, BALT. SUN, June 8, 2002, at 1A; Michael Kilian, *Pentagon Creates a Homeland Unit; Command Will Operate in U.S. to Guard Shores*, CHI. TRIB., Apr. 18, 2002, at 9; Esther Schrader, *U.S. to Get Single Military Umbrella*, L.A. TIMES, Apr. 18, 2002, pt. A1, at 15.

5. Kilian, *supra* note 4, at 9.

6. See 18 U.S.C. § 1385. The Posse Comitatus Act became law on 18 June 1878. See Act of June 18, 1878, 20 Stat. 152.

7. U.S. DEP’T OF DEFENSE, DIR. 5525.5, DOD COOPERATION WITH CIVILIAN LAW ENFORCEMENT OFFICIALS encl. 4 (15 Jan. 1986) (incorporating C1, 20 Dec. 1989) [hereinafter DOD DIR. 5525.5]; OFFICE OF HOMELAND SECURITY, *supra* note 4, at 48 (referring to the Posse Comitatus Act as “federal law” that “prohibits military personnel from enforcing the law within the United States except as expressly authorized by the Constitution or Act of Congress”); Schrader, *supra* note 4, at 15.

used as a national police force; and (2) the internal policies that, in the name of the Act, sometimes lead to bizarre results.¹⁰ After providing an overview of the current confusion surrounding the Act, this article follows a chronological approach that carefully deconstructs the many layers of intertwined confusion and outright deception surrounding the Act. The authors match words with deeds to determine how the originators viewed the law. The article carefully traces Congress's haphazard actions over many decades to increase military participation in civil law enforcement along with the more recent DOD counter-reaction to congressional efforts to increase DOD support to law enforcement agencies that enforce narcotics laws. After accurately describing the Act's limited meaning, this article then places the Act in context with the more robust laws that prevent the misuse of the military as a national police force, but do not interfere with appropriate national security activities.

II. Overview of the Current State of Confusion

In many respects, the confusion surrounding the Posse Comitatus Act is completely understandable. This nineteenth century remnant from the Reconstruction period has been mischaracterized from its very beginnings, at times deliberately. One initial deception was to hide the Act's racist origins by linking the Act with the principles surrounding the founding of the

8. See John R. Brinkerhoff, *The Posse Comitatus Act and Homeland Security*, J. OF HOMELAND SECURITY (Feb. 2002), at <http://www.homelandsecurity.org/journal/articles>. After quoting the Posse Comitatus Act in full, Brinkerhoff states:

Th[is] quotation . . . is the much-discussed Posse Comitatus Act in its entirety. That is it! That is all there is to it. Seldom has so much been derived from so little. Few articles written about the act and its implications cite the law as it is written, leading one to believe that the authors have never taken the trouble to go to the U.S. Code and see for themselves or to look up the legislative history of the act or to read the exceptions in the law. As a result, much of what has been said and written about the Posse Comitatus Act is just plain nonsense.

Id.

9. See Eric Schmitt, *Wider Military Role in U.S. Is Urged*, N.Y. TIMES, July 21, 2002, at 16; Joyce Howard Price, *Biden Backs Letting Soldiers Arrest Civilians*, WASH. TIMES, July 22, 2002, at 1.

United States, without accounting for the passage of the Constitution or the Civil War.¹¹ To compound matters, the Act's most vocal nineteenth century supporters incorporated by reference the controversial, yet somewhat contrived, arguments against a standing U.S. army from the revolutionary period.¹² The Act's supporters also hid their unsavory agenda behind patriotic phrases and ideas of the Anti-Federalists that the founders them-

10. See *infra* note 21. As of June 2002, the blanket deployment order, discussed *infra* note 21, had not been issued. A Navy ship Captain who deployed a CG LEDET to board a suspected foreign terrorist vessel approaching the United States was, therefore, prohibited from providing any "direct" relief or assistance to the LEDET. The Navy and DOD maintain that this prohibition is statutory, however. See *infra* sections VIII-IX (showing how this limitation is actually administrative). If the same LEDET boards a U.S. fishing vessel to enforce routine fisheries regulations, however, then DOD personnel and equipment may be fully involved in all aspects of the law enforcement boarding, including the arrest of U.S. citizens. See 16 U.S.C. § 1861 (2000); *infra* section V.F. Obviously, the threat of a maritime equivalent to the 11 September 2001 attacks by foreign vessels is of far greater concern.

Another bizarre result from the current policies is that internal policy does not prohibit the U.S. Navy from stopping and boarding foreign vessels off the coast of Pakistan or in the Mediterranean Sea to locate terrorists and Taliban personnel. In fact, this traditional naval mission is known as "maritime interception operations." The mission "involves the boarding and search or inspection of suspect vessels and taking custody of vessels that are carrying out activities in support of terrorist organizations." State Department Briefing, FED. NEWS SERV., June 3, 2002 (remarks of Mr. Reeker). In a January 2002 example of the mission, Navy personnel boarded and searched a Syrian merchant vessel, the *Hajji Rahmeh*, in the Mediterranean Sea. See Vernon Loeb, *Fighting Terror on the High Seas: European Command's Overshadowed—but Key—Role in War*, WASH. POST, June 11, 2002, at A15. If the *Hajji Rahmeh* had evaded the Navy vessels and arrived off the coast of New York City, however, the Navy is supposedly prohibited from taking any similar action or even directly supporting the Coast Guard boarding team since this is now a civilian law enforcement mission.

A final nonsensical example is that the Posse Comitatus Act supposedly prohibited National Guard troops deployed on the Canadian border after September 11, presumably to stop terrorists, from conducting surveillance from the helicopters that flew them to their assignments. See Schmitt, *supra* note 9, at 16.

11. See *infra* notes 118-23, 148-49 and accompanying text (describing Congressman Kimmel's characterization of the Act as an attempt to curb abuses by the regular army; and describing the purported rationale of Congressman Knott—who introduced the bill which ultimately passed in the House—that he designed his amendment to prevent the ability of every marshal and deputy marshal to call out the army to aid in the enforcement of the laws).

selves had not put into practice.¹³ In short, the Act was carefully disguised in two levels of deliberate misinformation.

The effort to disguise the Act's true origins in Reconstruction bitterness and racial hatred was overwhelmingly successful. The language of misdirection grew over the years by frequent repetition that eventually transformed a hate law into the respected shorthand for the general principle that Americans do not want a military national police force. Additionally, just about everyone examining the law focused on the false historical arguments instead of carefully analyzing the law's actual text and historical context. Therefore, they missed, or ignored, the key fact that the original Posse Comitatus Act was at least one-third pure fiscal law: Congress

12. See *infra* note 118 and accompanying text. As Alexander Hamilton pointed out in *Federalist Nos. 24-26*, the controversy about a standing army under the new federal Constitution seems to have been more of a political maneuver by the Anti-Federalists than a serious objection. See generally *THE FEDERALIST NOS. 24-26* (Alexander Hamilton). At the time of the ratification debates, the Articles of Confederation did not prohibit the general government from keeping or raising a standing army, although it did attempt to limit state authority to maintain any body of forces without permission of the federal Congress. See ARTS. OF CONFED. art. VI.

In any event, Massachusetts had arguably ignored the provision and raised a force without obtaining congressional approval to put down Shay's rebellion. Additionally, none of the thirteen state constitutions actually prohibited the state government from raising or keeping a standing army in peacetime. Instead, the Bill of Rights in four states said that standing armies *ought not to be raised or kept up without the consent of the legislature*, while the constitutions of two states, Pennsylvania and North Carolina, said that standing armies *ought not to be kept up in peacetime*. The remaining state constitutions were silent on the issue. See *THE FEDERALIST* No. 24, at 127; No. 25, at 134-35; No. 26, at 136 (Alexander Hamilton) (Clinton Rossiter ed., 1999). Since the new federal Constitution required Congress to discuss and authorize the army every two years, only two out of thirteen state constitutions had even the semblance of a conflict with the proposed federal plan.

Moreover, as Hamilton pointed out in *Federalist Nos. 24 and 26*, the "ought not" language in the Pennsylvania and North Carolina constitutions was more of a caution than a prohibition reflecting the "conflict between jealousy and conviction; between the desire of excluding such establishments at all events and the persuasion that an absolute exclusion would be unwise and unsafe." *THE FEDERALIST* No. 24, at 127; No. 26, at 139. Additionally, in *Federalist No. 25*, Hamilton notes that Pennsylvania had resolved to raise a body of troops in peacetime to put down partial disorders in one or two counties notwithstanding the "ought not" language in the Pennsylvania constitution. *THE FEDERALIST* No. 25, at 134; see also *THE FEDERALIST* No. 38, at 206-07 (James Madison) (Clinton Rossiter ed., 1999) (writing that Congress, unchecked by any other branch of the federal government, and soon to be flush with cash from the western territory, could raise an indefinite number of troops for an indefinite period of time under the Articles of Confederation).

13. See *infra* section III.A.

prohibited the expenditure of funds to use troops as “a posse comitatus or otherwise to execute the laws.”¹⁴ This funding limit expired at the end of the fiscal year along with a decisive, but temporary, exercise of congressional power under the Constitution.¹⁵

After expiration of the fiscal law section, only the criminal law portions of the Posse Comitatus Act remained effective. The criminal offense had several elements. Almost 100 years later, however, the first courts exploring the Act inadvertently focused almost all the subsequent litigation and commentary on just two of the elements: (1) which armed forces must comply with the Act, and more importantly, (2) how to define the phrase “to execute the laws.” The meaning of the Act’s other elements remains largely unaddressed, even though Congress considered, but rejected, attempts to remove them from the law.¹⁶

Many of the courts analyzing the Act also wrote about the law as if it was the only law or principle that limited the use of the armed forces in a law enforcement role. Some, therefore, have claimed to discern a broader policy or “spirit” behind the Act that is not supported by the historical record or the statute’s text.¹⁷ While these wider policies are sound, they are embodied in federalism, the law concerning federal arrest authority, election law, and especially fiscal law. The portion of the Posse Comitatus Act that survived the nineteenth century doesn’t have to do all the work, a view that even the Act’s original proponents appeared to recognize.¹⁸ Trying to force-fit all these other principles into the surviving part of the Act has only created a need to “discover” a number of implied exceptions and has sowed a great deal of confusion.

Further muddying the waters, much of the commentary about this topic has been infected with a now thoroughly discredited, and racist, his-

14. Act of June 18, 1878, 20 Stat. 152. See *infra* notes 129-30 and accompanying text.

15. See *infra* note 130 and accompanying text & note 440.

16. See *infra* notes 128-29 and accompanying text.

17. See *infra* notes 307-10 and accompanying text.

18. A significant component of the two-year struggle to pass the Act involved fiscal law. For example, proponents blocked passage of an Army appropriation until resolution of the dispute over the Act, resulting in unpaid Army troops for several months. See *infra* notes 115-16 and accompanying text. Additionally, proponents of the Act emphasized the congressional power of the purse, and the final version of the Act contained an explicit fiscal law prohibition. See 5 CONG. REC. 2113 (1877) (Mr. Atkins discussing the bill’s fiscal section and emphasizing the congressional power of the purse); *infra* note 130.

torical analysis of the Reconstruction period.¹⁹ Other commentators, and courts, have simply avoided or minimized the Act's brutal racist origins. Moreover, congressional efforts in the 1980s designed to expand military participation in law enforcement contain language that, when read in isolation, actually appears to increase legal restrictions on the military.²⁰

The DOD inherited, and built upon, this confusion in a system of administrative regulations in the 1980s. The regulations adopted a very expansive interpretation of the Act's prohibitions, particularly regarding the activities of the U.S. Navy and Marine Corps,²¹ but then identified several implied exceptions to the greatly expanded rules. Moreover, the regulations have remained mostly frozen in time despite two subsequent changes in the law designed to further increase military support to civilian

19. See *infra* note 88 (discussing the Dunning school of thought).

20. See 10 U.S.C. § 375 (2000).

21. See *infra* note 338 and accompanying text. The following is a recent example of the impact of this expansive interpretation of the Act. In the Winter of 2001-2002, Navy ships carrying Coast Guard Law Enforcement Detachments (LEDETs) were deployed off major U.S. ports to query and board high-interest inbound merchant ships. These mostly foreign-flagged vessels are very large and presented a potential threat of being used as a weapon. The major purpose of the Coast Guard boarding was to verify that the vessel was under the control of the ship's master and did not actually present a threat. Because these vessels are normally several hundred feet long, a LEDET of four to six members was, in some cases, not large enough to ensure everyone's safety. This temporarily led to the use of Navy personnel as backup security for the LEDET. See Joint Media Release, U.S. Coast Guard / U.S. Navy, Navy, Coast Guard Join Forces for Homeland Security (Nov 5, 2001), http://www.uscg.mil/overview/article_jointrelease.htm; United States Coast Guard, Maritime Law Enforcement, *Homeland Security*, para. 2, at <http://www.uscg.mil/lantarea/aole/text/mhls.htm> (last visited Mar. 8, 2003).

A 7 February 2002 Opinion of the Deputy Judge Advocate General of the Navy, however, concluded that such "direct" assistance from the Navy was prohibited by DOD/Navy policy interpreting the Act and by 10 U.S.C. § 375, absent very high-level approvals. This interpretation of the statutes and DOD/Navy policy initially put Navy ship captains in a tough situation since the only apparent options were either to not board a suspicious vessel or to send the small LEDET and hope for the best. Larger LEDETs were not an option in most instances since the Navy ships used in this operation did not have enough space. See Letter from Deputy Judge Advocate General to Commander in Chief, U.S. Atlantic Fleet (Feb. 7, 2002) (partially classified document; this article discusses only unclassified portions). The Navy JAG opinion goes on to recommend that the Navy operational commander seek the necessary approvals to support the Coast Guard LEDETs with homeland security boardings. This would be accomplished by requesting that the Secretary of Defense issue a blanket deployment order. See *id.*

law enforcement. One law neglected by the DOD increased its authority to assist civilian agencies that fight terrorism.²²

This confusing legal quagmire might best be left alone if the status quo actually did anything useful, such as protecting American civil rights or limiting abuses of executive power. As shown in section IV of this article, however, the Posse Comitatus Act has proven to be a very poor guardian of the line between civil and military affairs. Potentially more effective legal controls on the military remain untapped due to the excessive focus on the Act.

III. Ignoble Origins of the Posse Comitatus Act

A. The Act Is Not from the Revolutionary Period

While the nation's founders were deeply concerned with the abuses of the British Army during the colonial period and military interference in civil affairs,²³ the majority was even more concerned about a weak national government incapable of securing life, liberty, and property.²⁴

22. See *infra* note 372 and accompanying text.

23. The Declaration of Independence stated of King George: "He has kept among us, in times of peace, Standing Armies, without the consent of our legislatures. He has affected to render the Military independent of and superior to the Civil power." DECLARATION OF INDEPENDENCE paras. 13-14. The Declaration also condemns King George for "quartering large bodies of armed troops among us." *Id.* para. 16. Jefferson's initial draft, however, complained of both standing armies and ships of war. PAULINE MAIER, AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE 107, 146 (1997). Also, the basis for the charges regarding standing armies was that King George II had asked Parliament's permission before bringing Hanoverian troops into England. Jefferson's argument was that King George III was similarly bound to get the colonial legislature's permission before sending troops into the colonies. *Id.* at 114; see also U.S. CONST. amend. III ("No soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law."); see also Christopher A. Abel, Note, *Not Fit for Sea Duty: The Posse Comitatus Act, the United States Navy, and Federal Law Enforcement at Sea*, 31 WM. & MARY L. REV. 445, 449-50 (1990); Clarence I. Meeks, *Illegal Law Enforcement: Aiding Civil Authorities in Violation of the Posse Comitatus Act*, 70 MIL. L. REV. 83, 86-87 (1975).

24. See ROBERT W. COAKLEY, THE ROLE OF FEDERAL MILITARY FORCES IN DOMESTIC DISORDER 1789-1878, at 4-7 (U.S. Army Center of Military History 1988) (discussing Shays' Rebellion and quoting a 1786 letter from George Washington to James Madison); see also THE FEDERALIST No. 21, at 107-08 (Alexander Hamilton) (Clinton Rossiter ed., 1999), No. 23, at 121 (Alexander Hamilton) (Clinton Rossiter ed., 1999) ("The principal purposes to be answered by union are these—the common defense of the members; the preservation of the public peace, as well against internal convulsions as external attacks . . .").

Some vocal patriots sought to avoid a standing army and any federal control over the state militias; however, in the end, theirs was the minority view.²⁵ The new Constitution did not contain the explicit limits and outright bans desired by some.²⁶

Instead, the framers eventually counted on the now-familiar system of checks and balances to prevent abuses.²⁷ The President, charged with the faithful execution of the laws of the United States, is also Commander in Chief of the Army, Navy, and state militias called to federal service.²⁸ The Constitution contains no explicit limits on the President's use of the armed forces to carry out the executive function beyond those contained in the

25. Actually, the concept of a standing army was not seriously debated during the Constitutional Convention; what little debate there was revolved around the size of the standing army. George Washington is believed to have ended the debate when he wondered if potential enemies could also be counted on to limit the size of their armies. COAKLEY, *supra* note 24, at 12; DANIEL A. FARBER & SUZANNA SHERRY, *A HISTORY OF THE AMERICAN CONSTITUTION* 140 (1990). The Anti-Federalists made the argument against any standing army during the state ratification debates; however, the focus was on the danger of centralized power. FARBER & SHERRY, *supra*, at 180-81; *see also supra* note 12 (discussing *The Federalist No. 38*).

26. One can argue that the give and take of the political process leading to the Constitution resulted in an implied limit on the use of the regular army, and perhaps the federalized militia, to quell domestic disorders. *See* John P. Coffey, Note, *The Navy's Role in Interdicting Narcotics Traffic: War on Drugs or Ambush on the Constitution?*, 75 GEO. L.J. 1947, 1951-52 (1987); COAKLEY, *supra* note 24, at 11. The Constitutional Convention and ratification debates make it clear that some wished to impose more stringent limits on the central government's ability to use force internally. The standing army argument, however, was raised and soundly rejected in both the congressional debates over the Bill of Rights. FARBER & SHERRY, *supra* note 25, at 242; *see also supra* notes 12, 25 and accompanying text.

27. *See* THE FEDERALIST NO. 51 (James Madison) (Clinton Rossiter ed., 1999) (The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments). The constitutional ratification debates from 1787-1788 show how deeply the Anti-Federalists feared central government power and demonstrate the political maneuvering and calculation of the day. For example, the Federalist emphasis on the militia as the principal military arm of the central government helped diffuse concern over the congressional power to raise a standing army. This also left the Anti-Federalists in the position of having to argue that any federal authority over the militia was, by itself, dangerous to liberty. *See* COAKLEY, *supra* note 24, at 15-19; THE FEDERALIST NO. 29, at 152 (Alexander Hamilton) (Clinton Rossiter ed., 1999) ("By a curious refinement upon the spirit of republican jealousy we are even taught to apprehend danger from the militia itself in the hands of the federal government.").

28. U.S. CONST. art. II, §§ 2-3.

Bill of Rights.²⁹ Congress retains the power of the purse over the armed forces, but is prohibited from appropriating Army funds for more than two years to ensure each session reexamines the issue of a standing army.³⁰ Many prominent Federalists considered this congressional power over Army funding to be the most significant check upon its misuse.³¹ No similar control was placed upon congressional funding for the Navy.³²

The framers clearly were aware of the posse comitatus and the use of the military in some forms of law enforcement, yet they did not prohibit the practice. The sheriff's power to call upon the assistance of able-bodied men to form a posse was an established feature of the common law.³³ Moreover, naval forces of the time were traditionally used to enforce var-

29. See Abel, *supra* note 23, at 450 n.35. Taken together, articles II, III, and IV of the Constitution may authorize the President to use the armed forces in whatever manner he deems reasonably necessary to carry out his chief executive function. See also THE FEDERALIST No. 28, at 146 (Alexander Hamilton) (Clinton Rossiter ed., 1999) ("That there may happen cases in which the national government may be necessitated to resort to force cannot be denied The means to be employed must be proportioned to the extent of the mischief."); No. 69, at 385-86 (Alexander Hamilton) (Clinton Rossiter ed., 1999) (stating that the President has supreme command and direction of the military and naval forces, as first general and admiral of the nation). But see Coffey, *supra* note 26, at 1951-52 (arguing that the Constitution's reservation of power to Congress to call forth the militia to execute the laws of the Union, combined with the lack of any explicit grant of similar authority to the "army," indicates an intent to deny the army authority to execute the law).

30. U.S. CONST. art. I, § 8. In *Federalist No. 26*, Hamilton wrote of this provision:

The legislature of the United States will be *obliged* by this provision, once at least in every two years, to deliberate upon the propriety of keeping a military force on foot; to come to a new resolution on the point; and to declare their sense of the matter by a formal vote in the face of their constituents.

THE FEDERALIST No. 26, at 139 (Alexander Hamilton) (Clinton Rossiter ed., 1999).

31. See, e.g., THE FEDERALIST No. 41, at 227 (James Madison) (Clinton Rossiter ed., 1999). "Next to the effectual establishment of the Union, the best possible precaution against danger from standing armies is a limitation of the term for which revenue may be appropriated to their support. This precaution the Constitution has prudently added."

Id.

32. See U.S. CONST. art. I, § 8.

33. See Abel, *supra* note 23, at 460. *Black's Law Dictionary* defines *posse comitatus* as "[t]he entire population of a county above the age of 15, which a sheriff may summon to his assistance in certain cases, as to aid him in keeping the peace, in pursuing and arresting felons." DELUXE BLACK'S LAW DICTIONARY 1162 (6th ed. 1990).

ious laws.³⁴ Finally, the federal government's power to call out the posse comitatus under the new Constitution was an issue actively discussed during the ratification debates and in the federalist papers.³⁵

A key feature of the traditional posse comitatus was the sheriff's power to *require* able-bodied men to lend assistance.³⁶ Given the framers' obvious concerns about the army, the absence of any explicit limit on the power of the local sheriff to call-out troops as members of a posse comitatus is difficult to explain unless one concludes that this was not perceived as a major problem. This apparent lack of concern, however, might be explained by the fact that a common law posse comitatus followed the direction of the local sheriff, while the framers were far more concerned about centralized power, especially the power of Congress.³⁷ Moreover,

34. See Abel, *supra* note 23, at 457. The need to create and maintain naval forces was not a controversial matter. See THE FEDERALIST NO. 41, at 228 ("The palpable necessity of the power to provide and maintain a navy has protected that part of the Constitution against a spirit of censure which has spared few other parts.").

35. See THE FEDERALIST NO. 29, at 151-52 (Alexander Hamilton) (Clinton Rossiter ed., 1999). The Anti-Federalists had argued that the new federal government didn't have the power to call out the posse comitatus, which would lead to the use of troops to execute the laws of the Union. Hamilton dismissed the claim that the federal government could not require participation in the posse comitatus, stating:

There is a striking incoherence in the objections which have appeared, and sometimes even from the same quarter, not much calculated to inspire a very favorable opinion of the sincerity or fair dealing of their authors. The same persons who tell us in one breath that the powers of the federal government will be despotic and unlimited inform us in the next that it has not authority sufficient even to call out the POSSE COMITATUS. The latter, fortunately, is as much short of the truth as the former exceeds it.

Id. at 151-52.

36. *Id.*; Roger B. Hohnsbeen, Note, *Fourth Amendment and Posse Comitatus Act Restrictions on Military Involvement in Civil Law Enforcement*, 54 GEO. WASH. L. REV. 404, 406 (1986); Abel, *supra* note 23, at 457.

37. FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 266-70 (1985) (stating that some delegates to the Constitutional Convention and opponents to the proposed Constitution considered congressional authority to regulate the militias a risk to liberty).

the army was extremely small at this time, constituting less than one percent of the nation's total military force.³⁸

The failure of the framers to prohibit military participation in civil affairs and preserving domestic order explicitly also cannot be a result of a lack of knowledge. The Army's role under the new Constitution was a significant issue. In *Federalist No. 8*, Hamilton argued that the Union would result in a smaller standing army. Of this smaller standing army (a necessary evil) he said: "The army under such circumstances may usefully aid the magistrate to suppress a small faction, or an occasional mob, or insurrection"³⁹ Moreover, in denying charges that the federal government intended to use military force to enforce the law, Hamilton never claimed that the Constitution would prohibit such action. Instead he wrote in *Federalist No. 29*: "What reason could there be to infer that force was intended to be the sole instrument of authority, merely because there is a power to make use of it when necessary?"⁴⁰ Clearly, the Posse Comitatus Act did not originate from the Revolutionary Period.

B. Evolution of the Cushing Doctrine

Legislative and executive action in the early days of the American republic confirm that the use of federal troops or federalized militia to preserve domestic order, either as part of a posse comitatus or otherwise, was an accepted feature of American life under the new Constitution.⁴¹ The

38. See COAKLEY, *supra* note 24, at 23. In 1792, the Army's authorized strength (not actual or effective strength, which was almost certainly lower) was around 2000 troops, so the failure to specifically mention the regular troops may have been due to their small numbers in relation to the state militias, which consisted of every free white able-bodied male between eighteen and forty-five. See *id.*; 7 CONG. REC. 3580 (1878) (remarks of Mr. Potter). By comparison, in 1780-1781, the Commonwealth of Virginia had nearly 50,000 men in the state militia. See THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 89 (W.W. Norton & Co. 1972) (1787). In *Federalist No. 46*, Madison estimated the combined state militias at 500,000 men. THE FEDERALIST No. 46, at 267 (James Madison) (Clinton Rossiter ed., 1999).

39. THE FEDERALIST No. 8, at 37 (Alexander Hamilton) (Clinton Rossiter ed., 1999).

40. THE FEDERALIST No. 29, at 152 (Alexander Hamilton) (Clinton Rossiter ed., 1999). Also, in *Federalist No. 28*, Hamilton stated: "That there may happen cases in which the national government may be necessitated to resort to force cannot be denied The means to be employed must be proportioned to the extent of the mischief." THE FEDERALIST No. 28, at 146 (Alexander Hamilton) (Clinton Rossiter ed., 1999).

41. See Abel, *supra* note 23, at 451-52, 460 and accompanying notes. The Judiciary Act of 1789 continued the practice of calling out a posse comitatus and using U.S. soldiers and sailors as members, making it a common feature in early U.S. history. *Id.* at 460.

Judiciary Act of 1789 gave federal marshals the power to call out the posse comitatus, and a 1792 amendment made the implied power to call on the military explicit.⁴² In 1794, President Washington led a large force of federal troops into western Pennsylvania because farmers refused to pay a whiskey excise tax and treated the U.S. revenue officers much as they had the earlier British tax collectors.⁴³ Later, President Jefferson issued a broad proclamation that relied upon the Chief Executive's authority to call on the entire populace, military and civilian, to serve as a grand posse comitatus to counter Aaron Burr's planned expedition against Spanish terri-

42. See Meeks, *supra* note 23, at 88; Abel, *supra* note 23, at 460. The 1792 amendment actually authorized the use of a militia to assist the marshal's posse. The provision, however, gave rise to the practice of using both regulars and militia members as part of a posse. See Meeks, *supra* note 23, at 88. The failure of the law to mention the regular troops specifically may have been due to their small numbers in relation to the state militias. See *supra* note 38. In any event, it soon became an accepted practice for the marshal to call out both the militia and regular troops to serve in the posse. An 1878 Attorney General opinion stated:

It has been the practice of the Government since its organization (so far has been known to me) to permit the military forces of the United States to be used in subordination to the marshal of the United States when it was deemed necessary that he should have their aid in order to the enforcement of his process [sic]. This practice was deemed to be well sustained under the twenty-seventh section of the judiciary act of 1789, which gave to the marshal power "to command all necessary assistance in the execution of his duty" and was sanctioned not only by the custom of the Government but by several opinions of my predecessors.

16 Op. Att'y Gen. 162, 163 (1878).

43. See ALAN BRINKLEY, *AMERICAN HISTORY: A SURVEY* 174 (9th ed. 1995); Abel, *supra* note 23, at 451 & n.36. The First Congress had passed the Calling Forth Act for the Militia in 1792, delegating to the President the power to call a state militia into federal service to enforce the laws of the union. In each case, the President was required to issue a "cease and desist" proclamation to the rioters before acting. President Washington used this authority to raise troops to counter the Whiskey Rebellion. CLAYTON D. LAURIE & RONALD H. COLE, *THE ROLE OF FEDERAL MILITARY FORCES IN DOMESTIC DISORDERS 1877-1945*, at 18 (U.S. Army Center of Military History 1997); H.W.C. Furman, *Restrictions upon the Use of the Army Imposed by the Posse Comitatus Act*, 7 MIL. L. REV. 85, 88 & n.20 (1960). In 1807, the President was permitted to use regular troops under the same restrictions. See Act of Mar. 8, 1807, 2 Stat. 443.

tory.⁴⁴ In 1832, President Andrew Jackson initially sent military forces toward South Carolina under a Jefferson-like posse comitatus theory to prevent secession.⁴⁵ In an 1851 report to the Senate, President Fillmore stated that the President had the inherent power to use regular troops to enforce the laws and that all citizens could be called into a posse by the marshal.⁴⁶

The Senate Judiciary Committee, with only one dissenting voice, agreed that the marshals could summon both the militia and regular troops to serve in a posse comitatus.⁴⁷ In 1854, Attorney General Cushing formally documented the doctrine, concluding:

[T]he posse comitatus comprises every person in the district or county above the age of fifteen years whatever may be their occupation, whether civilians or not; and including the military of all denominations, militia, soldiers, marines. All of whom are alike bound to obey the commands of a sheriff or marshal.⁴⁸

Initially, the Cushing Doctrine, as the long-standing policy became known, was used to help the U.S. marshals enforce the Fugitive Slave Act in Northern states.⁴⁹ As such, the doctrine was undoubtedly popular with Southern slaveholders. Southern support for the doctrine, however,

44. See Furman, *supra* note 43, at 89; COAKLEY, *supra* note 24, at 79-80. When called upon to issue a proclamation responding to Aaron Burr's actions to organize insurgents against Spanish territory in 1806, Jefferson ordered "all officers having authority, civil or military, and all other persons, civil or military, who shall be found in the vicinity" to aid and assist "by all means in their power" to search for and bring to justice Burr's supporters. Furman, *supra* note 43, at 89. Jefferson later called this "an instantaneous levee en masse." MERRILL PETERSON, THOMAS JEFFERSON AND THE NEW NATION 851 (Oxford Univ. Press 1975).

45. Furman, *supra* note 43, at 89. President Jackson was awaiting federal legislation that would permit him to use force against the insurgent state since the South Carolina governor was certainly not going to request federal assistance. *Id.*

46. COAKLEY, *supra* note 24, at 130.

47. *Id.* at 130-31.

48. See 6 Op. Att'y Gen. 466, 473 (1854) (internal citation omitted). This opinion is known as the Cushing Doctrine. The Posse Comitatus Act was specifically designed to overturn it. 7 CONG. REC. 4241-47 (1878); Memorandum from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, to Benjamin Forman, Assistant General Counsel (International Affairs), Department of Defense, subject: Legality of deputizing military personnel assigned to the Department of Transportation (Sept. 30, 1970).

49. See 6 Op. Att'y Gen. 466 (1854).

severely waned during the Civil War and Reconstruction periods as federal troops began to enforce civil rights laws and protect the freedmen.⁵⁰

C. The Act's True Roots in the Civil War and Reconstruction Periods

The arrival of federal troops in the Southern states during the Civil War had quickly undermined the slaveholders' authority, even before the Emancipation Proclamation formally announced the beginning of the end of the "peculiar institution."⁵¹ As the war ended, much of the former Confederacy was occupied by victorious federal troops, including some of the 134,000 blacks in the federal Army.⁵² For some Southerners, the military occupation was worse than the battlefield defeat.⁵³ The presence of victorious Union troops, including former slaves, humiliated many former Confederates.⁵⁴ Throughout the war, black Union troops flaunted their contempt for the symbols of slavery and relished the opportunity to exert authority over, and in some cases torment, Southern whites.⁵⁵ Black soldiers acted, according to one New York newspaper, as "apostles of black

50. 5 CONG. REC. 2117 (1877) (Mr. Banning calling the Cushing Doctrine "an opinion questionable at best, but strangely perverted by the Attorney-General"); 7 CONG. REC. 3582 (1878); *see infra* section III.C.

51. *See* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877, at 4, 8-10 (1988). The Emancipation Proclamation was signed on 1 January 1863. Notably, while the plantation owners dominated the antebellum South, many independent white yeoman farmers owned few, if any, slaves and were politically and socially distinct from the planter class. These self-sufficient "upcountry" farmers led western Virginia to secede from Virginia and engaged in armed resistance against the Confederacy in eastern Tennessee. Union societies flourished in other parts of the South, and thousands of Southern men joined the Union Army outright or resisted Confederate authority. One historian has described this as a civil war within the Civil War. *See id.* at 11-17. Not surprisingly, many of these southern Unionists became prominent white Republican leaders of Reconstruction. They were called "scalawags" by the temporarily displaced planter class. *See id.* at 17; BRINKLEY, *supra* note 43, at 421-22.

52. *See* JOHN H. FRANKLIN, RECONSTRUCTION: AFTER THE CIVIL WAR 23, 35 (1961); FONER, *supra* note 51, at 8 (stating 180,000 blacks had served in the Union Army).

53. *See* FRANKLIN, *supra* note 52, at 35.

54. *See id.*; FONER, *supra* note 51, at 9. Former slave owners were very easy to humiliate by modern standards and reportedly became quite indignant if not treated to the same deference that they were entitled to under slavery. For example, one North Carolina planter complained bitterly to the Union commander that a black soldier had bowed and greeted the white planter without first being invited to speak to a white man. *See* FONER, *supra* note 51, at 120. An Alabama newspaper complained that literate blacks might read a competing black newspaper, become "pugnacious," and no longer exhibit proper respect for their former owners. *Id.* at 117.

55. *See* FONER, *supra* note 51, at 9.

equality,” spreading radical ideas about black civil and political rights, which in turn inspired constant complaints from Southern whites.⁵⁶ Black Union soldiers rode the streetcars, spoke to whites without permission, and helped organize black schools.⁵⁷ Perhaps even worse in Southern eyes, black troops intervened in plantation disputes and sometimes exerted control and authority over whites on behalf of the Army.⁵⁸

The Army also became associated with the rise of black political power and organization.⁵⁹ The spring and summer of 1865 saw an extensive mobilization of black political activity, at least in areas that had been occupied by Union Troops during the war.⁶⁰ Union Leagues and other groups openly sought black equality under the protection of the Army and Freedmen’s Bureau.⁶¹ While the federal Army quickly demobilized after the war,⁶² it remained a powerful symbol of the destruction of the South’s antebellum way of life.⁶³ Army activity to protect blacks or assist institu-

56. *See id.* at 80.

57. *Id.*

58. *Id.* “It is very hard,” wrote a Confederate veteran, “to see a white man taken under guard by one of those black scoundrels.” *Id.* Southern whites were also indignant at being made to answer charges made by blacks before Freedmen’s Bureau courts. One Georgian considered it “outrageous that blacks had white men arrested and carried to the Freedmen’s court . . . where their testimony is taken as equal to a white man’s.” *Id.* at 151. Of the Freedmen’s Bureau judge, a Mississippian complained: “He listened to the slightest complaint of the Negroes, and dragged prominent white citizens before his court upon the mere accusation of a dissatisfied negro.” *Id.* at 150.

59. *See id.* at 43 (describing the situation in Tennessee), 110-11 (describing early black political activity in Norfolk, Virginia).

60. *See id.* at 110.

61. *Id.* at 110-11. The Freedman’s Bureau, formally known as the Bureau of Refugees, Freedmen, and Abandoned Lands, was created on 3 March 1865. *See id.* at 68-70, 142-70; FRANKLIN, *supra* note 52, at 36, 228. The Bureau had the almost impossible mission to introduce a system of free labor in the South, establish schools for the freedmen, provide aid to the sick and disabled, adjudicate disputes between the races, and secure equal justice for blacks and white Unionists from state and local courts and government. This led many Southerners to consider the Bureau an important part of a foreign government forced upon them and supported by an army of occupation. *See* FRANKLIN, *supra* note 52, at 36-39. President Johnson and many Northern Democrats also opposed the Bureau. Like the Army, the Bureau’s perceived influence greatly exceeded reality. At its peak, the Bureau had no more than 900 agents in the entire South. FONER, *supra* note 51, at 143. Moreover, part of the Bureau’s agenda was to get blacks back to work as free labor, which, in many cases, involved pressuring blacks to go back to work on the plantations. *Id.* at 143-44.

62. The number of Army troops dropped quickly from 1 million to 152,000 by the end of 1865. By the fall of 1866, total Army strength stood at only 38,000 men, with most stationed on the Western frontier. *See* FONER, *supra* note 51, at 148; FRANKLIN, *supra* note 52, at 119-20.

tions such as the Freedmen's Bureau, no matter how limited, kept the wounds open and raw.⁶⁴

One prominent Tennessee planter perhaps summarized the Southern perspective on the Bureau and the Army best when he wrote:

The Agent of the Bureau . . . *requires* citizens (former owners) to make and enter into *written contracts* for the hire of their *own* Negroes. . . . When a Negro is not *properly* paid or fairly dealt with and *reports* the facts, then a squad of Negro soldiers is sent after the *offender*, who is *escorted* to town to be dealt with as per the Negro testimony. In the name of God how long is such things to last [sic]?⁶⁵

Politically, the period immediately following the war was much more benign for the former leaders of the South. Under the generous terms of Presidential Reconstruction,⁶⁶ state governments were in place throughout the South by the end of 1865.⁶⁷ Not surprisingly, these state governments

63. FONER, *supra* note 51, at 154. While Southern whites generally resented the presence of Union Soldiers, in some locations shortly after the war Army troops actually helped control the freedmen and force them back into plantation labor. *Id.* at 154-55.

64. See FRANKLIN, *supra* note 52, at 36; see also FONER, *supra* note 51 (illustrations following page 194) (two images of the Freedmen's Bureau). Initially, the Bureau had no separate appropriation, so it drew personnel and resources from the Army. FONER, *supra* note 51, at 143. One of the Bureau's most important missions was the creation of schools for black children. By 1869, the Bureau oversaw about 3000 schools serving 150,000 students. *Id.* at 144. While hated by white Southerners, this activity eventually helped lay the groundwork for a public education system in the South. *Id.*

65. FONER, *supra* note 51, at 168.

66. Presidential Reconstruction consisted of President Lincoln's Reconstruction Plan and President Johnson's "Restoration" Plan. The Lincoln Plan, announced in December 1863, offered a general amnesty to all white Southerners, except high Confederate officials, who pledged loyalty to the Union and accepted the end of slavery. Loyal voters could set up a state government once ten percent of the number of voters in 1860 took the oath. Three occupied Southern states, Louisiana, Arkansas, and Tennessee, were readmitted under this plan in 1864. President Johnson's Restoration Plan, implemented in the summer of 1865, incorporated some of the more restrictive provisions from the vetoed Wade-Davis bill; however, it was also designed to quickly readmit the former Confederate states into the Union. See *id.* at 35-37, 60-61 (describing the Wade-Davis bill), 176-84; BRINKLEY, *supra* note 43, at 416-17; FRANKLIN, *supra* note 52, at 23-29.

67. See PHILIP JENKINS, A HISTORY OF THE UNITED STATES 148 (1997); BRINKLEY, *supra* note 43, at 417.

contained many familiar Confederate faces⁶⁸ and moved quickly to assert white domination over blacks via a series of laws known as the “Black Codes.”⁶⁹ These laws, while varying from state to state, consigned blacks to a hopelessly inferior status slightly better than serfdom.⁷⁰ For example, some codes forbade blacks from taking any jobs other than as plantation workers or domestic servants.⁷¹ Unemployed blacks could be arrested for vagrancy by local officials, fined by the courts, and then hired out to private employers to satisfy the fine.⁷² Mississippi even required blacks to possess written proof, each January, of employment for the upcoming year.⁷³ Many states also established an “apprentice” system for black minors that, in practice, provided free plantation labor indistinguishable from slavery.⁷⁴ As one Southern Governor stated, the newly reconstructed governments were a white man’s government and intended for white men

68. Georgia selected the former Confederate vice president, Alexander H. Stevens, as a U.S. Senator. *See* BRINKLEY, *supra* note 43, at 417; FRANKLIN, *supra* note 52, at 43. The reconstructed Southern governments also contained former Confederate cabinet officers and senior military officers, many un-pardoned or otherwise ineligible to vote. FRANKLIN, *supra* note 52, at 43. Pro-Confederates were also appointed to a large number of local patronage jobs, in some cases because there simply were not enough unconditional Union men available or to build political bridges to the old power class. After all, seventy-five percent of white males between eighteen and forty-five had served in the Confederate Army at some point, and many white Republican politicians realized that they could not stay in power without some additional white support. FONER, *supra* note 51, at 185, 188, 197.

69. *See* FONER, *supra* note 51, at 199. The North Carolina provisional governor listed unqualified opposition to black voting rights as a central part of Southern Unionism. The Florida governor insisted that emancipation did not imply civil equality or the vote. Instead, he advised the freedmen to return to the plantation, work hard, and obey their old Masters. *Id.* at 189.

70. *See id.* at 198-204; FRANKLIN, *supra* note 52, at 49. The basic idea was to return matters to as near as slavery as possible. FONER, *supra* note 51, at 199 (citing the remarks of Radical Benjamin Flanders describing the situation in the South).

71. *See* BRINKLEY, *supra* note 43, at 417-18.

72. *See id.* at 418. Note, however, that these vagrancy laws were not unlike those in the North. *See* FRANKLIN, *supra* note 52, at 50. In the South, however, normally only blacks were forced to work. In Florida, blacks who broke labor contracts could be whipped, placed in the pillory, or sold for up to one year of labor, while whites faced only the threat of civil lawsuits. *See* FONER, *supra* note 51, at 200.

73. FONER, *supra* note 51, at 198.

74. *Id.* at 201. The laws generally allowed judges to bind black orphans and children from impoverished families to white employers. The former owner usually had first preference, and consent of the child’s parents was not required. Moreover, the definition of “minors” was quite flexible for the time, allowing whites to “employ” a sixteen year-old “apprentice” with a wife and child. *Id.*

only.⁷⁵ The same could be said for the courts.⁷⁶ Georgia went so far as to expel the modest number of black citizens elected to the state legislature.⁷⁷

The “reconstructed” state governments also did very little to protect blacks against what was, unfortunately, just the beginning of widespread racial terrorism.⁷⁸ In many areas, the violence raged unchecked. For example, Texas records from the Freedmen’s Bureau recorded the murder of 1000 blacks by whites from 1865-1868.⁷⁹ The stated “reasons” for the murders include: “One victim ‘did not remove his hat;’ another ‘wouldn’t give up his whiskey flask;’ a white man ‘wanted to thin out the niggers a little;’ another wanted ‘to see a d—d nigger kick.’”⁸⁰

At this point, efforts by the freedmen to assert even a modicum of their freedom probably led to the largest number of attacks. Freedmen were beaten and murdered for not acting like slaves. “Offenses” included

75. See FRANKLIN, *supra* note 52, at 51 (describing the remarks of the South Carolina Provisional Governor B.F. Perry). Some of the most flagrant provisions of the Black Codes were never enforced due to the action of Army commanders. The laws were mostly replaced, however, with racially neutral laws that, in practice, only applied to blacks. FONER, *supra* note 51, at 208-09. The idea of a “white man’s government” remained a central part of the Democratic Party platform in the 1868 presidential election. The Democratic candidate for Vice President, Frank Blair, wrote that a Democratic President could restore whites to power in the South by using the Army. In campaign speeches, he also excoriated Republicans for placing the South under the rule of “semi-barbarous blacks” who “longed to subject white women to their unbridled lust.” *Id.* at 339-40.

76. FONER, *supra* note 51, at 150. The basic problem was that Southern whites could not conceive that the freedmen had any rights at all. The primary objective of Southern courts during Presidential Reconstruction was to control and discipline the black population and force it to labor for whites. *Id.* at 204-05.

77. See FRANKLIN, *supra* note 52, at 131. The extent of white intolerance can be illustrated by the fact that at no point did blacks dominate the Southern governments. In other words, “black rule” was a myth. See FONER, *supra* note 51, at 353; *infra* note 88.

78. See FONER, *supra* note 51, at 119-23; FRANKLIN, *supra* note 52, at 51. The North also had its own racial problems both before and during the war. In the 1840s and 1850s, white supremacy was a central platform of the Northern Democratic Party, and four states, Iowa, Illinois, Indiana, and Oregon, refused to admit blacks into the state. In 1860, free blacks made up less than two percent of the North’s population, but faced almost universal discrimination in voting, schooling, employment, and housing. See FONER, *supra* note 51, at 25-26. The 1863 draft riots in New York City degenerated into brutal attacks on black citizens. Only the arrival of federal troops fresh from the Gettysburg battlefield restored order. See *id.* at 32-33. Unlike the South, however, New York launched some reforms, and cooler heads looked on the racial brutality as a problem to be addressed vice an acceptable social practice. *Id.* at 33.

79. FONER, *supra* note 51, at 120.

80. *Id.* Texas courts indicted some 500 whites for the murder of blacks in 1865-1866, but not one conviction was obtained. *Id.* at 204.

attempting to leave a plantation, disputing contract payments, attempting to buy land, and refusing to be whipped.⁸¹

Newspaper stories about the Black Codes and abuse of the former slaves enraged Northerners, and the Republican Congress opposed President Johnson's lenient Reconstruction plan. The Southern actions united Republicans behind a more radical agenda since there was a broad consensus that the freedmen's personal liberty and ability to compete as free laborers had to be guaranteed to give meaning to emancipation.⁸² After more than a year of congressional investigations, preliminary steps, and additional Southern resistance,⁸³ Congressional (or "radical") Reconstruction became entirely dominant in early 1867.⁸⁴ Under Congressional Reconstruction, the existing state governments were dissolved, direct military rule was introduced, and specific measures were taken to encourage black voting.⁸⁵ Moreover, "radical" leaders insisted on building a political establishment that would permanently secure full civil rights for the freedmen.⁸⁶

Not surprisingly, neither military rule by federal troops⁸⁷ nor the subsequent mixed-race Republican state governments were popular with the white oligarchy that had dominated the South before the war. From their perspective, Congressional Reconstruction imposed corrupt and inept for-

81. *Id.* at 121.

82. *Id.* at 225.

83. This included an 1866 pogrom against blacks in New Orleans that was halted with the intervention of the U.S. Army, and the Memphis race riots in which angry whites rampaged through black neighborhoods for three days burning homes, schools, and churches. See *id.* at 261-64; BRINKLEY, *supra* note 43, at 419; FRANKLIN, *supra* note 52, at 62-63.

84. FONER, *supra* note 51, at 276. Tennessee was readmitted, but the other ten Southern states were divided into five military districts under the control of a military commander. Only adult black males and white males who had not participated in the rebellion could register to vote. These voters would elect a convention to prepare a new state constitution acceptable to the U.S. Congress. Once the state constitution was ratified, voters could select officials who must then ratify the Fourteenth Amendment to the Constitution. See BRINKLEY, *supra* note 43, at 419; FONER, *supra* note 51, at 276-77; FRANKLIN, *supra* note 52, at 70-73. By 1868, there were about 700,000 black voters and 625,000 white voters in the South. See JENKINS, *supra* note 67, at 150; FRANKLIN, *supra* note 52, at 86.

85. See FRANKLIN, *supra* note 52, at 70; JENKINS, *supra* note 67, at 150. Ironically, many Northern states did not allow blacks to vote. See FONER, *supra* note 51, at 222-23; FRANKLIN, *supra* note 52, at 62.

86. See JENKINS, *supra* note 67, at 148-49. As politicians, the Republican senators and representatives also undoubtedly realized that the newly freed slaves would vote Republican.

eign governments propped up by an occupying army.⁸⁸ Accordingly, Southern Democrats did everything possible to undermine rapidly the Republican mixed-race state governments. In some areas, expanded voting rights for former Confederates gradually created white Democratic voting majorities, while economic pressure induced blacks to avoid political activity.⁸⁹ In other areas, however, more direct action to limit black Republican voting was required to return the white planter class to power. Terrorist organizations such as the Ku Klux Klan, the Knights of the White Camellia, and the Knights of the Rising Sun served as the unofficial, and highly decentralized, Southern white army in the war against Northern rule.⁹⁰ For this “army,” no act of intimidation or violence was too vile, so long as it was directed against blacks and their white political allies.⁹¹

While the Republican state governments resisted this “counter-reconstruction,” their efforts to combat the Klan were ineffective, and state officials appealed for federal help.⁹² Some federal interventions resulted, including the 1871 Federal Ku Klux Act that gave the President the power

87. The Army was used in a role analogous to the modern mission of “Peace Enforcement Operations.” Peace Enforcement Operations (PEO) are the application of military force or the threats of its use to coerce or compel compliance with resolutions or sanctions. The PEO forces strive to be impartial and limit actual use of force. The primary goal, however, is to apply coercion in a way that makes the parties embrace the political solution over continued conflict. *See* JOINT CHIEFS OF STAFF, JOINT PUB. 3-07.3, JOINT TACTICS, TECHNIQUES, AND PROCEDURES FOR PEACE OPERATIONS ch. III (12 Feb. 1999). The mission is known as “Peacekeeping” if all sides to the conflict consent to the participation of the U.S. troops. *Id.* at I-10. Most Reconstruction Army commanders were extremely reluctant to participate in this mission and tried to keep out of civil matters. Some even opposed radical Reconstruction. *See* FONER, *supra* note 51, at 307-08.

88. *See* FRANKLIN, *supra* note 52, at 39. Other Southern complaints concerned exploitation by Northern “carpetbaggers” and betrayal by Southern white Republican “scalawags.” *See* BRINKLEY, *supra* note 43, at 421-22; JENKINS, *supra* note 67, at 150. This “traditional” view of Reconstruction described the period as “bayonet rule.” BRINKLEY, *supra* note 43, at 432. This now discredited view of Reconstruction is reflected in the work of William A. Dunning during the early 1900s. Dunning and his followers portrayed Congressional Reconstruction as a sordid attempt by Northern Republicans to take revenge on Southern rebels and assure Republican domination of state and national government. Ignorant blacks were pushed into positions of power (black or Negro rule), while plundering carpetbaggers, working with local white scalawags, fleeced the public. After a heroic struggle, the Democratic white community overthrew these governments and restored “home rule” (white supremacy). *See id.* at 432-33; FONER, *supra* note 51, at xix-xx; *see also* FONER, *supra* note 51, at 294-307 (dispelling many myths about carpetbaggers and scalawags), 353 (giving a relatively short list of significant state offices held by black officials during Reconstruction).

89. *See* BRINKLEY, *supra* note 43, at 421; FRANKLIN, *supra* note 52, at 172-73.

90. *See* FONER, *supra* note 51, at 342-45, 425-44.

to suspend habeas corpus and proclaim martial law when necessary.⁹³ President Grant used the relatively few federal troops remaining in South Carolina and other states to make arrests and enforce the anti-Klan law.⁹⁴ The Act, however, expired in 1872, and any temporary benefits quickly faded along with the already waning Northern will to enforce Reconstruction.⁹⁵ With a few exceptions, Southern Republicans were left to fend for themselves. As one prominent historian has noted: “Negroes could hardly be expected to continue to vote when it cost them not only their jobs but their lives. In one state after another, the Negro electorate declined steadily

91. See BRINKLEY, *supra* note 43, at 430; FRANKLIN, *supra* note 52, at 155.

It involved the murder of respectable Negroes by roving gangs of terrorists, the murder of Negro renters of land, the looting of stores whose owners were sometimes killed, and the murder of peaceable white citizens. On one occasion in Mississippi a member of a local gang, “Heggie’s Scouts,” claimed that his group killed 116 Negroes and threw their bodies into the Tallahatchie River. It was reported that in North Carolina the Klan was responsible for 260 outrages, including seven murders and the whipping of 72 whites and 141 Negroes. Meanwhile, the personal indignities inflicted upon individual whites and Negroes were so varied and so numerous as to defy classification or enumeration. There were the public whippings, the maiming, the mutilations, and other almost inconceivable forms of intimidations.

FRANKLIN, *supra* note 52, at 157

92. FONER, *supra* note 51, at 438-44. Many states passed anti-Ku Klux Klan laws, appointed special constables, declared martial law, and offered rewards. State militias, many composed of black troops, were deployed to keep the peace and arrested some suspects. It did not work, however, as white Democrats lashed back with even more determination, and the Republican administrations refused to respond with similar levels of force. See *id.* at 436-42; FRANKLIN, *supra* note 52, at 162-63.

93. FONER, *supra* note 51, at 454-55. The federal Ku Klux Klan Act and Enforcement Acts dramatically increased federal participation in criminal law, as the federal government no longer depended upon local law enforcement officials to protect the freedmen. Instead, the full authority and resources of the national government could be used, for a short time, to protect civil and political rights. *Id.* at 455-56.

94. See *id.* at 457-58; FRANKLIN, *supra* note 52, at 168.

95. A severe economic depression caused by the “Panic of 1873” also sapped available state and federal resources and led to significant Republican political losses as voters blamed the party in power during the 1874 congressional elections. See FONER, *supra* note 51, at 512-24, 535.

as the full force of the Klan came forward to supervise elections that federal troops failed to supervise.”⁹⁶

One by one, the small clique of white landowners who had dominated the South before the war replaced the mixed-race Republican governments.⁹⁷ Two states, Alabama and North Carolina, faced a period of political stalemate beginning in 1870. In both, Republicans could claim that they remained the majority party in peaceful elections.⁹⁸ While the potential for federal intervention induced some restraint, the “redeemed” state governments moved forward under Democratic leadership to exert white supremacy and control of the labor force.⁹⁹ Schools for blacks and poor whites closed, segregation was required, and black voting power strictly limited.¹⁰⁰ By 1876, the only survivors of the Reconstruction regime were in Louisiana, Florida, and South Carolina. Without federal troops, however, it was clear that the last of the Republican governments would fall.¹⁰¹

These last vestiges of occupying federal troops were used to supervise polling places in Louisiana, Florida, and South Carolina during the controversial presidential election of 1876.¹⁰² The need to prevent fraud and voter intimidation was clear enough. In South Carolina, for example, the “Plan of Campaign” called upon each Democrat to “control the vote of at

96. See FRANKLIN, *supra* note 52, at 172.

97. See BRINKLEY, *supra* note 43, at 429-30. Southern Democrats looked upon this as a joyous event and called it “redemption” or the return of home rule. *Id.* Many other factors besides direct violence contributed to the downfall of the Southern Republican governments, including economic pressure from white Democrats, internal Republican feuds, white Republican racism, corruption, the economic depression, the severe problems facing state and local governments in the South, and the sheer number of white Democrats once voting restrictions on former rebels were lifted. FONER, *supra* note 51, at 346-49. Additionally, the national Republican Party became much more conservative during the Depression and moved away from the free labor ideology. *Id.* at 525. The campaign of violence by Southern white Democrats and loss of Northern will, however, were the decisive factors in redemption. *Id.* at 603.

98. FONER, *supra* note 51, at 444.

99. See *id.* at 421. This activity began in border states and the upper South. *Id.*

100. See *id.* at 422-23. When Georgia was “redeemed” in 1870-1871, a poll tax combined with new residency and registration requirements quickly reduced the number of black voters, and a shift from ward to citywide elections eliminated Republicans from Atlanta’s city council. Moreover, a black legislator from a remaining Republican enclave was expelled from the state legislature and jailed on trumped-up charges. *Id.* at 423.

101. Furman, *supra* note 43, at 90-91.

102. *Id.* During the election of 1876, over 7000 deputy marshals were used to supervise the election, and President Grant ordered federal troops to the polling places in Louisiana, Florida, and South Carolina to prevent fraud and voter intimidation. *Id.*

least one Negro by intimidation, purchase, keeping him away or as each individual may determine.”¹⁰³ Some Democrats planned to carry the election “if we have to wade in blood knee-deep.”¹⁰⁴

The subsequent political battles over the contested election results led to the effective withdrawal of federal troops from the South in early 1877 as part of a deal to resolve which candidate would assume the Presidency.¹⁰⁵ The state Republican governments collapsed, and the traditional white ruling class resumed power.¹⁰⁶ In the words of W.E.B. DuBois, “The slave went free; stood a brief moment in the sun; then moved back again toward slavery.”¹⁰⁷

D. Legislative Action to Prevent Another Reconstruction Period

Initial congressional action to maintain this movement began shortly after the 1876 election, at the peak of Southern resentment over military intervention to protect black voting rights in Louisiana, Florida, and South Carolina. At the time, the entire body of federal law had been codified in the 1874 Revised Statutes (RS).¹⁰⁸ Five of these laws, RS 1989, 5297, 5298, 5299, and 5300, addressed the use of the Army and Navy in the execution of the laws and to suppress insurrections, domestic violence, or unlawful combinations or conspiracies against either state or federal authority. Revised Statutes 5297 and 5298 were the direct descendants of the Calling Forth Act of 1795 and the 1807 amendments permitting the use of regular troops upon request of a state government. Revised Statute 5298 allowed the President to employ the land and naval forces of the United States to combat forces opposing federal authority without an invitation from a state government. Revised Statutes 5299 and 1989, passed as part of the Ku Klux Klan Act, permitted the President to employ the land and naval forces to enforce civil rights. In all cases of a planned intervention

103. FONER, *supra* note 51, at 570.

104. *Id.* at 574.

105. In a nutshell, Democrats, whose candidate had won the popular vote and perhaps the electoral vote, dropped opposition to the selection of Republican Rutherford B. Hayes in exchange for the withdrawal of most federal troops from the South, a non-interference policy, and certain other concessions. See BRINKLEY, *supra* note 43, at 430-31; JENKINS, *supra* note 67, at 151-52; FONER, *supra* note 51, at 582; see also GORE VIDAL, 1876 (1976) (historically accurate fictionalized account of the election).

106. FONER, *supra* note 51, at 582.

107. *Id.* at 602.

108. REVISED STATUTES OF THE UNITED STATES (2d ed. 1878) [hereinafter REVISED STATUTES] (passed at the first session of the Forty-Third Congress, 1873-1874).

under RS 5297-5299, however, RS 5300 required the President to issue a proclamation commanding the insurgents to disperse and retire peaceably to their respective homes before employing the military forces.¹⁰⁹

Other laws, RS 2002-2003 and the related criminal provisions at RS 5528-5532, limited the use of military or naval forces at polling places and in elections.¹¹⁰ Most significantly, these election laws prohibited placement of military and naval forces at polling places unless necessary to repel armed enemies of the United States *or to keep peace at the polls*.¹¹¹

The President's actions to supervise polling places during the 1876 election were harshly criticized by many members of the democratically controlled House in early 1877.¹¹² Ironically, this use of Army troops to keep the peace at polling places was specifically contemplated by RS 2002 and 5528.¹¹³ Nonetheless, according to one member, Congressman Atkins, military supervision of polling places was a tyrannical and unconstitutional use of the Army to protect and keep in power unelected tyrants.¹¹⁴ In other words, the lawful use of the Army gave three Southern Republican state governments a chance to survive, primarily by keeping the Ku Klux Klan from intimidating Republican voters.

In response to these concerns, Congressman Atkins offered a rider to the Army appropriations bill prohibiting the use of the Army "in support of the claims, or pretended claim or claims, of any State government, or officer therefore, in any State, until such government shall have been duly

109. See LAURIE, *supra* note 43, at 18-21; REVISED STATUTES, *supra* note 108, at 348, 1029-30.

110. Revised Statute 2002 prohibited any person in the military, naval, or civil service of the United States from bringing troops or armed men to the place of an election in any state unless necessary to repel the armed enemies of the United States, or keep peace at the polls. Revised Statute 5528 imposed criminal sanctions of up to five years' imprisonment at hard labor for violations. Revised Statute 2003 prohibited Army and Navy officers from interfering with elections. Revised Statutes 5530 through 5532 contained the related criminal provisions. See REVISED STATUTES, *supra* note 108, at 352, 1071, §§ 2002-2003, 5528, 5530-5532 (codified as amended at 42 U.S.C. § 1972, 18 U.S.C. §§ 592-593). The exception that permitted the use of troops at polls to keep the peace, however, is no longer in the law. See *infra* note 455 and accompanying text.

111. REVISED STATUTES, *supra* note 108, at 352, 1071.

112. See 5 CONG. REC. 2112-17 (1877).

113. See REVISED STATUTES, *supra* note 108, §§ 2002, 5528.

114. See 5 CONG. REC. at 2112 (remarks of Congressman Atkins).

recognized by Congress.”¹¹⁵ The Senate deleted the rider, and the forty-fourth Congress adjourned without passing an Army appropriations provision. Since Congress did not pass what is today known as a continuing resolution, Army troops were not paid for several months.¹¹⁶

The House renewed the debate in the forty-fifth Congress with an amendment to the Army appropriations bill providing: “It shall not be lawful to use any part of the *land or naval forces* of the United States to execute the laws either as a posse comitatus or otherwise, except in such cases as may be expressly authorized by act of Congress.”¹¹⁷ The sponsoring Democratic Congressman, Mr. Kimmel, roundly denounced regular troops as bloodthirsty brutes, questioned the constitutionality of a standing army, and vigorously restated the colonial debates about the danger of a standing army.¹¹⁸ He referred to President Hayes as an unelected monarch who preferred bullets to ballots.¹¹⁹ He also claimed that the Army shielded the tyrants who had reconstructed state governments, imposed state constitutions on unwilling people, obstructed the ballot, and excluded the represen-

115. *Id.* at 2119. The bill also sought to reduce the Army’s size by thirty-eight percent. For Congressman Atkins, at least, this bill, along with the subsequent bill that eventually led to the Act, might be more accurately described as the Ku Klux Klan Protection Act. Of course, many others had more honorable reasons to support the bill, and unsuccessful efforts had been made to limit the use of the Army as a posse comitatus in 1856. *See* Abel, *supra* note 23, at 460-61 & n.100; *supra* notes 23, 26-27 and accompanying text. The Democratic Party also tapped into widespread resentment over the use of federal troops during the war to quell strikes at a New York arms factory, to prohibit worker organization in St. Louis war-production industries, and to suppress strikes in the Pennsylvania coal country under the guise of quelling resistance to the draft. *See* FONER, *supra* note 51, at 31. The Democrats used these incidents, in part, to position the Democratic Party as the home of the working man, while painting the Republican Party as an agent of the rich. *Id.*

Another potentially motivating event was President Hayes’s use of federal troops to suppress violence associated with the great railway strike in July 1877. Ironically, many of these troop deployments were made under the authority of the existing statutes concerning the domestic deployment of the Army and did not rely upon the Cushing Doctrine or a posse comitatus theory. *See* LAURIE, *supra* note 43, at 33, 36, 41 (stating that the President issued proclamations required by RS 5300).

116. LAURIE, *supra* note 43, at 32; COAKLEY, *supra* note 24, at 343; Furman, *supra* note 43, at 95 & n.61.

117. 7 CONG. REC. 3586 (1878) (emphasis added). The wording of this initial bill concerning the “land and naval forces of the United States” is identical to that in the primary federal statutes of the time (RS 5297 through 5300 and RS 1989) that specifically authorized Army and Navy intervention in domestic matters. *Compare id.* with REVISED STATUTES, *supra* note 108, §§ 1989, 5296-5300. *See supra* notes 108-09 and accompanying text.

tatives of the people from state government—often at the behest of minor federal officials.¹²⁰

According to Mr. Kimmel, the nation had lived under absolute military despotism ever since it became accepted that members of the Army could be called as a posse comitatus.¹²¹ On the other hand, Congressman Kimmel was quite sanguine about Southern home rule, noting the Southern side's "good faith" acceptance of defeat, honorable obedience to court authority, and the resulting racial harmony.¹²² Given the historical context and explicit references to Reconstruction "tyrants" and racial harmony, it is difficult to dispute the bill's reflection of lingering Reconstruction bitterness or the sponsor's agenda.¹²³

The substitute bill that passed the House, introduced by Congressman Knott, omitted the restriction on the use of naval forces and added a criminal penalty.¹²⁴ While the debate on the substitute bill was more temperate, at least one Southern representative got "heartily tired" of repeatedly hearing about the use of federal troops in the 1876 election.¹²⁵ The debate's significant focus on the "unlawful" use of Army troops to supervise poll-

118. 7 CONG. REC. at 3579-80, 3583-84. Of a member of the Regular Army, Mr. Kimmel said:

He lives by blood! His is a business apart from the people. . . . [H]is habits unfit him for the relations of civil life He sacks, desecrates, indulges when and where he dares. He serves, obeys, destroys, kills, suffers[,] and dies for pay. He is a mercenary whom sloth, luxury[,] and cowardice hires to protect its ease, enjoyment, and life.

Id. at 3584.

119. *Id.* at 3586.

120. *Id.* at 3579-86 (remarks of Congressman Kimmel.) Kimmel also argued that the power for the marshals, the lowest officers of the United States courts, to call out the Army as a posse comitatus never existed. He cited the use of the Army by "all sorts of people" to suppress labor unrest, enforce revenue laws, and execute local law. Congressman Knott, who introduced the bill that ultimately passed the House, stated that he designed his amendment to stop the fearfully common practice in which every marshal and deputy marshal could call out the military to aid in the enforcement of the laws. *Id.* at 3849.

121. *Id.* at 3582. This period of military despotism described by Mr. Kimmel would have started at least as early as 1807 under President Jefferson. *See supra* note 44 and accompanying text.

122. 7 CONG. REC. at 3582, 3586.

123. *See supra* section III.C.

124. *See* 7 CONG. REC. at 3845.

125. *Id.* at 3847 (remarks of Congressman Pridemore).

ing places, with no acknowledgement that federal laws clearly permitted the action, may be one reason why the Act is so misunderstood.¹²⁶ It also suggests a high level of political posturing and misdirection by some of the bill's proponents since the House bill did not change the existing laws that permitted troops to keep the peace at polling places.

The Senate added language to account for any constitutional authority for use of the Army as a posse comitatus, or otherwise, to execute the laws. Senator Kernan sponsored the Senate amendment. His remarks focused on the actions of peace officers and other low officials to call out the Army and order it about the polls of an election.¹²⁷ The Senate also considered an amendment by Senator Hill, a supporter of the bill, to change the Act to read: "From and after the passage of this act it shall not be lawful to employ any part of *the Army* of the United States *for the purpose of executing the laws* except in such cases as may be expressly authorized by the Constitution or by act of Congress."¹²⁸

This amendment, and others designed to clarify the bill's meaning, were defeated, and the Act became law on 18 June 1878 as part of the Army appropriations bill.¹²⁹ It stated:

It shall not be lawful to employ any part of *the Army* of the United States, as a posse comitatus, or otherwise, for the purpose of executing the laws, except in such cases as may be expressly authorized by the Constitution or by act of Congress; and no money appropriated by this act shall be used to pay any of the expenses incurred in the employment of any troops in violation of this section. And any person willfully violating the provisions of this section shall be deemed guilty of a misdemeanor¹³⁰

126. See *supra* notes 108-11 and accompanying text.

127. 7 CONG. REC. at 4240. Senator Kernan said: "Hence I think Congress should say that there shall be *no right* to use the Army as a posse comitatus by the peace officers of the State or the General Government" *Id.* (emphasis added). Senator Beck agreed and indicated that the whole object of this section was to limit the marshals who called out the Army. *Id.* at 4241.

128. *Id.* at 4248 (emphasis added).

129. See Act of June 18, 1878, 20 Stat. 152.

130. Posse Comitatus Act of 1878, 20 Stat. 145, 152 (emphasis added); REVISED STATUTES, *supra* note 108, at 190 (2d ed. Supp. 1891). The limits on spending money under this appropriation expired at the end of the period for the appropriation act.

IV. The Act's Meaning in the Late Nineteenth and Early Twentieth Century

As with many controversial laws, the full extent of the Posse Comitatus Act was not clear to all the congressional and executive participants.¹³¹ Some believed, or hoped at least, that the law limited the President's ability to use Army troops domestically to those few instances specifically enumerated in other statutes.¹³² This interpretation relied upon two implicit beliefs: (1) the Constitution provided no authority for presidential use of the Army to execute the law; and (2) the language proposed by Senator Hill, but not adopted, was the law.¹³³ It also tended to focus on the rhetoric of some of the bill's strongest Southern supporters as opposed to the law's actual text.

Others involved in the debate thought, or hoped, that the law merely restated the obvious.¹³⁴ After all, federal law authorized President Grant's use of troops to keep the peace at polling places during the 1876 election.¹³⁵ Moreover, the Cushing Doctrine simply articulated long-standing

131. See 7 CONG. REC. 4299 (1878). As Senator Howe noted:

For all these reasons I should be opposed to this section if it were to be constructed precisely as the Senator from Delaware construes it. But is that the true construction? I will not say that it is not. I only say that Senators differ as to what the construction is and it seems to me hardly worthwhile to put a savage provision into the statute, the limitations of which are disputed about by even the warmest friends of the provision.

Id. See also *id.* at 4296 (remarks of Senator Kirkwood, describing the Act as a self-evident proposition; however, the discussion shows that the Senators differed widely over the lawful uses of the Army).

132. See, e.g., *id.* at 4247 (remarks of Senator Hill). Senator Hill articulated a theory whereby the Army was never used to execute the law. According to Senator Hill, the sheriff and his posse execute the law. Any effective opposition is considered an insurrection or domestic violence. At this point, the Army is used to quell the insurrection or domestic violence. The sheriff returns to execute the law once order is restored. *Id.* In support of this theory, Senator Hill offered an unsuccessful amendment to change the Act to read, "From and after the passage of this act it shall not be lawful to employ any part of the Army of the United States for the purpose of executing the laws." *Id.* at 4248. See also *supra* notes 107-09 and accompanying text (describing the laws that specifically authorized federal military intervention in domestic matters).

133. 7 CONG. REC. at 4247-48; see *supra* note 128 and accompanying text (discussing the proposed Hill amendment).

134. 7 CONG. REC. 4296 (remarks of Senator Bayard), 4297 (remarks of Senator Burnside).

135. See *supra* note 110 and accompanying text (discussing RS 2003 and RS 5528).

practice that had been ratified by at least three Presidents and the Senate Judiciary Committee.¹³⁶ This interpretation, however, minimized the multi-year effort of Southern Democrats to pass the Act. They certainly didn't think that the Act simply restated the obvious.

To the extent that agreement can be discerned from the contentious and deliberately misleading legislative history, most participants appeared to agree that the marshals, and other low-ranking federal officials, could no longer order Army troops to join the posse comitatus in subordination and obedience to the marshal.¹³⁷ In other words, the Act clearly undid the Jefferson-Jackson-Fillmore doctrine articulated by Attorney General Cushing in 1854.¹³⁸

At least one of the key disputes over the statute's additional meaning, if any, implicitly centered on the interpretation of the words "as a posse comitatus or otherwise."¹³⁹ While no court during the era of its passage interpreted the statute, under an established cardinal rule of statutory construction in 1879, the words must have some meaning.¹⁴⁰ The words cannot just be ignored, especially since Congress had an opportunity to remove them, but left the words in the law.¹⁴¹

While history can help define a nineteenth century "posse comitatus," one must use other tools to interpret the words "or otherwise." Two

136. See *supra* section III.B.

137. See 7 CONG. REC. 4296 (remarks of Mr. Teller); 16 Op. Att'y Gen. 162 (1878); 41 Op. Att'y Gen. 313, 1957 U.S. AG LEXIS 2, at *34-35 (Nov. 7, 1957) (citing President Hayes's diary of 30 July 1878); COAKLEY, *supra* note 24, at 344; Furman, *supra* note 43, at 97.

138. See *supra* section III.B.

139. See *supra* notes 128-29 and accompanying text (discussing one unsuccessful amendment to remove the words from the Act).

140. See *Market Co. v Hoffman*, 101 U.S. 112, 115-16 (1879). This opinion states:

We are not at liberty to construe any statute so as to deny effect to any part of its language. It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word. As early as in Bacon's Abridgment, sect. 2, it was said that "a statute ought, upon the whole, to be so constructed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." This rule has been repeated innumerable times.

Id.

141. See *supra* note 128 and accompanying text (discussing the proposed Hill amendment).

Supreme Court cases from the early 1900s indicate that *ejusdem generis*¹⁴² was also a familiar rule of statutory construction at the time of the Act's passage. Under this doctrine, as articulated in the early twentieth century, the general words "or otherwise" to execute the laws prohibit actions of the same general class as placing Army troops into a posse comitatus at the order of the local marshal. The general words "or otherwise" must have some meaning and, of course, the ultimate goal is to determine the "true" congressional intent from the many conflicting statements and actions.¹⁴³ Realistically, the best that can be said with any level of confidence is that while the words "or otherwise" did more than just limit the Army's involuntary inclusion in a posse comitatus by the marshals, it also did something significantly less than prohibit the use of the Army in all forms of domestic law enforcement.¹⁴⁴ Since the two primary "evils" addressed during the debates were the Cushing Doctrine and Army troops supervising polling places,¹⁴⁵ one reasonable interpretation is that the words "or otherwise" sought to limit any implied authority of the marshals to order Army troops to supervise the polls.

One item not in dispute was the Act's inapplicability to the U.S. Navy.¹⁴⁶ The House Bill introduced in the forty-fifth Congress proposed

142. Of the same kind, class, or nature. "A canon of construction that when a general word or phrase follows a list of specific persons or things, the general word or phrase will be interpreted to include only persons or things of the same type as those listed." BLACK'S LAW DICTIONARY 535 (7th ed. 1999). The rule, however, does not necessarily require limiting the scope of the general provision to the identical things specifically named. Nor does it apply when the context manifests a contrary intention. *Id.*

143. See *United States v. Mescall*, 215 U.S. 26, 31-32 (1909); *United States v. Bitty*, 208 U.S. 393, 401-02 (1908).

144. The Senate debate between Senators Blaine, Merrimon, and Windom also suggested some type of emergency exception to the Act whereby soldiers would respond as human beings or citizens, rather than as soldiers, under the "law of nature." 7 CONG. REC. 4245-46 (1878). Of course, the theory of soldiers acting as normal citizens was the foundation of the Cushing Doctrine, so this exchange does little to clarify the Act's meaning.

145. See *supra* notes 125-27 and accompanying text.

146. See *Furman*, *supra* note 43, at 97-102 (discussing a total focus on the Army); *Abel*, *supra* note 23, at 456-58 & n.76 (stating that the Framers did not consider a standing Navy as a potential menace to liberty, so the applicable constitutional provisions were not controversial); *Meeks*, *supra* note 23, at 101 (discussing shifting Navy opinion on the Act's applicability to the Navy and Marine Corps from 1954, when it was held to have no application, to 1973, when Navy policy changed to general compliance with the Act). One off-handed assumption is that the Navy was deleted from the initial bill because it was part of an Army appropriation bill. *Meeks*, *supra* note 23, at 101. Congress repeated this unsupported assumption in House Report 97-71; however, the House Report goes on to state that the Posse Comitatus Act does not apply to the Navy. *Id.* at 1787 (construing H.R. No. 97-71, at 1786 (1981)).

a limit on all land and naval forces; however, the Knott amendment changed the bill to cover only the Army.¹⁴⁷ Moreover, the extensive debate is clearly focused on the Army; the intensely focused surrounding discussion about the Army drowns out the few passing references to the Navy

147. See *supra* note 124 and accompanying text.

148. *United States v. Walden*, 490 F.2d 372, 373 (4th Cir. 1974), contains a frequently cited mischaracterization of the debate. In *Walden*, the court quoted one small section of the debate to prove that the Act applied to all the armed forces: “But this amendment is designed to put a stop to the practice, which had become fearfully common of *military officers* of every grade answering the call of every marshal and deputy marshal to aid in the enforcement of the laws.” *Id.* at 375 (quoting 7 CONG. REC. at 3849 (statement of Congressman Knott)) (emphasis added).

Placing these remarks in context, however, reveals a very different meaning:

[Mr. Knott:] The gentleman from New York expressed some surprise at the language I employed in this amendment. Had he observed it a little more minutely he would have found there was nothing furtive in it. It provided that it shall be unlawful to employ any part of *the Army* under the pretext or for the purpose of enforcing the law except in cases and under circumstances where such employment is authorized by express congressional enactment.

[Interruption from the chair and a question as to what class of cases the amendment is intended to meet.]

[Mr. Knott:] . . . gentleman from New York could be surprised at the language I employed in this amendment what must be the surprise of every intelligent lawyer on this floor at the announcement of the astounding proposition that the President of the United States, who is to enforce the law, can himself rise above the law and do with *the Army* what the law does not authorize him to do. If that principle is true, our pretext that we have a republican form of Government is a sham and a fraud; we are under a complete, absolute, unlimited, unrestrained, military despotism. Whatever the President of the United States may in his own discretion claim to be lawful he can do and there is no remedy for it.

Now, my friend from Indiana [Mr. Hanna] asked what particular class of cases this amendment applies to. It applies to *every employee of the Army or any part of the Army of the United States* in cases for which there is no congressional authority upon our statute book. I repeat for his edification what I said a while ago that the gentleman from Maryland [Mr. Kimmel] no longer ago than last Monday called the attention of this House to official proof that the *Army of the United States* had been used in hundreds of cases without authority of law, to assist marshals. . . .

or the military.¹⁴⁸ Additionally, at the time, the term “military” was often synonymous with “army.”¹⁴⁹

148. (continued)

There are, as I have already mentioned, particular cases in which Congress has provided that *the Army* may be used, which this bill does not militate against, such as the case of the enforcement of the neutrality laws, the enforcement of the collection of custom duties and of the civil-rights bill, and one or two other instances. But this amendment is designed to put a stop to the practice, which had become fearfully common of *military officers* of every grade answering the call of every marshal and deputy marshal to aid in the enforcement of the laws. The Constitution, sir, guarantees to every State a republican form of government and protection from domestic violence The amendment proposed does not conflict with that and it is surprising to me that the gentleman should be so sensitive when an attempt is made here to prescribe the limits and bounds beyond which the *Army of the United States* cannot go.

The *Army* was made, sir, as the servant of the people. It was not made to override or trample in the dust their rights. Civil law is made for the protection of the people and is paramount to any officer of any grade *in the Army*, from a corporal up to the Commander-in-Chief. The subordination of the military to the civil power ought to be sedulously maintained.

7 CONG. REC. at 3849 (statement of Congressman Knott) (emphasis added). Even more revealing is the fact that Congressman Knott’s amendment deleted the Navy from an earlier version of the bill. See *supra* note 124 and accompanying text.

149. At least some members of Congress considered these terms synonymous. See *id.* at 4297 (“May I ask my honorable friend, is there any citizen of the United States, whether in the naval or military branch of the service or in civil life who does not commit any act at the peril of it being lawful or not?”) (remarks of Sen. Bayard in favor of the bill) (emphasis added). A related 1865 law keeping military or naval officers away from polling places also used the word “military” to denote “army.” See REVISED STATUTES, *supra* note 108, § 2002, at 352 (“[n]o military or naval officer, or other person engaged in the civil, military, or naval service of the United States, shall . . .”); see also THE FEDERALIST No. 69, at 386 (Alexander Hamilton) (Clinton Rossiter ed., 1999) (the President has “supreme command and direction of the military and naval forces,” as first general and admiral of the nation), No. 74 (Alexander Hamilton) (entitled “The Command of the Military and Naval Forces . . .”) (emphasis added). But see REVISED STATUTES, *supra* note 108, §§ 5297-5300. While RS 5297 though RS 5299 use the phrase “land and naval forces of the United States,” RS 5300 uses the phrase “military forces” in a way that includes both the Army and Navy. See *id.*

While the Act itself did not apply to the Navy, in October 1878, the Attorney General appeared to repudiate the Cushing Doctrine formally, accepting the broader argument that the marshals' implied authority to call out any part of the armed forces as a posse comitatus did not exist.¹⁵⁰ In other words, the marshal was only prohibited under pain of criminal penalty from ordering out the Army as a posse comitatus; however, he had no legal authority to order out sailors and marines into the posse.

President Hayes concurred that the Act limited the marshal's authority over the Army, but he did not believe that the law applied to the President.¹⁵¹ A few months after signing the bill into law, he signed a broad proclamation concerning the generally lawless situation in the New Mexico Territory.¹⁵² He then deployed troops in a seventeen-month military intervention to enforce judicial process and enforce the law.¹⁵³ A great deal can be learned about the Act from this troop deployment since it occurred while the law's limit on the expenditure of federal funds was in place and the authors were still in Congress.

Except for the initial presidential proclamation and the location of the disturbances, it is difficult to distinguish significantly the long-term use of troops in the New Mexico territory from the earlier actions taken in the South during the Reconstruction period. The level of violence and general lawlessness in New Mexico, while directed at whites, was really no worse than in many parts of the former Confederacy. Yet Congress did not object, showing that the Act's primary purpose was to limit the authority of local army commanders to cooperate directly with the marshals and other local law enforcement officials. Presidential involvement with the decision to use troops in a law enforcement role appeared to be the only real limit imposed by the Act.¹⁵⁴

Skeptical that such a contentious law accomplished so little, President Chester Arthur initially felt that the Act severely restrained his ability to respond to a similar lawless situation in the Arizona territory a few years

150. See 16 Op. Att'y Gen. 162 (1878). But see *supra* note 149 (indicating the possibility that the use of the term "military" in this opinion was synonymous with the term "army").

151. 41 Op. Att'y Gen. 313, 1957 US AG LEXIS 2, at *34-35 (Nov. 7, 1957) (citing President Hayes's diary of 30 July 1878); 16 Op. Att'y Gen. 162 (1878); Furman, *supra* note 43, at 97.

152. LAURIE, *supra* note 43, at 68. As some members suggested during the debates, the Act was a significant blow to good order in the sparsely populated West. See 7 CONG. REC. 4303 (1878) (remarks of Mr. Hoar); LAURIE, *supra* note 43, at 66.

later. He, therefore, requested that Congress amend the Act in December 1881 and again in April 1882.¹⁵⁵ In reply to the second request, a unanimous 1882 Senate Judiciary Committee report confirmed that the primary evil addressed by the Posse Comitatus Act was the marshal's power to call out and control the Army.

The posse comitatus clause referred to arose out of an implied authority to the marshals and their subordinates executing the laws to call upon the Army just as they would upon bystanders who, if the Army responded, would have command of the Army or so much of it as they had, just as they would of the bystanders, and would direct them what to do.¹⁵⁶

With respect to the lawless situation in the Arizona territory and the President's request for relief from the limitations imposed by the Act, the

153. See LAURIE, *supra* note 43, at 59-73 (describing the situation in Lincoln County, New Mexico, from 1878-1879); Furman, *supra* note 43, at 97. This period is known as the Lincoln County War. The disorder began early in 1878 when two ranchers, John Chisum and John Turnstall, challenged a rival faction that controlled the region's economy. The Turnstall side included the infamous William H. Bonney, known as Billy the Kid. Initially, the local Army commanders used their troops as a posse comitatus to help keep the peace. Upon learning of the Act via General Order No. 49, however, the local commander was ordered to cease further support of civil authorities without permission from higher authority. The situation deteriorated rapidly as the rival factions and unassociated criminal gangs learned of the Army's impotence. LAURIE, *supra* note 43, at 59-66. One observer wrote that the factional conflict descended into "depredations and murder by a band of miscreants who have probably been attracted from all parts of the country by the knowledge of the inability of the authorities, civil or military, to afford protection." *Id.* at 66 (quoting the Army surgeon stationed at Fort Stanton).

At the request of the regional military commander, the President issued a proclamation that unlawful obstructions, combinations, or assemblages of person against the authority of the United States made it impracticable to enforce the law. The President then authorized the use of federal troops to ensure the faithful execution of the law. For the next seventeen months, the Army acted against the various bandits, gangs, and outlaws to enforce the law. *Id.* at 67-68.

Before the President issued the proclamation, Secretary of War McCrary articulated an emergency exception to the Act in a written order (General Order No. 71). If time did not permit for an application to the President, then troops could be used in cases of sudden and unexpected insurrection or riot endangering public property of the United States, when the U.S. mails might be interrupted or robbed, or in other equal emergencies. The acting commander, however, had to make a post-event report to the Adjutant General. *Id.* at 66.

154. How the proclamation requirement imposed a significant legal, as opposed to political, limit on the President's domestic use of troops is difficult to envision.

155. LAURIE, *supra* note 43, at 75.

same Senate Judiciary Committee said:

In all these cases the President of the United States having the power of employing any part of the Army from three soldiers to three thousand to assist in the execution of the laws in the Territory of Arizona, retains the dominion over this Army himself and the soldiers under command of their own officers to aid the civil authority, instead of being under the command of the marshal of the Territory. . . . The technical posse comitatus which is not expressly authorized by law can be dispensed with, the President, as is perhaps best in these far-off places, retaining the command of the troops by his own officers, who are perhaps quite as safe a depository of such power as the marshal himself. He directs them to resist all this unlawfulness, merely first giving notice to these people that there is not going to be any more of it allowed. So we think that the President is armed with ample power for this emergency already, and that it is not necessary that legislation should be had.¹⁵⁷

The Act clearly did not end Army involvement in domestic legal affairs.¹⁵⁸ Initially, the key difference from the Reconstruction period was that the President approved or ratified most actions;¹⁵⁹ some sort of proclamation complying with RS 5300 was normally, but not always, issued

156. 13 CONG. REC. 3458 (1882) (remarks of Sen. Edmunds on behalf of the Judiciary Committee). The Senate was responding to a presidential request that Congress amend the Act to permit Army assistance to law enforcement in the Arizona territory *See id.* Accord 7 CONG. REC. 3849 (1878) (remarks of Congressman Knott) (“But this amendment is designed to put a stop to the practice, which has become fearfully common, of military officers of every grade answering the call of every marshal and deputy marshal to aid in the enforcement of the laws.”).

157. 13 CONG. REC. at 3458. The notice mentioned by Senator Edmunds is the presidential proclamation described under RS 5300. *See also* 17 Op. Att’y Gen. 333 (1882); 17 Op. Att’y Gen. 242 (1881).

158. The Army intervened in domestic affairs 125 times from 1877-1945. LAURIE, *supra* note 43, at 421. In addition to the Lincoln County War, described previously in note 153, in April 1878 troops were used in Hastings, Nebraska, as a show of force to prevent a potential jailbreak. The local Army commander initiated action on his own authority under the “emergency” authority of General Order No. 71. *See id.* at 72-74; *supra* note 153 (discussing General Order No. 71). Additional interventions occurred in Arizona territory (1881-1882), Utah (1885), Wyoming (1892 and 1895), Washington territory (1885-1886), and Oklahoma (1894). *See* LAURIE, *supra* note 43, at 73-113.

159. There were, however, some very significant exceptions to the general rule of direct presidential involvement under the “Direct Access Policy” from 1917-1921. LAURIE, *supra* note 43, at 230-32, 259; *see infra* notes 185-89 and accompanying text.

before troops intervened;¹⁶⁰ and the Army stayed out of the South.¹⁶¹ The federal response to the Chicago Pullman strikes in 1894,¹⁶² however, highlighted the Act's negligible impact on the almost unchecked scope of presidential authority as Commander in Chief.

At the time of the strike, the U.S. Attorney General, Richard Olney, was on the payroll of a major railroad, and he moved aggressively to involve the federal government in the dispute.¹⁶³ His actions included ordering the U.S. Marshal to deputize some 3000 representatives of the railroad companies, including a large number of unemployed thugs and drunks, to increase tensions.¹⁶⁴ Acting largely on a pretext, Olney then convinced President Cleveland on 3 July 1894 to dispatch federal troops to Illinois over the strong objection of the governor and before the city's mayor had even asked for state assistance.¹⁶⁵

Initially, the troops were broken into small detachments assigned to assist police squads and marshals' posses throughout the city.¹⁶⁶ Placing

160. See *supra* notes 108-09 and accompanying text (discussing RS 5300 and other related statutes). The requirement to issue a proclamation became, in many cases, more of a formality than a genuine legal hurdle. For example, during a 1892 Army intervention to quell labor unrest in Idaho, the presidential proclamation neglected to issue a formal cease and desist order as required by law. See LAURIE, *supra* note 43, at 155-57. Four days after the intervention began, the Secretary of War directed the local Army commander to issue the appropriate proclamation on 17 July. *Id.* at 159. Although subsequent use of the troops in Idaho as a posse comitatus exceeded the scope of their earlier orders, the President ratified these actions on 2 August. See *id.* at 160.

161. See *supra* note 158.

162. Responding to labor unrest, George Pullman closed his manufacturing plant in May 1894. The resulting strike involved the plant workers and the Railway Union. A key tactic of the striking railway workers was to not handle any Pullman cars on any train. The railroads, acting through its group, the General Manager's Association, sought to provoke federal intervention. They did so by placing Pullman cars on as many trains as possible and avoiding calling on municipal authorities or the state militia between 26 June and 2 July. LAURIE, *supra* note 43, at 134.

163. *Id.* at 134, 137. Attorney General Olney reportedly received \$10,000 per year from the railroad, while his federal salary was \$8000 per year. *Id.* at 134-35.

164. *Id.* at 136.

165. *Id.* at 138, 144. Over 4700 state National Guard troops were available to assist. At the peak of the riot, about 4000 were involved in quelling the disorder. *Id.* at 145. This is not the only time that the Cleveland administration used a pretext to justify federal intervention in labor disputes. Army troops occupied Coeur d'Alene, Idaho, from July to September 1894 to protect unthreatened railroads and monitor tranquility. Earlier violence had subsided before the regulars arrived without even the call-up of state troops. Local officials pressured the governor to request federal troops, and keep them in place, to break the union. See *id.* at 163-65.

small detachments of troops under the ostensible command of local civilians to help enforce the law was essentially using the Army as a posse comitatus, albeit upon the general order of the President instead of the command of the local marshal. The governor complained bitterly about the unilateral federal action and pointed out that the President had neglected to issue the necessary cease and desist proclamation required under RS 5300.¹⁶⁷ In the end, however, the federal troops were a valuable asset in suppressing the riots, and there was no congressional outrage about the arguable violation of the Act and the role of the administration in creating the crisis.¹⁶⁸ It appeared that the Act did not, at least in cases involving interstate commerce, limit the President's authority to use and deploy troops domestically as he saw fit.¹⁶⁹

The only domestic use of troops that provoked even a partial congressional response concerned President McKinley's deployment of 500 troops to Coeur d'Alene, Idaho, from May 1899 to April 1901 at the governor's request. The situation leading up to this deployment was similar to the radical Reconstruction period in the South in several respects. The underlying tension was about political and social power as the miners

166. *Id.* at 140-41.

167. *Id.* at 144 & n.28. The proclamation was issued on 9 July. *Id.*

168. A similar set of facts developed in Hammond, Indiana. Attorney General Olney urged the governor to request Army assistance to protect against domestic violence. When the governor declined, the Secretary of War ordered troops into the area to remove obstructions to the mail and interstate commerce on 8 July 1894, one day before the President issued his proclamation. Late in the afternoon of 8 July, federal troops, under the command of Captain W.T. Hartz, fired indiscriminately into a crowd attempting to overturn a rail car. The shots wounded over a dozen individuals and killed an innocent bystander. The mayor protested the dispatch of federal troops to the town, and the local magistrate swore out arrest warrants for the troops involved in the shooting. Neither military nor civil officials, however, pressed the case. *Id.* at 149-50 & nn.28, 41, 43.

169. Furman, *supra* note 43, at 90. The prosecution of the labor leaders led to *In re Debs*, 158 U.S. 564 (1895). While the defense never raised the issue of the Posse Comitatus Act in *Debs*, the Court approved the President's use of troops without congressional authority in sweeping language, stating:

The entire strength of the nation may be used to enforce in any part of the land the full and free exercise of all national powers and the security of all rights entrusted by the Constitution to its care. The strong arm of the national government may be put forth to brush away all obstructions to the freedom of interstate commerce or the transportation of the mails. If the emergency arises, the army of the Nation, and all its militia, are at the service of the Nation to compel obedience to its laws.

Id. at 582.

struggled with the entrenched power structure represented by the anti-labor mining companies and state government. At the local level, miners put men into office sympathetic to the labor union. Either as result of the citizens' natural sympathies with the labor unions, or threats from a "secret clan," local efforts to prosecute violence by elements of the labor movement had met with little success over the years.¹⁷⁰

Matters came to a head in April 1899 when a large mining operation, in apparent violation of state law, announced that it would fire all union members and refused to arbitrate the dispute.¹⁷¹ A large piece of company equipment was blown up, and two employees were killed during a gunfight with company guards.¹⁷² President McKinley sent in regular troops at the request of the governor to restore order. Either unaware or unconcerned about the statutory requirements, the President failed to issue the proclamation required by RS 5300.¹⁷³ Without a proclamation, the subsequent Army actions were legally indistinguishable from many uses of troops during the radical Reconstruction period.

Violence subsided before the federal troops arrived because the perpetrators fled from the region. The troops, therefore, were used as part of a law enforcement dragnet to apprehend "suspects" identified by state officials.¹⁷⁴ In one instance, about 150 Army troops accompanied by four state deputies arrested the entire male population of one town, around 300 men in all.¹⁷⁵ In total, the Army helped state officials arrest and detain, without legal process, over 1000 union members and sympathizers, and it placed many under Army guard for up to four months.¹⁷⁶ The overall mil-

170. COEUR D'ALENE LABOR TROUBLES, H.R. REP. NO. 1999, at 28 (1900), *microformed on* CIS No. 4027, Fiche 8-9 (Cong. Info. Serv.).

171. *Id.* at 130-31.

172. LAURIE, *supra* note 43, at 166.

173. *Id.*; *see also supra* text accompanying notes 108-09. Revised Statute 5300 stated: "Whenever, in the judgment of the President, it becomes necessary to use military forces under this Title, the President shall forthwith, by proclamation, command the insurgents to disperse and retire peaceably to their respective abodes, within a limited time." REVISED STATUTES, *supra* note 108, at 1030. The Title referred to by RS 5300 is the law concerning insurrections, such as RS 5297-5299. *See id.*

174. H.R. REP. NO. 1999, at 8, 10, 126; LAURIE, *supra* note 43, at 171.

175. H.R. REP. NO. 1999, at 127. The Democrats questioned the legal status of the "so-called" state deputies due to the irregular nature of their appointments and the questionable authority of the person who made them. *Id.*; *see, e.g., id.* at 129-30 (legal status of Bartlett Sinclair). The Democrats also noted that federal troops must have made all arrests during a mission to pursue suspects into Montana since the Idaho state deputies had no authority to make arrests outside of Idaho. *Id.* at 128.

itary commander also helped the state government and mining companies illegally break the unions by instituting a system of “yellow dog” labor contracts that made workers promise not to join a union as a condition of employment.¹⁷⁷

In late 1899, the House Committee on Military Affairs investigated the legality of the Army’s actions. The June 1900 report split along party lines, with the Republican majority finding no fault with the Republican President or the actions of the Army commander.¹⁷⁸ In a bold display of misdirection, the majority brushed aside the President’s failure to issue a proclamation under RS 5300 by reinventing the statute’s text. According to the majority, the RS 5300 proclamation was only necessary when the President imposed martial law.¹⁷⁹ The troop deployment was, therefore, perfectly legal under the anti-insurrection laws at RS 5297-5298.¹⁸⁰

While sharply critical, the Democratic minority agreed that the initial deployment was lawful.¹⁸¹ The Democrats branded subsequent actions by the troops and President, however, as “reprehensible, violative of the liberty of the citizen, and totally unwarranted by the laws and Constitution of the United States.”¹⁸² Surprisingly, the Democrats made absolutely no mention of the Posse Comitatus Act. Either Congress had already forgotten about it entirely, or Congress agreed that the Act only undid the Cushing Doctrine. Clearly, Congress did not see the Act as imposing any meaningful legal limit on the Commander in Chief’s domestic use of the armed forces.

Subsequent Presidents of the early twentieth century generally complied with the various statutes regarding domestic employment of military

176. LAURIE, *supra* note 43, at 170-71, 75. Only fourteen ever went to trial; eleven were convicted. *Id.* at 175.

177. *Id.* at 173. The administration eventually rebuked the military commander for this action. *Id.*

178. H.R. REP. NO. 1999, at 124-25; LAURIE, *supra* note 43, at 176.

179. H.R. REP. NO. 1999, at 1, 11. This mischaracterization of RS 5300 was probably deliberate since the majority report mentions the correct use of the proclamation in accordance with RS 5300 when describing a 1892 intervention in the same area. *See id.* at 62; *see also supra* text accompanying notes 108-09 (describing RS 5300, which has nothing to do with a declaration of martial law).

180. H.R. REP. NO. 1999, at 10-11; *see supra* notes 108-09 and accompanying text (explaining the legal regime then in place concerning domestic employment of land and naval forces to suppress insurrections and enforce the laws).

181. H.R. REP. NO. 1999, at 131-32.

182. *Id.* at 132.

force.¹⁸³ Presidents Theodore Roosevelt and Taft closely adhered to the statutory requirements, issued the necessary proclamations required by RS 5300, and kept the Army neutral in what were mostly labor disputes. President Wilson began his administration in a similar manner.¹⁸⁴

In May 1917, however, Secretary of War Newton Baker unilaterally instituted a “Direct Access Policy” that suspended application of the Posse Comitatus Act and all other statutes governing the domestic employment of troops.¹⁸⁵ Under this policy, local and state officials could request and receive troops directly from regional Army commanders without any higher-level approvals or issuance of a presidential cease and desist proclamation.¹⁸⁶ Additionally, Secretary Baker instructed the regional Army commanders to allow their subordinates to respond directly to requests for federal military aid, and troops were authorized to make arrests.¹⁸⁷ In essence, Secretary Baker reestablished key parts of the Cushing Doctrine for nearly four and a half years.¹⁸⁸

Acting under the Direct Access Policy, Army troops intervened in twenty-nine domestic disorders between July 1917 and September 1921. The President issued the required proclamation in only one instance. Employers and local politicians used Army troops, although officially neutral, to break strikes; disperse crowds and demonstrations; prevent labor meetings; stifle political dissent; and arrest, detain, and imprison workers without the right of habeas corpus.¹⁸⁹

While labor leaders and union members certainly objected to these uses of federal troops, the Congress and general public appeared to accept the Direct Access Policy as a necessary national security measure. Presi-

183. LAURIE, *supra* note 43, at 179-92.

184. *Id.* at 203, 221.

185. *Id.* at 230. The Direct Access Policy was designed to solve the problem in many states in which the National Guard had been federalized and sent out-of-state in support of World War I. *Id.* at 229-30.

186. *Id.* at 230.

187. *Id.* at 231.

188. *Id.* at 252; *see supra* section III.B. The Army Judge Advocate General articulated that the Posse Comitatus Act did not intend to limit the employment of the military forces of the nation in meeting an attack on the very nation itself—a duty that rests primarily on the military rather than on civil power. LAURIE, *supra* note 43, at 231 (quoting Glasser Report, Lumber, at 7e-7f; Memorandum, The Judge Advocate General, to Attorney General, subject: Opinion on Legal Theory on Use of Troops in Civil Areas During War (12 Mar. 1917)).

189. LAURIE, *supra* note 43, at 232, 253.

dent Harding finally ended the Direct Access Policy in September 1921.¹⁹⁰ He did not do so, however, under any particular congressional pressure or concern that military officers were going to be prosecuted for violating the Posse Comitatus Act. The administration's move back to "normalcy" was internally driven.¹⁹¹ Yet again, it appeared that the Posse Comitatus Act imposed no serious legal limit upon the President's, or his administration's, authority to use Army troops internally, at least during or near a period of national emergency or conflict.

In addition to these presidential actions, Congress also moved decisively to increase the military's direct role in certain types of law enforcement.

V. Congress Steadily Increases the Military's Role in Law Enforcement¹⁹²

Within a generation of the Act's passage, Congress began a general trend to increase military participation in domestic law enforcement. It did so, however, without articulating an overall plan, theory, or theme concerning when increased military involvement in civil affairs was desirable. Moreover, for the first eighty-seven years, Congress did not discuss the

190. *Id.* at 232.

191. *Id.* at 231-32, 253, 259.

192. This section covers only a sample of the many instances where Congress provided explicit domestic law enforcement authority to the DOD armed forces. The cited laws are some of the most relevant to the current debate over the military's role in homeland security. Moreover, the DOD does not currently recognize the authority contained in most of these laws. See DOD DIR. 5525.5, *supra* note 7.

In a few instances, Congress also took away some authority. See *infra* note 454 and accompanying text (discussing a 1909 congressional effort to decrease the role of the armed forces in a civil law enforcement role). Additionally, part of the 1957 Civil Rights Act repealed the President's authority to use the land or naval forces to aid in the enforcement of an 1866 civil rights law (RS 1989). See Act of Sept. 9, 1957, Pub. L. No. 85-315, pt. III, § 122, reprinted in 1957 U.S.C.C.A.N. 707. The legislative history does not discuss this change; however, the 1957 Civil Rights Act contained four major provisions to expand the role of the federal government in civil rights. Namely, the law created a Commission on Civil Rights, established a Civil Rights Division in the Department of Justice, provided civil remedies against conspiracies depriving a person of civil rights, and provided a civil remedy for the Attorney General's use in protecting voting rights. *Id.* pts. I-IV, reprinted in 1957 U.S.C.C.A.N. 703-08; H.R. REP. No. 291, at 1966-76. It may be, therefore, that military involvement was no longer considered necessary due to the increased role of federal civil authorities. Opponents may also have quietly inserted the provision to undercut the law's practical impact.

Act. This leaves a disconnected series of apparently ad hoc policy decisions that are, nonetheless, important to an understanding of the law concerning the domestic employment of DOD forces.

A. Rivers and Harbors Act of 1894 (33 U.S.C. § 1)

In the late nineteenth century, Congress began to increase the Army's direct role in regulating civilian behavior and enforcing its new regulations. Section 4 of the Rivers and Harbors Act of 1894 vested in the Secretary of War the authority "to prescribe such rules and regulations for the use, administration, and navigation of any or all canals and similar works of navigation that now are, or that hereafter may be, owned, operated, or maintained by the United States as in his judgment the public necessity may require."¹⁹³ This gave the Secretary of War the authority to control and supervise the navigable waters of the United States.¹⁹⁴ Initially, the federal government opined that enforcement of this authority would be through injunctions if the unlawful action had not already occurred, or through criminal proceedings if the unlawful activity had occurred.¹⁹⁵ In 1902, however, the "power and authority to swear out process, and arrest and take into custody" was given to, among others, "assistant engineers and inspectors employed under them by authority of the Secretary of War."¹⁹⁶

The Army implemented part of this regulatory authority by establishing permanent exclusion zones ("restricted areas") around many military facilities.¹⁹⁷ Restricted areas generally provide security for government property, protect the public from risks arising from the government's use of a water area, or both.¹⁹⁸ Typically, the military official responsible for the facility has primary responsibility for enforcement of the regulation.¹⁹⁹

193. See Act of Aug. 17, 1894, ch. 299, § 4, 28 Stat. 362 (codified as amended at 33 U.S.C. § 1 (2000)).

194. See *Dams Across the Rio Grande*, 21 Op. Att'y Gen. 518 (1897).

195. See *id.*

196. Rivers and Harbors Act of 1899, ch. 425, § 17, 30 Stat. 1153 (codified as amended at 33 U.S.C. § 413). This enforcement system was made applicable to the authority in the Rivers and Harbors Act of 1894 by the Rivers and Harbors Act of 1902, ch. 1079, § 6, 32 Stat. 331. *But see* 33 U.S.C. § 413 (does not list 33 U.S.C. § 1 as a statute coming under 33 U.S.C. § 413's enforcement mechanism).

197. 33 C.F.R. pt. 334 (LEXIS 2003).

198. *Id.* § 334.2(b).

199. See, e.g., *id.* §§ 334.275 (Air Force enforcement), 334.280 (Army enforcement), 334.290 (Navy enforcement).

B. Espionage Act of 1917

During World War I, Congress expressly authorized the President to use all land or naval forces to take direct law enforcement actions in support of new authority granted to the Coast Guard under the Espionage Act of 1917.²⁰⁰ One purpose of the Espionage Act was to protect merchant shipping from sabotage.²⁰¹ The Espionage Act authorized the Secretary of the Treasury,²⁰² or the Secretary of the Navy when the Coast Guard is operating as part of the Navy,²⁰³ subject to approval by the President, to issue regulations:

govern[ing] the anchorage and movement of any . . . vessel[, foreign or domestic,] in the territorial waters of the United States, to inspect such vessel at any time, to place guards thereon, and, if necessary in his opinion in order to secure such vessels from damage or injury, or to prevent damage or injury to any harbor or waters of the United States, or to secure the observance of the rights and obligations of the United States, [to] take[, by and with the consent of the President,] for such purposes full possession and control of such vessel and remove therefrom the officers and crew thereof, and all other persons not specially authorized by him to go or remain on board thereof[.]²⁰⁴

The triggering event for the Espionage Act is a proclamation or Executive Order declaring that “a national emergency [exists] by reason of actual or threatened war, insurrection, or invasion, or disturbance or threatened disturbance of the international relations of the United States.”²⁰⁵ Congress has explicitly stated that “[t]he President may employ such departments, agencies, officers, or instrumentalities of the United States as he may deem necessary to carry out the purpose of this title.”²⁰⁶ The issu-

200. Act of June 15, 1917, Pub. L. No. 65-24, tit. II, ch. 30, 40 Stat. 217-31 (codified as amended at 50 U.S.C. § 191 (2000)).

201. See WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE, CIVIL LIBERTIES IN WARTIME* 173 (1998).

202. The Espionage Act initially authorized the Secretary of the Treasury to issue regulations. When the Coast Guard was transferred to the Department of Transportation, the authority to issue regulations was transferred to the Secretary of Transportation. See Department of Transportation Act, Pub. L. No. 89-670, § 6(b)(1), 80 Stat. 931, 938 (1966).

203. See 50 U.S.C. § 191a.

204. *Id.* § 191 (first paragraph).

205. *Id.* A 1996 Amendment permits Espionage Act actions upon the Attorney General’s determination of an actual or anticipated mass migration requiring a federal response. See Pub. L. No. 104-208, § 649, 110 Stat. 3009-711 (1996).

ance of a presidential proclamation or Executive Order invoking the Espionage Act has the effect of transferring all authorities to regulate the anchorage and movement of vessels, except the authorities codified in 33 U.S.C. § 3 and 14 U.S.C. § 91, to the Secretary of the department in which the Coast Guard is operating.²⁰⁷ Therefore, upon the invocation of the Espionage Act, all branches of the U.S. armed forces can enforce Espionage Act regulations and all regulations pertaining to vessel operations.

The potential scope of this military law enforcement role is very broad. The Espionage Act was the primary authority used to control the movement and anchorage of vessels during World War II. Several regulations were issued during World War II under the authority of the Espionage Act.²⁰⁸ Following the presidential proclamation of a national emergency on 27 June 1940, the Secretary of the Treasury first issued regulations implementing the Espionage Act on 2 July 1940.²⁰⁹ Subsequent to this, the

206. 50 U.S.C. § 194.

207. *See* Movement of Vessels in St. Mary's River, 33 Op. Att'y Gen. 203 (1922). The basis of this opinion was that when the Espionage Act is invoked, its regulatory authority supercedes other authorities. 33 U.S.C. § 3, however, was enacted during World War I after President Wilson had invoked the provisions of the Espionage Act. *See* Act of July 9, 1918, ch. 143, subch. XIX, §§ 1-4, 40 Stat. 892, 893. Thus, Congress could not have intended that invocation of the Espionage Act would supercede the authority to regulate vessels in the area around ranges. In addition, the authority to issue regulations around ranges was not viewed as being constrained to the territorial waters. *See Movement of Vessels in St. Mary's River*, 33 Op. Att'y Gen. at 203. The then Secretary of War's (now Secretary of the Army's) authority to issue regulations for ranges, *see* 33 U.S.C. § 3 (2000), was viewed as a wholly separate authority not overtaken by the Secretary of the Treasury upon invocation of the Espionage Act. *See* Letter from Coast Guard Headquarters to District Coast Guard Officer, 13th Naval District, Seattle, Washington (July 14, 1943), *excerpted in* U.S. COAST GUARD, LAW BULL. No. 86, at 3 (1943). Similarly, 14 U.S.C. § 91 was enacted shortly before World War II, *see* Act of Nov. 15, 1941, ch. 471, § 1, 55 Stat. 763, after the President had already invoked the Espionage Act. Following the same logic, the authority in 14 U.S.C. § 91 is not overtaken upon the invocation of Espionage Act authority. *See infra* notes 233-34 and accompanying text.

208. *See, e.g.,* Security of Ports and the Control of Vessels in the Navigable Waters of the United States, 7 Fed. Reg. 8026 (Oct. 10, 1942) (to be codified at 33 C.F.R. pt. 6) (amending, consolidating, and reissuing 33 C.F.R. pts. 6-7, 9 into a new 33 C.F.R. pt. 6) (these regulations were also issued under the authority of 50 U.S.C. § 191c (Act of Nov. 15, 1941)); *see also* U.S. DEP'T OF TREASURY, *Rules Are Adopted Governing the Anchorage and Movements of Vessels—To Be Enforced by Captains of the Port*, 1 COAST GUARD BULL. No. 18, at 141 (1940) [hereinafter CG BULL. I-18]; U.S. DEP'T OF TREASURY, *Coast Guard Begins Enforcement of New Regulations Governing Vessel Movement in American Ports*, 1 COAST GUARD BULL. No. 29, at 227-28 (1941) [hereinafter CG BULL. I-29].

209. *See* Regulations for the Control of Vessels in the Territorial Waters of the United States, 5 Fed. Reg. 2442 (July 2, 1940).

Coast Guard issued regulations amending and expanding these regulations.²¹⁰

The Coast Guard regulations issued in October 1942 took the form of rules regarding: boarding and searching of vessels;²¹¹ possession and control of foreign or domestic vessels;²¹² movement of vessels, including, supervision of vessels, identification requirements, departure licenses, special rules of local waters, individual licenses, general licenses, departure permits, crew lists, and “restricted areas” around bridges;²¹³ anchorage conditions and areas;²¹⁴ anchorage of vessels carrying explosives;²¹⁵ loading, unloading, and movement of explosives and inflammable material;²¹⁶ use and navigation of waters emptying into the Gulf of Mexico by vessels having explosives or other dangerous articles on board;²¹⁷ specific anchorage areas;²¹⁸ and general licenses.²¹⁹

The most recent use of Espionage Act authority followed the shooting down of two Brothers to the Rescue aircraft by Cuban armed forces. The presidential proclamation of a national emergency addressed the distur-

210. *See* Anchorage and Movements of Vessels and the Lading and Discharging of Explosive or Inflammable Material or Other Dangerous Cargo, 5 Fed. Reg. 4401 (Nov. 7, 1940) (codified at 33 C.F.R. pt. 7); Regulations for the Control of Vessels in the Territorial Waters of the United States, 6 Fed. Reg. 5221 (Oct. 14, 1941) (amending 33 C.F.R. pt. 6); Anchorage and Movements of Vessels and the Lading and Discharging of Explosive or Inflammable Material or Other Dangerous Cargo, 6 Fed. Reg. 5255 (Oct. 15, 1941) (amending 33 C.F.R. pt. 7); General License for Movements of Vessels Within, or Departure from, Territorial Waters, 6 Fed. Reg. 5342 (Oct. 21, 1941) (codified at 33 C.F.R. pt. 9) (establishing general licenses); General Licenses for Movements of Vessels Within, or Departure from, Territorial Waters, 7 Fed. Reg. 43 (Jan. 1, 1942) (revoking the general license for the waters of the West Passage of Narragansett Bay and the Sakonnet River); General Licenses for Movements of Vessels Within, or Departure from, Territorial Waters, 7 Fed. Reg. 4343 (June 9, 1942) (establishing general license number 2); Regulations for the Security of Ports and the Control of Vessels in the Navigable Waters of the United States, 7 Fed. Reg. 8564 (Oct. 23, 1942) (amending 33 C.F.R. pt. 6).

211. *See* 33 C.F.R. § 6.6 (1942); Security of Ports and the Control of Vessels in the Navigable Waters of the United States, 7 Fed. Reg. 8026 (Oct. 10, 1942).

212. *See* 33 C.F.R. § 6.7.

213. *Id.* §§ 6.13–.21.

214. *See id.* §§ 6.25–.37.

215. *See id.* §§ 6.50–.56.

216. *See id.* §§ 6.75–.85.

217. *See id.* pt. 6, subpt. B.

218. *See id.* pt. 6, subpt. C.

219. *See id.* pt. 6, subpt. D (based on regulations adopted on 10 October 1942, *see* Regulations for Security of Ports and the Control of Vessels in the Navigable Waters of the United States, 7 Fed. Reg. 8065 (Oct. 10, 1942)).

bances or threatened disturbances of U.S. international relations, and it authorized the regulation of the anchorage and movement of domestic and foreign vessels.²²⁰ These regulations took the form of a security zone²²¹ requiring certain size vessels to obtain permission from the Coast Guard Captain of the Port (COTP) before departing the zone with the intent to enter Cuban territorial waters.²²² These regulations gave the COTP the power to exercise all Espionage Act authority, including: issuing orders to control the launching, anchorage, docking, mooring, operation, and movement of vessels; removing people from vessels; placing guards on vessels; and taking partial or full control of a vessel.²²³ As previously noted, all branches of the U.S. armed forces may assist the COTP in enforcement of this regulation. As with other regulations issued under the Espionage Act, a violation of the regulations is a federal felony punishable by ten years in jail, a \$250,000 fine, and vessel seizure and forfeiture.²²⁴

C. 33 U.S.C. § 3 (Gunnery Ranges)

During World War I, Congress passed what is now 33 U.S.C. § 3, which granted the Army Corps of Engineers the authority to issue regulations to prevent injuries from target practice at gunnery ranges.²²⁵ Because this authority was passed while the Espionage Act was in effect, the Espi-

220. Proclamation No. 6867, 61 Fed. Reg. 8843 (Mar. 5, 1996). President Bush continued this authority on 26 February 2002. *See* 67 Fed. Reg. 9387 (Feb. 28, 2002).

221. A security zone is a designated area of land, water, or land and water from which persons and vessels are either prohibited or subject to various operating restrictions. *See* 33 C.F.R. §§ 6.01-5, 6.04-6, 165.30, 165.33 (LEXIS 2003). While the concept of a security zone can be traced back to the original Espionage Act, the first recorded use of the term “security zone” was in the 1965 amendments to the Magnuson Act regulations at 33 C.F.R. part 6. *See* Exec. Order No. 11,249, Amending Regulations Relating to the Safeguarding of Vessels, Harbors, Ports, and Waterfront Facilities of the United States, 30 Fed. Reg. 13,001 (Oct. 13, 1965); *see also supra* section III.B.

222. *See* 33 C.F.R. § 165.T07-013 (1998) The zone was narrowly tailored with respect to vessels of certain sizes and geographic scope. *See id.*

223. *See* 50 U.S.C. § 191 (2000); 33 C.F.R. § 165.T07-013 (discussing the COTP’s authority).

224. 18 U.S.C. § 3571 (2000); 50 U.S.C. § 192.

225. *See* Act of July 19, 1918, ch. 143, subch. XIX, §§ 1-4, 40 Stat. 892 (presently codified at 33 U.S.C. § 3 (2000)).

onage Act does not supercede this statute.²²⁶ The enforcement authority here is very clear as well. The Act explicitly states:

To enforce the regulations prescribed pursuant to this section, the Secretary of the Army may detail any public vessel in the service of the Department of the Army, or upon the request of the Secretary of the Army, the head of any other department may enforce, and the head of any such department is authorized to enforce, such regulations by means of any public vessel of such department.²²⁷

The plain language of the statute indicates Congress's intent to use the Army and any other department that has public vessels to enforce regulations issued under this authority.

One notable use of this authority is the "danger zone" established as part of the bombing and gunnery range on the eastern portion of Vieques Island, Puerto Rico.²²⁸ Persons and vessels are prohibited from the waters off Vieques during firing exercises.²²⁹ Violators are subject to arrest and imprisonment for up to six months.²³⁰ They may also be prosecuted for violating the federal trespass statute at 18 U.S.C. § 1382.²³¹ The Navy is primarily responsible for enforcing the danger zone regulations.²³²

D. Act of 15 November 1941 (14 U.S.C. § 91)

On the eve of World War II, Congress granted the Navy additional authority to enforce a new national security law in conjunction with the Coast Guard. The new authority was initially redundant since the President invoked the provisions of the Espionage Act for the "Control of Vessels in Territorial Waters of the United States" on 27 June 1940.²³³ As in World War I, once the President invoked the Espionage Act, only the

226. *See supra* note 207.

227. 33 U.S.C. § 3.

228. 33 C.F.R. § 334.1470 (LEXIS 2003). A danger zone is a water area used for target practice or other especially hazardous operations for the armed forces. *Id.* § 334.2(a).

229. *Id.* § 334.1470(b).

230. *See* 33 U.S.C. § 3 (third paragraph).

231. *See* *United States v. Zenon-Rodriguez*, No. 02-1207, 2002 U.S. App. LEXIS 7718, at *4-5 (1st Cir. Apr. 29, 2002); *United States v. Ayala*, No. 01-2148, U.S. App. LEXIS 7716, at *11 (1st Cir. Apr. 29, 2002).

232. 33 C.F.R. § 334.1470(b)(2).

authority in 33 U.S.C. § 3 to issue regulations to prevent injury from gunnery ranges remained an independent authority to govern the anchorage and movement of vessels.²³⁴

Congress probably believed that another, more specific, independent authority was needed as it tasked the Coast Guard to control the anchorage and movement of vessels to ensure the safety of U.S. naval vessels on 15 November 1941.²³⁵ Unlike the Espionage Act, the authority granted the Coast Guard in the Act of 15 November 1941 was not limited to periods of national emergency. Thus, the Coast Guard's (and Navy's) permanent authority to protect naval vessels was authority separate and apart from the Espionage Act.²³⁶

The Act of 15 November 1941²³⁷ stated:

The captain of the port, Coast Guard district commander, or other officer of the Coast Guard designated by the Commandant thereof, or the Governor of the Panama Canal in the case of the territory and waters of the Canal Zone, shall so control the anchorage and movement of any vessel, foreign or domestic, in the territorial waters of the United States, as to insure the safety or security of such United States naval vessels as may be present in his jurisdiction. In territorial waters of the United States where immediate action is required, or where representatives of the Coast Guard are not present, or not present in sufficient force to exercise effective control of shipping as provided herein, the

233. Proclamation No. 2412, 3 C.F.R. § 164 (1938-1943). During World War II, the Espionage Act was the primary statutory basis of the regulations for the control of vessels in U.S. waters. *See, e.g.*, Security of Ports and the Control of Vessels in the Navigable Waters of the United States, 7 Fed. Reg. 8026 (Oct. 10, 1942); CG BULL. I-18, *supra* note 208; CG BULL. I-29, *supra* note 208. *Cf.* Movement of Vessels in St. Mary's River, 33 Op. Att'y Gen. 203 (1922) (concluding that upon invocation of the Espionage Act, the Espionage Act supercedes the various authorities over the anchorage and movement of vessels transferred to the Secretary of the Treasury (now Secretary of Transportation) for the duration of the emergency, with the exception of regulations for ranges).

234. *See supra* notes 226-27 and accompanying text.

235. *See* Act of Nov. 15, 1941, ch. 471, § 1, 55 Stat. 763 (current version at 14 U.S.C. § 91 (2000)). The entire Coast Guard was moved under the control of the Navy on 1 November 1941. *See* Exec. Order No. 8929, 6 Fed. Reg. 5581 (Nov. 4, 1941). Earlier Executive Orders had moved specific portions of the Coast Guard to the Navy. *See, e.g.*, Exec. Order No. 8767, 6 Fed. Reg. 2743 (June 6, 1941); Exec. Order No. 8895, 6 Fed. Reg. 4723 (Sept. 16, 1941); Exec. Order No. 8851, 6 Fed. Reg. 4179 (Aug. 20, 1941); Exec. Order No. 8852, 6 Fed. Reg. 4180 (Aug. 20, 1941).

senior naval officer present in command of any naval force may control the anchorage or movement of any vessel, foreign or domestic, to the extent deemed necessary to insure the safety and security of his command.²³⁸

The Act of November 15 was viewed as a broad grant of authority to monitor and control vessel operations and, therefore, was used as authority to issue regulations during World War II.²³⁹ For example, the regulations regarding the “Security of Ports and the Control of Vessels in the Naviga-

236. This argument is based on: (1) the plain language of the Espionage Act and the Act of 15 November 1941; and (2) historical context. The plain language of the Espionage Act focuses on controlling vessels and controlling access to vessels to “secure such vessels from damage or injury, prevent damage or injury to any harbor or waters of the United States, or to secure the rights or obligations of the United States.” 50 U.S.C. § 191 (2000). Nothing in the plain language specifically identifies naval vessels as a protected entity. The Act of 15 November 1941 was enacted after the presidential proclamation of an emergency; therefore, the Coast Guard already had the authority to control the anchorage and movement of vessels under Espionage Act authority. Consequently, unless Congress was concerned that the Espionage Act did not cover naval vessels, the Act of 15 November 1941 would have been unnecessary. *Cf. supra* text accompanying note 226 (making the same argument for why the Navy has authority to regulate the areas around ranges even after the invocation of the Espionage Act).

The legislative history is sparse in this area. During World War II, however, the Coast Guard concluded that local officials could issue regulations under either the Espionage Act or the Act of 15 November 1941 to protect a submarine net tender. *See* Letter from Coast Guard Headquarters to District Coast Guard Officer, 3d Naval District (Jan. 13, 1943), *excerpted in* U.S. COAST GUARD, LAW BULL. No. 80, at 5 (1943).

237. Act of Nov. 15, 1941, ch. 471, § 1, 55 Stat. 763 (originally codified at 50 U.S.C. § 191c). Note that this is a separate statute and not a subpart of 50 U.S.C. § 191. Section 2 of the Act was codified as 50 U.S.C. § 191a (declaring that the powers vested in the Secretary of the Treasury by the Espionage Act will transfer to the Secretary of the Navy when the Coast Guard operates as part of the Navy); Section 3 of the Act amended 50 U.S.C. § 192 (deleting a reference to the Secretary of the Treasury and Governor of the Panama Canal); and Section 4 of the Act was codified as 50 U.S.C. § 191b (stating that nothing in the Act affects the power of the Governor of the Panama Canal). The Act of 15 November 1941 was also codified, for a time, in 14 U.S.C. § 48a. With the recodification of Title 14 in 1949, after the Coast Guard returned to the Department of the Treasury, 50 U.S.C. § 191c was deleted, but the authority was retained and transferred to 14 U.S.C. § 91. The reason the recodification removed the authority from its previous location in Title 50 where it was with the Espionage Act statutes is unknown. While the text of the Act of 4 August 1949 does not explain why this statute was moved, the purpose of the Act was to “revise, codify, and enact into law, Title 14 of the United States Code, entitled ‘Coast Guard.’” Act of Aug. 4, 1949, 63 Stat. 495.

238. Act of Nov. 15, 1941, ch. 471, § 1.

239. *See, e.g.,* Security of Ports and the Control of Vessels in the Navigable Waters of the United States, 7 Fed. Reg. 8026 (Oct. 10, 1942).

ble Waters of the United States,” issued on 10 October 1942, were issued, in part, under the authority of the Act of 15 November 1941.²⁴⁰ The regulations specifically authorized the senior naval officer present in command of any naval force to “control the anchorage or movement of any vessel . . . to the extent he deems necessary to insure the safety and security of his command.”²⁴¹ The triggering events for this power were the need for immediate action and that representatives of the Coast Guard were “not present, or not present in sufficient force to exercise effective control of shipping.”²⁴²

Following the expiration of Espionage Act authority after the war, the basis for creating protective zones surrounding Navy vessels moored at Navy installations reverted to peacetime authorities under 33 U.S.C. §§ 1 and 471.²⁴³ The statutory provisions currently located at 14 U.S.C. § 91, however, remained a basis to create protective zones around Navy vessels away from Navy installations.²⁴⁴

On 15 June 2002, the Coast Guard issued regulations implementing 14 U.S.C. § 91.²⁴⁵ The regulations establish permanent exclusion zones around naval vessels within the navigable waters of the United States and implement other security measures. A violation of the regulations is a Class D felony.²⁴⁶ When necessary, the senior naval officer present in command has full authority to enforce the regulation and may directly assist Coast Guard enforcement personnel. The senior naval officer present in command may also designate an “official patrol” to help keep vessels out of the exclusion area and take other enforcement actions.²⁴⁷

E. Magnuson Act (9 August 1950)

At the beginning of the Cold War, Congress expressly authorized the President to use all of the military services to take direct law enforcement actions in support of new authority granted to the Coast Guard in the Magnuson Act. The Magnuson Act authorizes the President to issue regulations:

(a) to govern the anchorage and movement of any foreign-flag vessels in the territorial waters of the United States, to inspect

240. See *id.* For an overview of these regulations, see *supra* notes 211-19 and accompanying text.

241. 33 C.F.R. § 6.4 (1942).

242. *Id.*

243. See Letter to Commander, 3d District (Nov. 30, 1948), *excerpted in* U.S. COAST GUARD, LAW BULL. NO. 151, at 3 (1948).

such vessels at any time, to place guards thereon, and, if necessary in his opinion in order to secure such vessels from damage

244. *See* 14 U.S.C. § 91 (2000). The current version of 14 U.S.C. § 91 reflects various “technical” changes made in 1986. The specific references to the Coast Guard and the grant of power to COTPs and District Commanders were removed, substituting “the Secretary” in their place. *See id.* Additionally, the original Act of 15 November 1941 stated that it “shall be the duty” of the Coast Guard to provide for the protection of naval vessels. Act of Nov. 15, 1941, ch. 471, § 1. The technical corrections, however, revised the statute to state that the “Secretary *may* control the anchorage and movement . . .” 14 U.S.C. § 91 (emphasis added). This indicates the discretionary nature of this authority. In addition, the term “territorial waters” was changed to “navigable waters.” *See id.* Further, the statute initially permitted the “senior naval officer present in command of any naval force” to control the anchorage and movement of vessels under certain circumstances. Act of Nov. 15, 1941, ch. 471, § 1. The technical amendment, however, permits the “senior naval officer present in command” to control the anchorage and movement of vessels under certain circumstances. 14 U.S.C. § 91.

The technical amendment also changed the language relating to the Navy’s authority to act. The statute, as enacted, permitted the senior naval officer present in command of any naval force to act when “immediate action is required, *or* where representatives of the Coast Guard are not present, *or* not present in sufficient force . . .” Act of Nov. 15, 1941, ch. 471, § 1 (emphasis added). The technical amendments changed the language to “If the Secretary does not exercise the authority in subsection (a) of this section *and* immediate action is required.” 14 U.S.C. § 91 (emphasis added). While the substitution of “and” for “or” appears to be a substantive change, the fact that the regulations issued under the Act of 15 November 1941 during World War II also used “and” between “immediate action being necessary” and “lack of Coast Guard presence” lessens the practical impact. In other words, the original regulatory interpretation of the statute is consistent with the current statutory language.

The real import of the term “technical correction” is the indication that one should use the initial statutory language to define what constitutes “if the Secretary does not exercise the authority” to control the anchorage and movement of vessels. *See* 14 U.S.C. § 91. Because the 1986 change is a technical amendment, the language “if the Secretary does not exercise the authority,” *id.*, should be interpreted consistently with the original statutory language to mean “representatives of the Coast Guard are not present, or not present in sufficient force to exercise effective control of shipping,” Act of Nov. 15, 1941, ch. 471, § 1.

Therefore, 14 U.S.C. § 91 permits the senior naval officer present in command to take certain actions under certain circumstances. The senior naval officer present in command is able to control the anchorage and movement of vessels in the vicinity of a naval vessel to ensure the safety and security of that naval vessel. Under this authority, the senior naval officer present in command can grant or deny vessels permission to enter the regulated zone, issue orders to specific vessels within the regulated zone, and take law enforcement action against violators. This authority comes into existence when immediate action is necessary, and the Coast Guard is not present or not present in sufficient force.

245. 67 Fed. Reg. 31,958-61 (May 13, 2002) (Atlantic Area); *id.* at 38,386 (June 4, 2002) (Pacific Area).

or injury, or to prevent damage or injury to any harbor or waters of the United States, or to secure the observance of rights and obligations of the United States, may take for such purposes full possession and control of such vessels and remove therefrom the officers and crew thereof, and all other persons not especially authorized by him to go or remain on board thereof;

(b) to safeguard against destruction, loss, or injury from sabotage or other subversive acts, accidents, or other causes of similar nature, vessels, harbors, ports, and waterfront facilities in the United States and all territory and water, continental or insular, subject to the jurisdiction of the United States.²⁴⁸

The triggering event for the Magnuson Act is a presidential finding that the “security of the United States is endangered by reason of actual or threatened war, or invasion, or insurrection, or subversive activity, or of disturbances or threatened disturbances of the international relations of the United States.”²⁴⁹

The Magnuson Act also uses language that permits regulations governing the anchorage and movement of vessels; however, the Magnuson Act takes a slightly different format than the Espionage Act and the Act of 15 November 1941. Like the Espionage Act, the Magnuson Act authorizes regulations governing the anchorage and movement of vessels, the inspection of vessels, placing guards on vessels, and taking full possession and control of vessels, including the removal of officers and crew.²⁵⁰ The Magnuson Act also gives the President the authority to regulate “to safeguard against destruction, loss, or injury from sabotage or other subversive acts, accidents, or other causes of similar nature, vessels, harbors, ports, and

246. *Id.* at 7994 (Feb. 21, 2002). A Class D felony carries a potential punishment of six years’ imprisonment and a \$250,000 fine. *Id.*

247. *Id.* at 7993.

248. 50 U.S.C. § 191 (2000) (the Magnuson Act was codified in 50 U.S.C. § 191 with the pre-existing Espionage Act). Notably, subparagraph (b) applies to both foreign and U.S. flagged vessels. *See id.* § 191(b).

249. *Id.*

250. *See id.*

waterfront facilities.”²⁵¹ The general provisions of the Magnuson Act regulations²⁵² are contained in 33 C.F.R. part 6.²⁵³

In October 1950, three months after the enactment of the Magnuson Act, President Truman issued the Executive Order required to permit reg-

251. *Id.*

252. For specific Magnuson Act security zones, see 33 C.F.R. pt. 165 (LEXIS 2003).

253. *See id.* pt. 6. While the preamble of the Executive Order suggests that the regulations issued in 33 C.F.R. part 6 are “to safeguard . . . vessels, harbors, ports, and waterfront facilities,” Exec. Order. No. 10,173, Regulations Pertaining to the Safeguarding of Vessels, Harbors, Ports, and Waterfront Facilities of the United States, 3 C.F.R. 356 (1949-1953), the structure and content of the regulations indicate that the President issued regulations to “govern the anchorage and movement” of foreign flag vessels and “to safeguard . . . vessels, harbors, ports, and waterfront facilities.” 50 U.S.C. § 191(a)-(b).

The legislative history is clear that the Magnuson Act, unlike the Espionage Act, permits the United States to institute measures to control vessel movement without requiring a declaration of a national emergency. *See* S. REP. NO. 81-2118, at 1 (1950), *reprinted in* 1950 U.S.C.C.A.N. 2954, 2954. The legislative history of the Magnuson Act indicates that the intent of enacting subparagraphs (a) and (b) was not to create two sources of authority that could be enacted independently; instead, the Senate Report suggests that the purpose of having separate subparagraphs was to set out two separate grants of power, both of which would become activated upon the finding that the security of the United States was endangered. *See* S. REP. NO. 81-2118, at 1 (1950), *reprinted in* 1950 U.S.C.C.A.N. 2954, 2954-55. Senate Report 81-2118, in discussing the purpose of the Bill, states:

The bill would authorize the President to institute such measures and issue such regulations to control the anchorage and the movement of foreign-flag vessels in the waters of the United States when the national security is endangered.

It also gives the President the power to safeguard against destruction, loss, or injury from sabotage or other subversive acts to vessels, harbors, ports, and other water-front [sic] facilities. It will permit the United States to put in such protective measures short of a declaration of a national emergency.

Id.

A Letter from the Deputy Attorney General to the Senate Committee Chairman in favor of the legislation supports this position. The letter states that the difference between the two Acts is that the Espionage Act requires a declaration of a national emergency and has no express provision for the protection of harbors, ports, and waterfront facilities, while the Magnuson Act does not require a declaration of national emergency and expressly provides for the protection of harbors, ports, and waterfront facilities. *See* Letter from Peyton Ford, Deputy Attorney General, to Honorable Edwin C. Johnson, Chairman, Committee on Interstate and Foreign Commerce, United States Senate (July 17, 1950), *reprinted in* 1950 U.S.C.C.A.N. 2954, 2955.

ulations implementing the law. Executive Order 10,173 states that “the security of the United States is endangered by reason of subversive activity.”²⁵⁴ Based on this finding, the President issued regulations “relating to the safeguarding against destruction, loss, or injury from sabotage or other subversive acts, accidents, or other causes of similar nature, of vessels, harbors, ports, and waterfront territory and water, continental or insular, subject to the jurisdiction of the United States.”²⁵⁵

The Magnuson Act contains the same broad enforcement authority as the Espionage Act; Congress has given the President the authority to use “such departments, agencies, officers, or instrumentalities of the United States as he may deem necessary to carry out the purpose of this title.”²⁵⁶ The President has exercised this authority and issued regulations stating that the Coast Guard may enlist the aid of all federal agencies in the enforcement of regulations issued pursuant to the Magnuson Act.²⁵⁷

Taken together, this is a clear statement of authority to use any branch of the armed forces to enforce regulations issued under the Magnuson Act,²⁵⁸ including the authority to govern the anchorage and movement of vessels, inspect vessels, place guards on vessels, and take full possession and control of vessels, to include the removal of officers and crew.²⁵⁹ It also includes the authority to enforce the many exclusion areas (security zones) established under authority of the Magnuson Act.²⁶⁰ A violation of

254. See Exec. Order No. 10,173, Regulations Pertaining to the Safeguarding of Vessels, Harbors, Ports, and Waterfront Facilities of the United States, 3 C.F.R. 357 (1949-1953). On 21 August 2002, President Bush signed an amendment to reflect the newly emphasized terrorist threat and modify the regulations at 33 C.F.R. pt. 6. See Executive Order: Further Amending Executive Order 10,173, as Amended, Prescribing Regulations Relating to the Safeguarding of Vessels, Harbors, Ports, and Waterfront Facilities of the United States (Aug. 21, 2002) (amending 33 C.F.R. pt. 6).

255. *Id.* This language closely mirrors 50 U.S.C. § 191(b), which states that the President is authorized to issue rules and regulations “to safeguard against destruction, loss, or injury from sabotage or other subversive acts, accidents, or other causes of similar nature, vessels, harbors, ports, and waterfront facilities in the United States and all territory and water, continental or insular, subject to the jurisdiction of the United States.” 50 U.S.C. § 191(b) (2000).

256. *Id.* § 194.

257. See 33 C.F.R. § 6.04-11 (LEXIS 2003).

258. From 1950 until the enactment of the Ports and Waterways Safety Act (PWSA) in 1972, the Coast Guard used its authority under the Magnuson Act to carry out its port safety program. See S. REP. NO. 92-724 (1972), reprinted in 1972 U.S.C.C.A.N. 2766, 2767. Congress viewed the PWSA as a “broader, permanent statutory basis for the exercise of authority for non-defense aspects of port safety.” *Id.*

259. See 50 U.S.C. § 191; 33 C.F.R. pt. 6.

the Magnuson Act regulations is a federal felony punishable by ten years in jail, a \$250,000 fine, and vessel seizure and forfeiture.²⁶¹

F. Fisheries and Conservation Management Act of 1976

Congress passed the Magnuson Fisheries Conservation and Management Act of 1976 (MFCMA)²⁶² to “provide for the protection, conservation, and enhancement of the fisheries resources of the United States.”²⁶³ This comprehensive act addresses the authority of the United States to manage fisheries, foreign fishing, and international relations, and established a national fisheries management program.²⁶⁴ The MFCMA provides for civil penalties,²⁶⁵ criminal offenses,²⁶⁶ and civil forfeitures.²⁶⁷ The enforcement provisions are particularly relevant to the present discussion.

Section 311 of the MFCMA establishes who can enforce the Act and their powers.²⁶⁸ The Secretary of Commerce and the Secretary of the department in which the Coast Guard is operating²⁶⁹ are charged with the responsibility to enforce the Act.²⁷⁰ In addition, Congress explicitly stated that the Secretaries may, by agreement, use DOD “personnel, services, equipment (including aircraft and vessels), and facilities.”²⁷¹ When there is an agreement, the officers enforcing the fisheries laws have the authority to: arrest; board, search, and inspect fishing vessels; seize fishing vessels; seize the catch; seize evidence; and execute warrants.²⁷² The legislative history makes Congress’s intent unambiguous: DOD personnel may have

260. See 33 C.F.R. § 165.30, .33, .100 (listing specific security zones throughout the United States).

261. 18 U.S.C. § 3571 (2000); 50 U.S.C. § 192.

262. Fisheries Conservation and Management Act of 1976, Pub. L. No. 94-265, 90 Stat. 331 (codified as amended at 16 U.S.C. §§ 1801-1883 (2000)).

263. H.R. REP. NO. 94-445, at 21 (1976), *reprinted in* 1976 U.S.C.C.A.N. 593, 593.

264. See generally Fisheries Conservation and Management Act of 1976, Pub. L. No. 94-265.

265. *Id.* § 308, 16 U.S.C. § 1858.

266. *Id.* § 309, 16 U.S.C. § 1859.

267. *Id.* § 310, 16 U.S.C. § 1860.

268. *Id.* § 311, 16 U.S.C. § 1861.

269. The Coast Guard operates as part of the Department of Transportation, except “upon declaration of war or when the President directs, the Coast Guard shall operate as a service in the Navy.” 14 U.S.C. § 3 (2000).

270. See Fisheries Conservation and Management Act of 1976, § 311(a), 16 U.S.C. § 1861(a).

271. *Id.*

law enforcement authority to carry out the fisheries laws of the United States.²⁷³

G. 49 U.S.C. § 324 (12 January 1983)

The Secretary of Transportation has the specific authority to provide for participation of military personnel in carrying out duties and powers related to the regulation and protection of air traffic and other duties and powers given to the Secretary of Transportation.²⁷⁴ The authority to use military members to carry out the duties related to the regulation and protection of air traffic originated in the Federal Aviation Act of 1958.²⁷⁵ Section 9(c) of the Department of Transportation Act of 1966 authorizes the Secretary of Transportation “to provide for participation of military personnel in carrying out the functions of the Department.”²⁷⁶ The plain language of these authorities is clear: DOD personnel can be detailed to the Secretary of Transportation to carry out functions of the Department of Transportation, which include regulatory and law enforcement functions.

The legislative history of these Acts support their plain meaning. The legislative history of the Federal Aviation Act of 1958 makes it clear that the intent of the provision permitting the detail of military members to carry out duties related to the regulation and protection of air traffic is to ensure that national security and defense considerations are taken into account, and to improve government economy by using DOD personnel with knowledge and experience of military air traffic control and military use of air space.²⁷⁷ The Federal Aviation Act includes specific provisions stating that the Secretaries of military departments will not have control

272. *See id.* § 311(b), 16 U.S.C. § 1861(b).

273. *See* H.R. REP. NO. 94-445, at 75 (1976), *reprinted in* 1976 U.S.C.C.A.N. 593, 645 (stating that “the Secretary [of Commerce] and the Secretary of the Department in which the Coast Guard is operating would be authorized to utilize by agreement . . . the personnel, services, and facilities of any other Federal Agency”); S. CONF. REP. NO. 94-711, at 57-58 (1976), *reprinted in* 1976 U.S.C.C.A.N. 660, 681 (stating that “[t]he conference substitute specifically provides that the utilizable equipment of other agencies includes aircraft and vessels and that the Federal agencies required to cooperate in such enforcement include all elements of the Department of Defense”).

274. *See* 49 U.S.C. § 324(a)(1)-(2).

275. *See* Federal Aviation Act of 1958, § 302(c), Pub. L. No. 85-726, 72 Stat. 739.

276. Department of Transportation Act of 1966, § 9(c), 49 U.S.C. § 324(a)(2).

277. *See* H.R. REP. NO. 85-2360 (1958), *reprinted in* 1958 U.S.C.C.A.N. 3741, 3748-49.

over the duties and powers of military members detailed to the Department of Transportation.²⁷⁸ This is to ensure that military members bring their skills, but are not influenced by the military so that their loyalty is to the civilian agency.²⁷⁹ The legislative history of the Department of Transportation Act expresses Congress's intent to have DOD personnel detailed to the Department of Transportation to foster close consultation and cooperation between the departments.²⁸⁰

The longstanding policy of the federal government is that the Posse Comitatus Act does not cover DOD military personnel detailed to civilian agencies. The rationale behind this determination is that the military personnel detailed to the civilian agency are under the control of and subject to orders of the head of the civilian agency and are not considered part of the military for purposes of the Posse Comitatus Act.²⁸¹

VI. Subsequent Amendments to the Posse Comitatus Act

While Congress was busy expanding military law enforcement authority, the actual Posse Comitatus Act remained remarkably stable once

278. See 49 U.S.C. § 324(d).

279. See H.R. REP. NO. 85-2360, *reprinted in* 1958 U.S.C.C.A.N. 3741, 3749.

280. See H.R. REP. NO. 89-1701 (1966), *reprinted in* 1966 U.S.C.C.A.N. 3362, 3370.

281. See *Effect of Posse Comitatus Act on Proposed Detail of Civilian Employees to the National Infrastructure Protection Center*, 1998 OLC LEXIS 2 (Op. Off. Legal Counsel May 26, 1998). The Office of Legal Counsel opinion states:

Earlier opinions of this Office concluded that military personnel who are detailed to a civilian agency are not covered by the PCA because they are employees of the civilian agency for the duration of their detail, "subject to the exclusive orders" of the head of the civilian agency, and therefore "are not 'any part'" of the military for purposes of the PCA. Memorandum for Benjamin Forman, Assistant General Counsel, Department of Defense, from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, Re: Legality of deputizing military personnel assigned to the Department of Transportation (Sept. 30, 1970) ("Transportation Opinion") (military personnel detailed to the Department of Transportation to serve as security guards on civilian aircraft); see *Assignment of Army Lawyers to the Department of Justice*, 10 Op. O.L.C. 115, 121 (1986) (PCA "would not be implicated if [Army] lawyers were detailed on a full-time basis in an entirely civilian capacity under the supervision of civilian personnel").

the fiscal law portion expired in 1879. The Act was considered “obscure and all-but-forgotten” in 1948²⁸² and had no significant legal relevance until 1961.²⁸³ In 1956, the Act was moved to 18 U.S.C. § 1385 and amended to include the Air Force, which had split-off from the Army. It read:

Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or Air Force as a posse comitatus or otherwise to execute the laws shall be fined not more than \$10,000 or imprisoned not more than two years, or both. This section does not apply in Alaska.²⁸⁴

The penalty was later increased, and the last sentence making the law inapplicable in Alaska was removed in 1959.²⁸⁵ An attempt was made to subject the Navy to the Act in 1975; however, the bill died in committee.²⁸⁶

VII. The Confusion over the Posse Comitatus Act Begins in Earnest During the 1970s

In the early 1970s, the Posse Comitatus Act emerged from obscurity as creative defense counsel attempted to develop new exclusionary rules based on the Act. While this effort was unsuccessful, the early cases marked the complete triumph of the deceptive nineteenth century politi-

282. *Chandler v. United States*, 171 F.2d 921, 936 (1st Cir. 1948).

283. *See Abel, supra* note 23, at 462-63 (discussing *Wrynn v. United States*, 200 F. Supp. 457 (E.D.N.Y. 1961) (holding that an Air Force helicopter pilot searching for an escaped civilian prisoner was acting outside the scope of his duties, therefore, a bystander injured when the helicopter struck a tree could not recover under the Federal Tort Claims Act). The next case concerning the Act was not until 1974. *Id.*

284. Posse Comitatus Act, 70A Stat. 626 (1956).

285. *See* Pub. L. No. 86-70, § 17, *reprinted in* 1959 U.S.C.C.A.N. 157.

286. *See* Omnibus Crime Act, § 1, 94th Cong., tit. II, pt. G (1975). Section 1 of the Omnibus Crime Act proposed a modified Posse Comitatus Act that read:

Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, knowingly uses any part of the Army, Navy, or Air Force as a posse comitatus or otherwise to execute the laws is guilty of a Class A misdemeanor. Nothing in this section shall be construed to affect the law enforcement of the United States Coast Guard.

Id., *cited in* *Jackson v. Alaska*, 572 P.2d 87, 91 (Alaska 1977).

cians who cloaked the Act in patriotic rhetoric and references to the American Revolution. While perhaps done inadvertently, some modern courts appeared to brush aside the Act without discussion, focusing on broad and respected principles that had little, if anything, to do with the Act.

A. The Wounded Knee Cases (Army)

On the evening of 27 February 1973, at least one hundred armed persons occupied a portion of the village of Wounded Knee on the Pine Ridge Reservation in South Dakota, looted a trading post, and briefly held a few hostages.²⁸⁷ The Federal Bureau of Investigation (FBI), Marshal Service, and Bureau of Indian Affairs police responded, resulting in a tense standoff and a blockade. During the two-month standoff, a few members of the U.S. Army provided and maintained equipment used by the law enforcement officials and offered tactical advice to FBI officials on their use of force policy, negotiations, and other issues. A number of individuals were apprehended trying to enter the town to lend support to the militant protestors. The blockade-runners were prosecuted, in part, for interfering with the law enforcement officials surrounding the town. Several defendants asserted that the civilian law enforcement officers were not lawfully engaged in the performance of their official duties because they had received Army assistance in violation of the Posse Comitatus Act.²⁸⁸

A confusing patchwork of decisions resulted from these cases.²⁸⁹ The courts, however, did attempt to define when someone “executes” the law by distinguishing between active or pervasive participation by Army troops in law enforcement (a violation), and passive assistance to law enforcement officials (permitted). *United States v. McArthur*,²⁹⁰ the last case in the series, discusses the other cases and was upheld by the Eighth Circuit in *United States v. Casper*.²⁹¹ *McArthur*, therefore, had the most subsequent influence.²⁹² Like the other Wounded Knee cases, *McArthur*

287. See generally *United States v. Casper*, 541 F.2d 1275 (8th Cir. 1976); *United States v. Jaramillo*, 380 F. Supp. 1375 (D. Neb. 1974) (both providing detailed recitation of the facts surrounding this incident).

288. *Casper*, 541 F.2d at 1276; *United States v. McArthur*, 419 F. Supp. 186, 190 (N.D. 1975); *United States v. Red Feather*, 392 F. Supp. 916, 919-21 (S.D. 1975); *Jaramillo*, 380 F. Supp. at 1379; *United States v. Banks*, 383 F. Supp. 368, 374-75 (S.D. 1974).

289. Hohnsbeen, *supra* note 36, at 412.

290. 419 F. Supp. at 186.

291. 541 F.2d at 1275.

focuses entirely upon determining the correct test for when Army assistance rises to the level of executing the law.²⁹³ After reviewing the tests used in the other Wounded Knee cases, the judge posed the following determinative question: “Were Army or Air Force personnel used by the civilian law enforcement officers at Wounded Knee in such a manner that the military personnel subjected the citizens to the exercise of military power which was regulatory, proscriptive, or compulsory in nature, either presently or prospectively?”²⁹⁴ Using this standard, he concluded that the Army support did not violate the Act.²⁹⁵

The court, unfortunately, did little to connect this test to the Posse Comitatus Act. The opinion omits any discussion of the Act’s extensive history beyond a sentence noting that Americans have historically been suspicious of military authority as a tool of dictatorial power.²⁹⁶ Furthermore, *McArthur* contains no analysis of the actual wording of the Act; it merely provides a short conclusion that military personnel are not trained in constitutional freedoms and that the Act was intended to meet this danger.²⁹⁷

The court’s limited discussion of the Act and total focus on defining “execution of the law” obscures the Act’s other elements. As previously discussed, once the fiscal law section expired, the Posse Comitatus Act prohibited “the use of the Army or Air Force *as a posse comitatus or otherwise for the purpose of executing the laws*.”²⁹⁸ As the bill that eventually became the Act moved through Congress in 1878, the Senate considered changing it to simply prohibit the Army from executing the law. The proposed amendment failed, however, and the limiting words “as a posse comitatus or otherwise” remained.²⁹⁹ By focusing on the “executing the law” language without explicitly noting that the court skipped over “as a posse comitatus or otherwise,” *McArthur* appears to adopt the language rejected by the Senate in 1878.³⁰⁰ This approach would render meaningless, without discussion, words deliberately left in the law by Congress,

292. The standard articulated by the court is incorporated into the current DOD regulation concerning the Act. See DOD DIR. 5525.5, *supra* note 7; see also Abel, *supra* note 23, at 464.

293. *McArthur*, 419 F. Supp. at 193-94.

294. *Id.* at 194.

295. *Id.* at 194-95.

296. *Id.* at 193.

297. *Id.* at 193-94.

298. Act of June 18, 1878, 20 Stat. 152.

299. See 7 CONG. REC. 4247 (1878); *supra* notes 132-33 and accompanying text.

thus ignoring a major rule of statutory construction. The court, therefore, must have resolved the case on the basis of one unmet element concerning the execution of the law. Once the court determined that the Army troops had not executed the law, the wider analysis was simply unnecessary.

A full statement of the law following the Wounded Knee cases should have said:

The Posse Comitatus Act prohibits:

- (1) Willful
- (2) use of the Army or Air Force
- (3) as a posse comitatus or otherwise
- (4) in such a manner that U.S. citizens are subjected to the exercise of military power which is regulatory, proscriptive, or compulsory in nature, either presently or prospectively (that is, for the purpose of executing the law)
- (5) unless otherwise authorized by the Constitution or an act of Congress.

The *McArthur* court only addressed element four. Subsequent litigation, commentary, and regulatory action also focused almost entirely on this element.³⁰¹ The other elements, including the limiting words “as a posse comitatus or otherwise,” were simply ignored.³⁰² Some interpreted the case as establishing a test for all five elements.³⁰³

300. See 7 CONG. REC. 4247; *supra* notes 132-33 and accompanying text. The other cases from the Wounded Knee incident had the same focus on defining when the Army executes the law.

301. See, e.g., *United States v. Casper*, 541 F.2d 1275 (8th Cir. 1976). In *Casper*, a consolidated appeal of several Wounded Knee cases, the Eighth Circuit affirmed all convictions based on the *McArthur* test for when the law had been executed (element four of the analysis). See *id.* at 1278.

302. In *United States v. Yunis*, 924 F.2d 1086 (D.C. Cir. 1991), the court denied a defense request to dismiss the indictment because the government seized him in violation of the Act. In doing so, however, the court articulated that the Act established criminal penalties “for willful use of any part of the Army or Air Force in law enforcement, unless expressly authorized by law.” *Id.* at 1093. The court also approved the following three tests for when Army or Air Force officials execute the law via “active” participation: (1) The *McArthur* test that defined “active” participation as that which subjected U.S. citizens to military power that was regulatory, proscriptive, or compulsory in nature; (2) Direct active involvement in the execution of the laws; and (3) Participation when the military role pervaded the activities of civilian law enforcement authorities. *Id.* at 1094.

B. *United States v. Walden* (Navy 1974)

William and Ruby Walden were convicted of illegal firearm sales based, in large part, on the testimony of three U.S. Marines working undercover for the Treasury Department.³⁰⁴ The defendants unsuccessfully sought to exclude this evidence at trial based on a violation of the Posse Comitatus Act or, at a minimum, internal Navy regulations that applied the general policy behind the Act to Navy and Marine Corps personnel absent approval from high-level officials.³⁰⁵

On appeal, the Fourth Circuit held that the Act did not apply to the Navy.³⁰⁶ It also declined to apply an exclusionary rule for the violation of the Navy's internal administrative regulations. In doing so, however, the court articulated a broader "spirit" of the Act, opining that the legislative history showed congressional intent to apply the Act's policy to all armed services.³⁰⁷ In support, the court cited a small portion of the remarks of Congressman Knott who had introduced the amendment that eventually became the Act.³⁰⁸ Unfortunately, the court took these remarks out of con-

303. See 32 C.F.R. § 213.10a(7)(ii) (cancelled regulation) (stating that indirect assistance is not restricted by the Posse Comitatus Act provided that the assistance does not subject civilians to use of military power that is regulatory, proscriptive, or compulsory); DOD DIR. 5525.5, *supra* note 7, para. E4.1.7 (stating that indirect assistance is not restricted by the Posse Comitatus Act provided the assistance does not subject civilians to use of military power that is regulatory, proscriptive, or compulsory).

304. *United States v. Walden*, 490 F.2d 372, 373 (4th Cir. 1974).

305. See *id.* at 377. Navy Instruction 5400.12 provided that

[T]hroughout the United States, it is a fundamental policy to use civilian, rather than military, officials and personnel to the maximum extent possible in preserving law and order. In the Federal Government this policy is reflected by the Posse Comitatus Act (18 U.S.C. § 1385) which prohibits the use of any part of the Army or Air Force to enforce local, state, or federal law except as Congress may authorize. Although not expressly applicable to the Navy and Marine Corps, the act is regarded as a statement of Federal policy which is closely followed by the Department of Navy.

SEC'y OF NAVY, INSTR. 5400.12 (17 Jan. 1969), *cited in Walden*, 490 F.2d at 372.

306. *Walden*, 490 F.2d at 372; *accord* *United States v. Mendoza-Cecelia*, 963 F.2d 1467, 1477 (11th Cir. 1992); *Yunis*, 924 F.2d at 1093 ("We cannot agree that Congress' words admit of any ambiguity. By its terms, 18 U.S.C. § 1385 places no restrictions on naval participation in law enforcement operations. . . . Nothing in this history suggests that we should defy the express language of the Posse Comitatus Act by extending it to the Navy and we decline to do so.").

307. *Walden*, 490 F.2d at 375-76.

text,³⁰⁹ missing the fact that the Knott amendment actually deleted the Navy from an earlier version of the bill.³¹⁰

The court's reliance upon Knott's remarks to discern a legislative intent to apply the Act's policy to the Navy was clearly misplaced. In the end, *Walden* stands for the more limited proposition that while the Posse Comitatus Act does not apply to the Navy, the Navy may voluntarily impose more stringent limits upon itself. A violation of these internal administrative policies, however, does not mandate an exclusionary rule, although courts might, at some point, impose one for systemic intentional violations. Over time, however, some within the DOD saw the case as justification for more restrictive internal policies and, perhaps, as a tool to avoid expending scarce resources on a new congressional mandate to help law enforcement agencies control the flow of illegal drugs into America.³¹¹

VIII. Congressional Action to Further Increase Military Involvement in Civilian Law Enforcement (Round 1)

A. The 1981 Act (10 U.S.C. §§ 371-378)

By the late 1970s, the federal government formally acknowledged that it was easy to smuggle illegal drugs into the United States and distribute them to eager buyers.³¹² Marijuana from Colombia arrived by the ton load, while hundreds of pounds of cocaine flew in daily. The situation in

308. *Id.* at 375 (quoting 7 CONG. REC. 3849 (1878) (testimony of Congressman Knott)).

309. *See supra* note 148.

310. *See supra* note 124 and accompanying text; *see also supra* note 149 (equating "military" to "army").

311. *See infra* section VIII.B. Other courts have relied upon *Walden*'s misreading of the legislative history of the Act and cited the case, without analysis, as authority for the proposition that the Act applies to all branches of the armed services. *See, e.g.,* *United States v. Chaparro-Almeida* 679 F.2d 423, 425 & n.6 (5th Cir. 1982) (denying an appeal to exclude evidence obtained by a Coast Guard boarding team; first applying the Act to all armed forces, including the Coast Guard, but then citing the Coast Guard's law enforcement authority as an express statutory exception to the Act).

312. *See* GOV'T ACCOUNTING OFFICE, GAINS MADE IN CONTROLLING ILLEGAL DRUGS, YET THE DRUG TRADE FLOURISHES, REPORT NO. GAO/GGD-80-4, at 66-67 (1979) [hereinafter GAO/GGD-80-4]; *see also* Attorney General John Ascroft, Remarks at Organized Crime and Drug Enforcement Task Force (OCDEF) Twentieth Anniversary Conference (July 30, 2002).

south Florida, “a drug disaster area,” was out of control³¹³ and about to get even worse. In 1979, Miami was “Dodge City all over again,” “a replay of Chicago in the 1920s,” and a boomtown with cocaine as its currency.³¹⁴ Highly publicized shoot-outs between rival drug gangs introduced the term “cocaine cowboys” into the national press and reinforced the nation’s Wild West image of Miami.³¹⁵

Against this backdrop, but with little DOD support, Congress moved in 1981 to increase the amount of cooperation between the military and civilian law enforcement authorities as part of the 1982 DOD Authorization Act.³¹⁶ Three out of the four provisions concerning assistance, however, only ratified the existing DOD practice of providing information, equipment and facilities, and training to civilian authorities.³¹⁷ The only real change permitted DOD personnel to operate equipment on loan to civilian drug enforcement agencies under certain limited circumstances.³¹⁸ As a check on the possible misuse of the authority to operate equipment, Section 375 required regulations to limit direct military involvement in specified law enforcement activities while operating the equipment.³¹⁹ The House Bill also allowed military personnel to assist in drug arrests and seizures outside the land area of the United States, but the conference committee deleted this provision.³²⁰ Despite the disagreement over arrest authority, the law’s ultimate purpose was to increase military participation

313. GAO/GGD-80-4, *supra* note 312, at 70, 76; *Hearing Before the Subcomm. on Crime, House Comm. on the Judiciary on Narcotics Enforcement Policy*, 97th Cong. 3 (1981) (statement of Ronald F. Lauve, Senior Associate Director, General Government Division). *See generally* GUY GUGLIOTTA & JEFF LEEN, *KINGS OF COCAINE* (1989).

314. GUGLIOTTA, *supra* note 313, at 12 (quoting an unnamed federal prosecutor and county coroner).

315. *Id.* at 15.

316. *See* Department of Defense Authorization Act, 1982, Pub. L. No. 97-86, 95 Stat. 1099 (codified at 10 U.S.C. §§ 371-378 (2000)). There are many references to the lack of DOD support for the various bills during the debates. *See, e.g.*, 127 CONG. REC. 15,685 (1981) (remarks of Mr. Hughes concerning arrest authority) (“The reason we are here today is because the Secretary of Defense does not want this authority anyway. He does not want to cooperate.”).

317. *See* H.R. REP. NO. 97-71, pt. II, at 3 (1981), *reprinted in* 1981 U.S.C.C.A.N. 1785. “Current interpretation of the Posse Comitatus Act already permits all of the activity addressed by these four sections.” *Id.* at 1790. According to the House Judiciary Committee, some military commanders were denying aid that was permitted by law, perhaps in response to “ambiguous” court decisions. *Id.* (overview of H.R. 3519, § 908), *reprinted in* 1981 U.S.C.C.A.N. 1790; *see supra* section VII.

in law enforcement. Congress made the point explicit in Section 378 of the

318. See H.R. REP. NO. 97-71, § 375, *reprinted in* 1981 U.S.C.C.A.N. 1790. The applicable sections of Public Law 97-86 were codified as 10 U.S.C. §§ 371-378.

- (1) Section 371, Use of information collected during military operations, permitted DOD to share information collected in the course of normal operations with law enforcement officials.
- (2) Section 372, Use of military equipment and facilities, permitted DOD to make equipment, bases, or facilities available to civilian law enforcement officials.
- (3) Section 373, Training and advising civilian law enforcement officials, permitted DOD to train civilian officials on any equipment made available to them under section 372.
- (4) Section 374, Assistance by Department of Defense personnel, permitted DOD personnel to operate and maintain any equipment made available under section 372, but only to agencies that enforce federal drug, immigration, or customs law and subject to other specific restrictions such as high-level requests and “emergency” conditions.
- (5) Section 375, Restriction on direct participation by military personnel, required the Secretary of Defense to issue regulations so that any assistance provided under the authority of this law did not permit direct participation in specified law enforcement activities.
- (6) Section 376, Assistance not to affect adversely military preparedness, prohibited assistance given under authority of this law that would adversely affect military preparedness.
- (7) Section 377, Reimbursement, directed the Secretary of Defense to develop regulations for reimbursement by civilian agencies.
- (8) Section 378, Nonpreemption of other law, indicated that nothing in this law limited the executive’s use of military in law enforcement beyond that provided by the law existing prior to the 1982 Authorization Act.

95 Stat. 1116.

319. See *id.*; H.R. CONF. REP. NO. 97-311, at 121 (1981), *reprinted in* 1981 U.S.C.C.A.N. 1853-63. With respect to Section 375, the report states: “The limitation imposed by this section is only with respect to assistance authorized under any part of this chapter.” *Id.* at 121. The other types of assistance discussed in this chapter (beyond operating loaned equipment) are the provision of information, lending equipment, and providing training. See *id.*

320. *Id.*; H.R. REP. NO. 97-71, at 11, *reprinted in* 1981 U.S.C.C.A.N. 1793. Much of the House debate on the issue centered on the concern that the government would lose smuggling prosecutions if untrained Navy personnel were directly involved in the cases. 127 CONG. REC. 14,976-88, 15,659-88 (1981); Abel, *supra* note 23, at 469-70. The provision also prompted an unlikely alliance between federal drug enforcement officials, who feared DOD dominance over a high-profile mission; DOD officials, who feared a resource drain away from the Department’s primary mission; and civil libertarians, who feared an eventual military state. See Abel, *supra* note 23, at 470 & n.155; Hohnsbeen, *supra* note 36, at 420-21.

Act and the following House Conference Report statement:

Section 378 clarifies the intent of the conferees that the restrictions on the assistance authorized by the new chapter in title 10 apply only to the authority granted under that chapter. Nothing in this chapter should be construed to expand or amend the Posse Comitatus Act. In particular, because that statute, on its face, includes the Army and Air Force, and not the Navy and Marine Corps, the conferees wanted to ensure that the conference report would not be interpreted to limit the authority of the Secretary of Defense to provide Navy and Marine Corps assistance under, for example, 21 USC 873(b)³²¹

The 1982 Defense Authorization Act, therefore, established some explicit “safe harbors” of permissible activity. In some cases, these safe harbors came with conditions. Any conditions on the use of the safe harbor provisions, however, were limited to the safe harbors. The Authorization Act did not change the Posse Comitatus Act or impose any limitations beyond those in the Posse Comitatus Act itself.³²²

Section 375 of the 1982 DOD Authorization Act required the Secretary of Defense to issue regulations to ensure that any assistance provided under the authority of the law’s safe harbor provisions did not permit direct DOD participation in an interdiction of a vessel or aircraft, a search and seizure, arrest, or other similar activity unless otherwise authorized by law. The House Conference Report on Section 375 stated: “The limitation

321. H.R. CONF. REP. No. 97-311, at 122, *reprinted in* 1981 U.S.C.C.A.N. 1863. The report also states that the law does not rescind or direct the rescission of any current regulations that apply the policy and terms of the Act to the Navy or Marines. *Id.*

322. *See id.* Unfortunately, despite the explicit language of the conference report, many refer to the 1982 Defense Authorization Act as a change to the Posse Comitatus Act. *See, e.g.,* Abel, *supra* note 23, at 470; Hohnsbeen, *supra* note 36, at 419; GOV’T ACCOUNTING OFFICE, STATEMENT OF CHARLES A. BOWSER, COMPTROLLER OF THE UNITED STATES, BEFORE THE SENATE COMMITTEE ON ARMED SERVICES, REPORT NO. GAO/T-GGD-88-38 (1988) [hereinafter GAO/T-GGD-88-38]. Also, a number of courts have taken Section 375’s safe harbor limitation on military activities while operating equipment to support law enforcement as a blanket prohibition on direct participation by military personnel in civilian search, arrest, seizure, or other similar activity. *See United States v. Khan* 35 F.3d 426, 431 (9th Cir. 1994) (stating that Section 375 and the DOD regulations have applied the Posse Comitatus Act to the Navy); *United States v. Yunis*, 924 F.2d 1086, 1094 (D.C. Cir. 1991). This interpretation of the 1982 Authorization Act contradicts the explicit language of Section 378 and the associated legislative history. It also frustrates the entire purpose of the Authorization Act to increase military-civilian cooperation in law enforcement.

posed by this section is only with respect to assistance authorized under any part of this chapter.”³²³ Section 378 made it clear that the Authorization Act’s purpose was to increase military-civilian cooperation and that the Act did not impose any new limits on the use of military personnel in law enforcement. Taken together, these provisions required regulations to implement the new safe harbor provisions and suggested the need for rules to implement the Posse Comitatus Act.³²⁴

B. DOD Implementing Regulations

On 7 April 1982, the DOD published regulations at 32 C.F.R. part 213 implementing 10 U.S.C. §§ 371-378.³²⁵ While many parts of the regulation initially appear consistent with the authorizing statute, the regulation defeated the 1982 Authorization Act’s stated purpose to increase cooperation between the military and civilian law enforcement in several important ways. Taken together, the overly restrictive regulatory provisions appeared to reflect the DOD’s lack of support for the law and the congressional intent behind it.³²⁶ Also, since the DOD purported to base its regulations upon the Posse Comitatus Act, the regulations added to the confusion over the Act’s modern understanding.

First, the regulations adopted an extremely broad interpretation of the Posse Comitatus Act based upon the one element analyzed in the Wounded Knee cases. According to the regulations, the Act prohibits all “direct” DOD participation in law enforcement; civilians should not be subject to military power that is regulatory, proscriptive, or compulsory in nature. This administrative sleight-of-hand transformed the three primary tests for when one “executes” the law³²⁷ into the entire definition of the Act. In taking this action, the DOD instituted a version of the Act explicitly rejected

323. H.R. CONF. REP. NO. 97-311, at 121, *reprinted in* 1981 U.S.C.C.A.N. 1853, 1862.

324. *See* 13 Op. Off. Legal Counsel 321, 345 (1989).

325. *See* 47 Fed. Reg. 14,899 (Apr. 7, 1982) (adding a new pt. 213 to ch. I, 32 C.F.R.). Department of Defense Directive 5525.5, dated 15 January 1986, provided internal guidance consistent with the published regulations. *See* DOD DIR. 5525.5, *supra* note 7. On 28 April 1993, the DOD cancelled the published regulations and indicated that DOD Directive 5525.5 replaced 32 C.F.R. part 213. *See* 58 Fed. Reg. 25,776 (Apr. 28, 1983).

326. *See supra* notes 320, 324. One could fairly argue that the DOD regulations were, at least, partially designed out of concerns about a new resource-draining mission. *See supra* notes 320, 324; *infra* note 358 and accompanying text.

327. *See supra* section VII.A. Note that the *McArthur* test only applied to U.S. citizens. *See* *United States v. McArthur*, 419 F. Supp. 186 (N.D. 1975).

by the Senate in 1878 and rendered meaningless words deliberately left in the law by Congress.³²⁸ The DOD regulations also administratively extended the Act's coverage outside of the United States.³²⁹

The regulations also turned Section 375 of the Authorization Act, which places narrow limits on abuse of the safe harbor provisions, into a blanket prohibition against all direct involvement in interdiction, search and seizure, and arrest.³³⁰ By doing so, the regulations appeared to ignore Section 378 entirely and key words in Section 375.³³¹ This turned a law designed to increase military-civilian law enforcement cooperation on its head. To compound matters, the regulations expanded the specific list of prohibited activities beyond those listed in the statute.³³²

After significantly expanding the scope of the Act, the regulations articulated a number of implied exceptions to the (now expanded) Act.

328. See *supra* notes 128-29 and accompanying text.

329. Before the DOD and Navy regulations, courts held that the Act had no extraterritorial application. See *Chandler v. United States*, 171 F.2d 921, 936 (1st Cir. 1948); 13 Op. Off. Legal Counsel 321 (1989); Abel, *supra* note 23, at 468; Furman, *supra* note 43, at 107. While denying any relief based upon the Posse Comitatus Act, the *Chandler* court complimented the defense counsel for turning up "this obscure and all-but-forgotten statute." *Chandler*, 171 F.2d at 936.

330. See 32 C.F.R. § 213.10 (LEXIS 2003) (restrictions on participation of DOD personnel in civilian law enforcement activities). Separate sections of the regulation deal with the use of military equipment and facilities, *id.* § 213.9, and information sharing, *id.* § 213.8. If the regulation had followed the law, the restrictions section would have been more clearly linked to the specific sections implementing the new safe harbors. See *supra* note 321 and accompanying text.

331. 10 U.S.C. § 375 stated: "The Secretary of Defense shall issue such regulations as may be necessary to insure that *the provision of any assistance* (including the provision of any equipment or facility or the assignment of any personnel) to any civilian law enforcement official *under this chapter* does not include or permit direct participation . . ." 10 U.S.C. § 375 (1982) (emphasis added to highlight the words implicitly omitted by the DOD regulations). The DOD regulations also made no mention of Section 378.

332. See 32 C.F.R. § 213.10(a)(3). This provision states:

[T]he prohibition on use of military personnel as a posse comitatus or otherwise to execute the law prohibits the following forms of direct assistance: (i) Interdiction of a vehicle, vessel, aircraft, or other similar activity; (ii) A search or seizure; (iii) An arrest, stop and frisk, or similar activity; (iv) Use of military personnel for surveillance or pursuit of individuals, or as informants, undercover agents, investigators, or interrogators.

Id.

The bases of these non-express exceptions are not clear,³³³ however, they include: protection of DOD personnel, equipment, official guests, and classified information; actions leading to a DOD administrative proceeding; and actions related to the commander's "inherent" authority to maintain law and order on a military installation.³³⁴ Other DOD actions undertaken primarily for a military or foreign affairs purpose, responses to unexpected emergencies, and protection of federal property and functions are similarly permitted.³³⁵ Each of these implied "exceptions" permits DOD military personnel to participate in search, seizure, interdiction, surveillance, pursuit, and other direct law enforcement activities. A separate section of the regulation lists express statutory authorities that permit direct military assistance in law enforcement.³³⁶ Unfortunately, the list missed several important express authorities, including the Espionage Act, Magnuson Act, and Rivers and Harbors Act.³³⁷

The published regulations also applied the overly restrictive DOD interpretation of the Posse Comitatus Act, and the implied exceptions, to the Navy and Marine Corps as a matter of DOD policy.³³⁸ While the regulations gave the Secretary of the Navy some authority to deviate from the policy on a case-by-case basis, this authority was extremely limited. Advance approval of the Secretary of Defense was required for any activity likely to involve an interdiction of a vessel or aircraft, a search or seizure, an arrest, or other activity likely to subject any civilian to military power that was regulatory, proscriptive, or compulsory in nature.³³⁹ More-

333. The regulation first emphasizes that express statutory or constitutional exceptions to the Posse Comitatus Act are required. It then provides an incomplete list of statutory exceptions, leaving the implication that the remaining exceptions are, at least, a partial list of constitutional exceptions to the Act. *Compare id.* § 213.10(a), *with id.* § 213(a)(2)(iv).

334. *See id.* § 213.10(a)(2)(i).

335. *Id.* § 213.10(a)(2)(ii). The "emergency" exception to the Act was first articulated in 1878. *See supra* notes 144, 153.

336. 32 C.F.R. § 213(a)(2)(iv).

337. *See id.*; *supra* section V.

338. *See* 32 C.F.R. §§ 213.2 ("The term, 'Military Service,' as used herein, refers to the Army, Navy, Air Force, and Marine Corps."), 213.10(c). The regulations also classified any agency outside of the DOD as a civilian agency. *See id.* § 213.3. This included the Coast Guard, which, by law, is a military service, and a branch of the armed forces of the United States at all times. *See* 14 U.S.C. § 1 (2000).

over, the Secretary of Defense required various certifications from the head of the civilian agency requesting the assistance.³⁴⁰

Finally, as in several other areas, the DOD regulations adopted an overly restrictive interpretation of the law with respect to reimbursement from civilian law enforcement agencies. While the plain language of the Authorization Act and legislative history clearly gave the Secretary of Defense discretion to waive reimbursement, the DOD regulations claimed that the law required it.³⁴¹ An Office of Legal Counsel review concluded that the DOD's position conflicted with the plain language of the statute and was not even supported by statements in the legislative history the DOD cited to overcome the statute's plain language.³⁴² Taken together, the DOD regulations only compounded the layers of misinformation surrounding the Act and further confused some courts.

C. The Overly Restrictive DOD Regulations Begin to Merge with the Act

Despite the overly restrictive regulations, some increased DOD participation in law enforcement resulted from the 1982 Authorization Act. One prominent example involved the placement of Coast Guard Law Enforcement Detachments (LEDETS) on Navy ships scheduled to operate in areas of maritime smuggling activity. If a suspicious vessel was sighted,

339. 32 C.F.R. § 213.10(c)(2). Ironically, a provision allowing the President, or his designee, to approve direct military involvement in law enforcement activities is consistent with the historical implementation of the Posse Comitatus Act as applied to the Army. *See supra* section IV. The DOD regulations, therefore, could be conformed to the Act by deleting all mention of the Navy and applying the current authority for the Secretary of Defense, or appropriate Service Secretary, to permit direct involvement in law enforcement by Army and Air Force personnel.

340. 32 C.F.R. § 213.10(c)(2).

341. *Compare* 10 U.S.C. § 377 (1982) ("The Secretary of Defense shall issue regulations providing that reimbursement *may be* a condition of assistance to a civilian law enforcement official under this chapter." (emphasis added)), *with* 32 C.F.R. § 213.11(b) ("As a general matter, reimbursement *is required* when equipment or services are provided to agencies outside the Department of Defense. The primary source of law for reimbursement requirements is the Economy Act." (emphasis added)). Thus, the DOD claimed that the Economy Act required reimbursement, even though Section 377 of the DOD Authorization Act made reimbursement optional.

342. 6 Op. Off. Legal Counsel 464 (1982). The DOD reluctantly adopted the OLC position, but did not change the regulations. *See infra* note 358. The reimbursement provision, 10 U.S.C. § 377, was amended by Congress in 1988 to link the issue with the Economy Act more clearly and provide express exceptions to reimbursement under some circumstances. *See* Pub. L. No. 100-456, div. A, tit. XI, § 1104(a), 102 Stat. 2045 (1988).

tactical control of the Navy vessel would shift to the Coast Guard,³⁴³ and a Coast Guard team would board the vessel and take any subsequent law enforcement action.³⁴⁴ For the most part, Navy personnel served in a support or backup role for the Coast Guard law enforcement team.

These programs had some success in apprehending maritime drug smugglers, and a few defendants subsequently claimed that the Navy support to the Coast Guard violated the Posse Comitatus Act. The two circuit courts examining the issue agreed that the Act did not apply to the Navy.³⁴⁵ Both courts, however, while denying any relief to the defendants, held that the executive branch had extended the Act to the Navy via internal Navy

343. The practice of placing Navy vessels under temporary Coast Guard control, to the extent it was seen as a way to get around the Act, shows how far the current interpretations have strayed from the original Posse Comitatus Act. As discussed in section III, *supra*, the marshals taking control over military forces was one of the primary “evils” the Act sought to address. The DOD regulations and some courts, however, claimed the Act prohibited all direct DOD involvement in law enforcement actions.

To escape the extreme results from such a broad interpretation, a number of “exceptions” to the expanded Act have been developed. One theory is that military personnel detailed to a civilian agency are not covered by the Act because they are employees of the civilian agency for the duration of the detail. In other words, they are not any part of the Army, Air Force, or Navy for purposes of the Act (and DOD regulations) while detailed to a civilian law enforcement agency. See Effect of Posse Comitatus Act on Proposed Detail of Civilian Employees to the National Infrastructure Protection Center, 1998 OLC LEXIS 2 (Op. Off. Legal Counsel May 26, 1998); 10 Op. Off. Legal Counsel 115, 121 (1986) (Act not implicated if Army lawyers are detailed to DOJ as special assistant U.S. Attorneys); Memorandum from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, to Benjamin Forman, Assistant General Counsel (International Affairs), Department of Defense, subject: Legality of deputizing military personnel assigned to the Department of Transportation (Sept. 30, 1970). Thus, the executive branch can avoid the Act’s proscriptions by embracing the very “evil” that motivated the Act.

344. See *United States v. Roberts*, 779 F.2d 565, 566 (9th Cir. 1986); *United States v. Del Prado-Montero*, 740 F.2d 113, 114-15 (1st Cir. 1984); GOV’T ACCOUNTING OFFICE, DRUG CONTROL ISSUES SURROUNDING INCREASED USE OF THE MILITARY IN DRUG INTERDICTION, REPORT NO. GAO/NSIAD-88-156, at 28, 33 (1988) [hereinafter GAO/NSIAD-88-156] (describing the LEDET program in fiscal year 1987).

345. *Roberts*, 779 F.2d at 567 (“18 USC 1385. By its express terms, this act prohibits only the use of the Army and the Air Force in civilian law enforcement. We decline to defy its plain language by extending it to prohibit use of the Navy.”); *Del Prado-Montero*, 740 F.2d at 116. Note that the *Roberts* court implicitly adopted the compressed analysis from *Walden* and ignored the limiting words “as a posse comitatus or otherwise” which Congress intentionally left in the law. See *supra* notes 128-29 and accompanying text.

regulations from the mid-1970s.³⁴⁶ The courts then examined the facts to determine if the Navy had violated its internal regulations.³⁴⁷

The Ninth Circuit went on to hold that the 1981 congressional efforts to increase military cooperation with civilian law enforcement had the opposite effect by codifying the Navy regulations existing on 1 December 1981.³⁴⁸ In other words, the court held that Congress imposed a new limit by not directing the Navy to rescind any regulations that administratively applied the Act to the Navy and Marine Corps on 1 December 1981.³⁴⁹ Even assuming that this is a constitutional way to legislate, it is almost impossible to harmonize the Ninth Circuit's interpretation with the plain language of the 1982 Authorization Act and legislative history.³⁵⁰ In this particular case, however, the appeal was denied, even though the court found that the Navy had violated its old regulations.³⁵¹

The more lasting legacy from this period may be the affirmation of the three *Walden* principles:³⁵² The Posse Comitatus Act does not apply to the Navy; the DOD may, nonetheless voluntarily impose more stringent limits upon itself. A violation of these more restrictive internal administrative policies, however, does not mandate an exclusionary rule.³⁵³

Even more importantly, the mid-1980s cases effectively fused any discussion of the Posse Comitatus Act with the contents of the confusing and misleading DOD regulations implementing the 1982 DOD Authorization Act.³⁵⁴ If the Secretary of Defense said the Act applied outside the United States or to the Navy, then many courts would defer to this executive extension of the Act.³⁵⁵ If the DOD said that congressional efforts to

346. See *Roberts*, 779 F.2d at 567-68; *Del Prado-Montero*, 740 F.2d at 116.

347. Only the *Del Prado-Montero* court discussed the new DOD regulations implementing 10 U.S.C. §§ 371-378. See *Del Prado-Montero*, 740 F.2d at 116.

348. *Roberts*, 779 F.2d at 567. The court then determined that the Navy had violated the cancelled regulations, but then declined to exclude the evidence obtained by the Coast Guard boarding team. *Id.*

349. See *supra* note 321.

350. See *supra* note 322 and accompanying text. The *Roberts* court also does not discuss the DOD regulations to implement the 1982 DOD Authorization Act.

351. See *Roberts*, 779 F.2d at 569.

352. See *supra* section VIII.B.

353. *United States v. Clark* 31 F.3d 831, 837 (9th Cir. 1994); *United States v. Mendoza-Cecelia*, 963 F.2d 1467, 1477 & n.9 (11th Cir. 1992); *Hayes v. Hawes*, 921 F.2d 100, 104 (7th Cir. 1990) (citing *Roberts* as one of several cases declining to impose an exclusionary rule for a violation of 10 U.S.C. § 375 or the related regulations); *United States v. Hartley* 796 F.2d 112, 115 (5th Cir. 1986).

increase military-civilian cooperation somehow increased the limits on DOD forces, many courts would simply hold the DOD to its overly restrictive regulations.³⁵⁶ Many courts, especially the Ninth Circuit, gave little effort to distinguish between the DOD regulations and the Act.³⁵⁷ The deeply flawed DOD regulations ultimately controlled any discussion of the law.

354. See 1998 OLC LEXIS 2 (Op. Off. Legal Counsel May 26, 1998). “Unless we indicate otherwise by use of a more specific reference or citation, we use the term PCA to refer to the original statute itself, the related statutes, and the implementing Directive of the Department of Defense.” *Id.* at *4.

355. See *United States v. Khan*, 35 F.3d 426, 431 & n.6 (9th Cir. 1994) (DOD regulations apply the Act to the Navy and outside of the United States); *Hawes*, 921 F.2d at 102-03 (no need to determine if the Act applies to the Navy since the regulations implementing 10 U.S.C. § 375 apply the Act to the Navy; therefore, the cases interpreting the Act also interpret 10 U.S.C. § 375 and limit Navy involvement with civilian law enforcement officials); *United States v. Ahumado-Avendano*, 872 F.2d 367, 372-73 (11th Cir. 1989) (Act applies to the Navy by either implication or virtue of executive act). Despite this apparent expansion of the Act, no relief was granted to any defendant in any of these cases. In fact, the motion to either exclude evidence or dismiss an indictment based on an alleged violation of the Act or the DOD regulations is rarely successful. See Brian L. Porto, Annotation, Construction and Application of Posse Comitatus Act (18 USCA § 1385), and Similar Predecessor Provisions, Restricting Use of United States Army and Air Force to Execute Laws, 141 A.L.R. Fed. 271 (2001) (listing three cases in which some relief was granted as opposed to over fifty cases in which the defense was unsuccessful).

356. See *supra* note 355. But see *Mendoza-Cecelia*, 963 F.2d at 1477-78. According to *Mendoza-Cecelia*, the Act doesn’t apply to the Navy. Even if it did, 10 U.S.C. § 379 creates an exception that permits Navy ships to employ Coast Guard LEDETS. Any violation of the Navy implementing regulations or 10 U.S.C. §§ 371-378 does not warrant an exclusionary rule.

357. See, e.g., *United States v. Hitchcock*, 2002 U.S. App. LEXIS 4513, at *12-17 (9th Cir. Mar. 21, 2002). But see *United States v. Yunis*, 924 F.2d 1086, 1093-94 (D.C. Cir. 1991) (discussing the Act distinctly from the DOD regulations, concluding that the Navy violated neither when it assisted the Federal Bureau of Investigation in an overseas arrest and interrogation).

IX. Congressional Action to Further Increase Military Involvement in Civilian Law Enforcement (Round 2, The 1988 Amendments to the 1981 DOD Authorization Act (10 U.S.C. §§ 371-378))

By 1986, even prominent civil libertarians began to question the DOD's reluctance to participate in protecting the border from foreign threats,³⁵⁸ noting how easily terrorists could exploit this weakness.³⁵⁹ As *New York Times* columnist William Safire wrote:

The day can easily be foreseen when one of our cities is held hostage by a terrorist group or a terrorist state; the stuff of novels can quickly become reality. At that point, we would be asking: how did they get the bomb into our country? Whose job was it to stop the incoming weapon at our border? Why have we spent trillions on defense when any maniac can fly in a bomb that can destroy a city?³⁶⁰

Despite wide public perception that the United States had lost control of its borders, defense and law enforcement officials continued to oppose an increased DOD role in securing them.³⁶¹ In September 1988, however, Congress enacted a program to increase significantly the role of the armed forces in drug interdiction as part of the Defense Authorization Act for 1989.³⁶² The conference committee bill established a requirement for the DOD "to plan and budget for the effective detection and monitoring of *all* potential aerial and maritime threats to the national security."³⁶³ It also designated the DOD as the lead federal agency for the detection and monitoring of aerial and maritime transit of illegal drugs into the country.³⁶⁴

358. For example, the DOD complained in a 1988 GAO report that the use of 0.02% of its budget to assist law enforcement efforts (\$75 million out of \$274 billion) was a financial problem. See GAO/NSIAD-88-156, *supra* note 344, at 25-26. Thus, while the DOD never changed its regulation mandating reimbursement in all cases as a matter of law, it did implement the DOJ position that reimbursement was discretionary. See *supra* notes 341-42 and accompanying text.

359. See 132 CONG. REC. E1331 (1986) (remarks of Mr. Rangel of New York).

360. William Safire, *Thataway, Posse Comitatus*, N.Y. TIMES, Feb. 28, 1986, at A31, quoted in 132 CONG. REC. E1331.

361. See GAO/NSIAD-88-156, *supra* note 344, ch. 3; GAO/T-GGD-88-38, *supra* note 322, at 9-13; H.R. CONF. REP. NO. 100-989, at 453 (1988), reprinted in 1988 U.S.C.C.A.N. 2581 (remarks of Secretary of Defense Carlucci).

362. H.R. CONF. REP. NO. 100-989, at 447, reprinted in 1988 U.S.C.C.A.N. 2575.

363. *Id.* (emphasis added).

These two statements turned what some in the DOD may have seen as an undesirable collateral duty into “a major new military requirement.”³⁶⁵

The 1989 Defense Authorization Act also amended 10 U.S.C. §§ 371-378 to expand military assistance to civilian law enforcement while preserving military readiness and the civilian lead in direct law enforcement.³⁶⁶ The Secretary of Defense was required to consider the needs of civilian law enforcement when planning and executing military training or operations and to inform law enforcement officials promptly about drug-related intelligence.³⁶⁷ Department of Defense personnel and equipment could now be used to intercept vessels and aircraft detected outside of the United States and direct them to a location designated by civilian law enforcement officials.³⁶⁸ The 1988 Act also deleted the prohibition in 10 U.S.C. § 375 against participation in an interdiction.³⁶⁹ The limits on search, seizure, and arrest were re-ratified, as was the nonpreemption provision of 10 U.S.C. § 378.³⁷⁰ The 1988 Act also eliminated the requirement that the Attorney General and Secretary of Defense determine that an emergency existed before military assistance could be provided.³⁷¹ While concerns about direct law enforcement actions remained, the 1988 Act was clearly intended to further increase DOD participation in indirect law enforcement.

In 1998, Congress expanded the list of civilian agencies covered by the safe harbor provisions contained in 10 U.S.C. § 374 (operation of loaned equipment) to include those fighting terrorism.³⁷² The list of agen-

364. *Id.* The language in the legislative history is broader than in the actual law. The legislative history effectively tasks the DOD to detect and monitor all potential air or sea threats to national security and lists drug interdiction as one “aspect” of the larger mission. *Id.* Section 1102 of the statute, however, only lists the DOD as the single lead agency of the federal government for the detection and monitoring of aerial and maritime transit of illegal drugs into the United States. *See* Pub. L. No. 100-456, 102 Stat. 2042 (1989).

365. H.R. CONF. REP. NO. 100-989, at 448, *reprinted in* 1988 U.S.C.C.A.N. 2576.

366. *Id.* at 450, *reprinted in* 1988 U.S.C.C.A.N. 2578.

367. *Id.*; 10 U.S.C.A. § 371(b)-(c) (West 1989).

368. H.R. CONF. REP. NO. 100-989, at 451, *reprinted in* 1988 U.S.C.C.A.N. 2579.

369. *Id.* at 452, *reprinted in* 1988 U.S.C.C.A.N. 2580. The prohibitions only applied to assistance provided under the rest of the Authorization Act’s safe harbor provisions. *See supra* section VII.A.

370. 10 U.S.C. § 379 assigned the search, seizure, and arrest function to 500 active duty Coast Guard law enforcement personnel placed on appropriate navy vessels. H.R. CONF. REP. NO. 100-989, at 454-55, *reprinted in* 1988 U.S.C.C.A.N. 2582-83; *see* 10 U.S.C.A. § 379 (West 2001).

371. *See* 10 U.S.C.A. § 374(b)(2)(E).

372. Pub. L. No. 105-277, § 201, 112 Stat. 2681-567 (1988).

cies that can receive enhanced assistance under 10 U.S.C. § 374 now includes those enforcing customs, drugs, immigration, and terrorism laws.³⁷³

Despite these changes in the law, the DOD regulations concerning assistance to law enforcement remained unchanged. There was no move to implement the expanded safe harbors,³⁷⁴ improve cooperation in counterterrorism, or implement the mandate “to plan and budget for the effective detection and monitoring of all potential aerial and maritime threats to the national security.”³⁷⁵ The original overbroad provisions concerning reimbursement remain in place. If anything, the DOD implementing regulations became more restrictive as the Department’s policy shifted from cooperation with law enforcement to the “maximum extent practicable” in 1982 to the current policy of cooperation “to the extent practical.”³⁷⁶

The DOD regulations and court cases based upon them therefore make an extremely poor legal foundation upon which to build the new Homeland Security Strategy or define the scope of the Posse Comitatus Act. Other, legally sound, theories that both permit necessary military participation and check executive and military power, however, are available.

X. The Act’s Meaning in the Twenty-First Century; Just One Part of a System of Laws and Regulations That Limit Military Interference in Civil Affairs

A. The Posse Comitatus Act

373. See 10 U.S.C.A. § 374(b)(1).

374. Department of Defense Directive 5525.5 provided internal guidance consistent with the published regulations at 32 C.F.R. part 213. See DOD DIR. 5525.5, *supra* note 7 (discussed *supra* note 325). The Navy issued SECNAVINST 5820.7B on 28 March 1988 to implement DOD Directive 5525.5. See SEC’Y OF NAVY, INSTR. 5820.7B (28 Mar. 1988) [hereinafter SECNAVINST 5820.7B]. Both remain effective as of May 2002. The only change has been a December 1989 amendment to DOD Directive 5525.5 permitting the Secretary of Defense to limit the extraterritorial effect of the DOD regulations. See DOD DIR. 5525.5, *supra* note 7, at 6. The public regulations at 32 C.F.R. part 213, on the other hand, were cancelled on 28 April 1993. See 58 Fed. Reg. 25,776 (Apr. 28, 1993).

375. H.R. CONF. REP. NO. 100-989, at 447, *reprinted in* 1988 U.S.C.C.A.N. 2575.

376. Compare 32 C.F.R. § 213.4, with DOD DIR. 5525.5, *supra* note 7, at 2, para. 4. But see SECNAVINST 5820.7B, *supra* note 374, para. 6 (cooperation to the maximum extent practicable).

While no one has ever been convicted of violating the Act,³⁷⁷ and probably never will, the Act's surviving portion³⁷⁸ remains a criminal law. Therefore, discussing the Act element-by-element, like any other criminal law, is useful. In 2003, the Act states:

Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.³⁷⁹

The term "willfully" generally means that the defendant knowingly performed an act, deliberately and intentionally, as contrasted with accidentally, carelessly, or unintentionally.³⁸⁰ In this context, willfully may also mean that the accused had "an evil-meaning mind, that is to say, that he acted with knowledge that his conduct was generally unlawful."³⁸¹ If the proscribed conduct could subjectively and honestly be considered innocent, then a willful mens rea may require the defendant to have more specific knowledge of the law being violated.³⁸² Given the frequent misinterpretation of the Act, the technical nature of the words "as a posse comitatus or otherwise," and the exceptions language at the beginning of the statute, the higher standard for willfulness should probably apply. This

377. See H.R. REP. NO. 97-71, pt. I (1981), reprinted in 1981 U.S.C.C.A.N. 1787 ("According to a spokesman for the Department of Justice, no one has been charged or prosecuted under the Posse Comitatus Act since its enactment. Testimony of Edward S.G. Dennis Jr. on behalf of the Department of Justice . . .").

378. A significant portion of the original Act limited the executive branch's authority to spend appropriated funds to pay the expenses incurred in employing troops as a posse comitatus. See *supra* note 130 and accompanying text.

379. 18 U.S.C.A. § 1385 (West 2001).

380. FEDERAL JURY PRACTICE AND INSTRUCTIONS, CIVIL AND CRIMINAL § 17.05 (5th ed. 2001).

381. *Sillasse Bryan v. United States*, 524 U.S. 184, 193-94 (1998).

382. *Id.*; *Ratzlaf v. United States*, 510 U.S. 135, 136-37, 138 (1994). This is a rare exception to the principle that ignorance of the law is not a defense to a criminal charge, an exception currently limited to highly technical statutes such as tax and financial laws. *Bryan*, 524 U.S. at 194-95.

could be one reason no one has ever been successfully prosecuted for violating the Act.

With the definition of willfulness in place and the historical record in mind, the Act can be restated as:

Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress,

- (1) intentionally and with a bad purpose to either disobey or disregard the law
- (2) uses any part of the Army or Air Force
- (3) within the United States
- (4) upon the demand of, and in subordination to, the sheriff, U.S. marshal, or other law enforcement official
- (5) to directly enforce civilian law in a way that U.S. citizens are subject to the exercise of military power which is regulatory, proscriptive, or compulsory in nature, or at a polling place
- (6) without first obtaining permission of the President to do so shall be fined under this title or imprisoned not more than two years, or both.

This more focused and historically accurate interpretation offers several advantages over many others:

- (1) It applies a “cardinal” rule of statutory construction to interpret the words “as a posse comitatus or otherwise,” which Congress deliberately left in the law, rather than ignoring these words;
- (2) It applies a historically accurate definition of *posse comitatus* to interpret the law as written and accounts for the Cushing Doctrine’s central role in motivating the Act;
- (3) It applies another recognized rule of statutory construction, *ejusdem generis*, to define the words “or otherwise” in context; and
- (4) Unlike almost all others, this interpretation accounts for the fact that a significant portion of the Act expired in the nineteenth century.

This more focused approach also accounts for the many domestic uses of troops by various Presidents that the broader interpretation of the Act implemented by the DOD and some courts would deem unlawful. The

restatement even takes into consideration the Direct Access Policy of 1917-1921, assuming that the Secretary of War asserted presidential authority as part of the National Command Authority.³⁸³

By interpreting all the words in the statute, accounting for those that Congress permitted to expire, and applying the correct historical context, articulating a large body of “exceptions” to the Act is unnecessary. The Act’s important, focused role is to counter the primary evil of 1878: the loss of control over army troops via the Cushing Doctrine. Other laws and constitutional provisions further limit the military, keep it away from polling places during elections, and capture the broader policies against military involvement in domestic affairs. The Act is an important, but partially redundant, component of a statutory and constitutional system that limits military involvement in civil affairs.

B. The Rest of the System That Limits Military Involvement in Civil Affairs

1. Federalism Prevents State Law Enforcement from Commanding Federal Military Assets

The Constitution establishes a system of dual sovereignty in which both the federal and state governments have authority to act, within their

383. Constitutionally, the ultimate authority and responsibility for the national defense rests with the President. Under current law and doctrine:

The *National Command Authorities* (NCA) are the President *and* Secretary of Defense or persons acting lawfully in their stead. The term NCA is used to signify constitutional authority to direct the Armed Forces in their execution of military action. Both movement of troops and execution of military action must be directed by the NCA; by law, no one else in the chain of command has the authority to take such action except in self-defense.

NATIONAL DEFENSE UNIVERSITY, JOINT FORCES STAFF COLLEGE, JFSC PUB. 1, JOINT STAFF OFFICER’S GUIDE § 102 (2000). The current administration is doing away with the term “National Command Authority”; however, the change has not yet been formalized.

proper spheres of authority, directly on the people. In *Lane County v. Oregon*,³⁸⁴ the Court stated:

The people of the United States constitute one nation, under one government, and this government, within the scope of the powers with which it is invested, is supreme. On the other hand, the people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence.³⁸⁵

The control of the U.S. military is one area in which federal power is supreme. In *Federalist No. 23*, Alexander Hamilton stated that once it is determined that the federal government is to be entrusted with providing for the common defense, then “there can be no limitation of that authority which is to provide for the defense and protection of the community in any manner essential to its efficacy—that is, in any manner essential to the formation, direction, or support of the National Forces.”³⁸⁶

The Supreme Court addressed the relationship between federal and state power over the military in *United States v. Tarble*.³⁸⁷ In that case, the Court held:

Now, among the powers assigned to the National government, is the power “to raise and support armies,” and the power “to provide for the government and regulation of the land and naval forces.” The execution of these powers falls within the line of its control over the subject is plenary and exclusive. It can determine, without question from any State authority, how the armies shall be raised, whether by voluntary enlistment or forced draft, the age at which the soldier shall be received, and the period for which he shall be taken, the compensation he shall be allowed, and the service to which he shall be assigned. And it can provide the rules for the government and regulation of the forces after they are raised, define what shall constitute military offences, and prescribe their punishment. No interference with the execution of this power to the National government in the formation, organization, and government of its armies by any State officials

384. 74 U.S. (7 Wall.) 71 (1869).

385. *Id.* at 75-76.

386. THE FEDERALIST NO. 23, at 121-22 (Alexander Hamilton) (Clinton Rossiter ed., 1999).

387. 80 U.S. (13 Wall.) 397 (1872).

could be permitted without greatly impairing the efficiency, if it did not utterly destroy, this branch of the public service.³⁸⁸

The Supreme Court recently affirmed its holding of the supremacy of the federal government with regard to control of the military in *Perpich v. Department of Defense*.³⁸⁹ In that case, the Court, explicitly approving *United States v. Tarble*, held that the federal government may order the National Guard to active duty for training outside the United States without the consent of the state or a presidential proclamation.³⁹⁰

From these cases, the supremacy of federal control over the military is clear. In this regard, the Posse Comitatus Act can be viewed as Congress's expression of constitutional law regarding federalism.

2. DOD Military Personnel Have Limited Arrest and Investigative Authority³⁹¹

Unlike their state and local counterparts, federal officials, including designated law enforcement officers, have no general arrest authority. Instead, federal agents have only whatever limited arrest powers are granted to them via specific federal statutes. The Constitution creates this distinction by granting the central government limited powers and reserving the general police power to the States.³⁹² Accordingly, “[n]o act of Congress lays down a general federal rule for arrest without a warrant for federal offenses”³⁹³ and “when Congress want[s] to grant the power to make arrests without a warrant, it [does] so expressly.”³⁹⁴

Absent a specific grant of authority, therefore, active duty Army, Navy, Air Force, and Marine personnel do not have federal arrest authority over civilians.³⁹⁵ There may be some limited exceptions to this general rule for violations committed on a military base or when DOD military personnel pursue a suspect fleeing from a military installation.³⁹⁶ In the vast majority of cases, however, DOD military personnel have no formal arrest authority over civilians.³⁹⁷ They cannot function as a national law enforcement agency. No other law, including the Posse Comitatus Act or

388. *Id.* at 408.

389. 496 U.S. 334 (1990).

390. *See id.* at 353-54.

391. Lieutenant Brad Kieserman assisted with this section.

392. *United States v. Morrison*, 529 U.S. 598, 618 n.8 (2000).

393. *United States v. Di Re*, 332 U.S. 581, 591 (1948).

10 U.S.C. § 374, is necessary to reach this conclusion. The regulatory prohibition against DOD personnel making civilian arrests repeats the point that most military personnel have no arrest authority.³⁹⁸

Additionally, the vast majority of DOD military personnel do not have authority to even investigate suspected violations of criminal laws. While Congress gave most Coast Guard personnel explicit authority to conduct certain law enforcement inquiries, examinations, inspections, and searches,³⁹⁹ the DOD armed forces received no similar authority. Instead, the authority of DOD personnel to conduct criminal investigations is lim-

394. *Ward v. United States*, 316 F.2d 113 (9th Cir. 1963); *United States v. Moderacki*, 280 F. Supp. 633, 637 (D. Del. 1968); *United States v. Helbock*, 76 F. Supp. 985 (D. Ore. 1948) (all three cases analyzing 39 U.S.C. § 3523(a)(2)(K), which provided *inter alia* that United States Postal Inspectors could, in any criminal investigation, “apprehend and effect . . . arrests of postal offenders”). Notwithstanding the apparently plain language of the statute authorizing postal inspectors to effect arrests, the reasoning of the *Moderacki* court is illustrative of the analysis conducted by several federal courts that concluded Congress did not intend for postal inspectors to have arrest authority:

An argument can be made that “apprehends and effects arrests” means “to make arrests.” If this were what was intended, why the curious language, “apprehends and effects arrests”? There is the connotation here that the duty of the inspector is to locate the offender, detain him when necessary and summon someone to arrest him. By contrast, officers of the Federal Bureau of Investigation, the Secret Service and the United States Customs Service are granted the power to arrest in no uncertain terms.

Moderacki, 280 F. Supp. at 637. Another court analyzed the legislative history of the provision and concluded that the purpose of the statute was to establish postal salary levels by job descriptions rather than by job title, thereby classifying existing duties and not creating “new authority.” *Alexander v. United States*, 390 F.2d 101, 103-04 (5th Cir. 1968).

The Postal Service responded to these rulings by obtaining a legislative change to clarify the arrest authority of postal inspectors. *See* 18 U.S.C. § 3061 (2000). Section 3061 is illustrative of the limited arrest authority of many federal agents because it creates a framework that permits warrantless arrests for any federal felony committed in the officer’s presence or for which the officer has reasonable grounds to believe that the person to be arrested committed a federal felony; however, the officer may only exercise this authority when engaged in the enforcement of laws related to the limited function of his federal agency. *Id.* *See also* 8 U.S.C. § 1357 (2000) (Immigration and Naturalization Service); 18 U.S.C. §§ 3052 (FBI), 3056 (Secret Service), 3061 (Postal Inspectors); 19 U.S.C. §§ 1581, 1589a (2000) (Customs); 21 U.S.C. § 878 (2000) (Drug Enforcement Agency); 26 U.S.C. § 7608 (2000) (Internal Revenue Service agents); 49 U.S.C. § 114(q) (2000) (designated Transportation Security Administration employees). These statutes expressly confer warrantless arrest and weapons carriage authority for many federal agencies.

ited to internal matters such as on-base crime, suspected violations by military personnel, and crimes committed by civilian employees in the course of their official duties.⁴⁰⁰ While a lack of authority to conduct criminal investigations is a more subtle form of control over the DOD military

395. Pursuant to Rule for Courts-Martial 302, MANUAL FOR COURTS-MARTIAL, UNITED STATES R.C.M. 302 (2002), and article 7 of the Uniform Code of Military Justice (UCMJ), UCMJ art. 7 (2002), various military officials, including authorized criminal investigators, may “apprehend” any person subject to the UCMJ, regardless of location, if there is probable cause to believe that the person has committed a criminal offense. *See id.* art. 2. Normally, persons on active duty constitute the largest block of persons subject to the UCMJ.

Members of the U.S. Coast Guard have even broader arrest authority under 14 U.S.C. § 89(a), which states:

The Coast Guard may make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of laws of the United States. . . . When from such inquiries, examination, inspection, or search it appears that a breach of the laws of the United States rendering a person liable to arrest is being, or has been committed, by any person, such person shall be arrested or, if escaping to shore, shall be immediately pursued and arrested on shore

14 U.S.C. § 89(a) (2000).

396. Major Matthew J. Gilligan, *Opening the Gate?: An Analysis of Military Law Enforcement Authority over Civilian Lawbreakers on and off the Federal Installation*, 161 MIL. L. REV. 1, 27-33 (1999).

397. *Id.* at 6-7.

398. Civilian special agents of the Defense Criminal Investigative Service have express authority to execute warrants and make arrests without a warrant. They may also carry firearms in the performance of their duties. *See* 10 U.S.C. § 1585-1585a (2000).

399. 14 U.S.C. § 89 (discussed *supra* note 395). The Coast Guard is the fifth military service in the armed forces of the United States. *Id.* §1.

400. Gilligan, *supra* note 396, at 27-33; *see also* U.S. DEP’T OF ARMY, REG. 195-2, CRIMINAL INVESTIGATION ACTIVITIES § 3.1 (1995). The Army has investigative authority whenever an Army interest exists and investigative authority has not been reserved to another agency such as the DOJ. Army interest exists whenever (1) the crime is committed on a military installation; (2) the suspect is believed to be subject to the UCMJ; (3) the suspect is a DOD civilian employee who committed an offense in connection with his official duties; (4) the Army is the victim of the crime; and (5) in situations where off-base criminal activities have a direct adverse effect on the effective operation of a military facility (introduction of illegal drugs). *Id.*; *see also* U.S. DEP’T OF DEFENSE, DIR. 5210.56, USE OF DEADLY FORCE AND THE CARRYING OF FIREARMS BY DOD PERSONNEL ENGAGED IN LAW ENFORCEMENT AND SECURITY DUTIES (25 Feb. 1992) (with C1, 10 Nov. 1997) (giving a similar list of investigations and permitting DOD personnel to carry weapons when so engaged); Major Steven Nypaver, *CID and the Judge Advocate in the Field—A Primer*, ARMY LAW., Sept. 1990, at 7-8.

branches, it is a powerful legal impediment when combined with the standards of conduct and fiscal law. For example, in 1979, the Department of Justice maintained that a lack of explicit authority for the FBI to investigate narcotics violations limited the Bureau's role to support of the Drug Enforcement Agency.⁴⁰¹

3. *Fiscal Law*

Congress's "power of the purse" is perhaps the single most important check in the Constitution on presidential power,⁴⁰² especially with respect to potential misuse of the military.⁴⁰³ It is up to Congress to decide whether to provide funds for a particular program or activity.⁴⁰⁴ Abuses, however, were common through the post-Civil War years. The permanent funding statutes in Title 31 have evolved over two centuries to combat these abuses and check executive power.⁴⁰⁵ Even a basic review of the fiscal law framework shows the importance of the (now expired) fiscal law portion of the Posse Comitatus Act.

a. *Fiscal Law Framework*

The General Accounting Office has established a three-part test to determine whether it is legal to obligate or expend funds: "(1) The purpose of the obligation or expenditure must be authorized; (2) The obligation must occur within the time limits applicable to the appropriation; and (3)

401. See GAO/GGD-80-4, *supra* note 312, at 189 (appendix IX containing the DOJ's response to the GAO report).

402. 1 GEN'L ACCOUNTING OFFICE, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 1-3 (2d ed. 1991) [hereinafter GAO RED BOOK].

403. See *Federalist No. 23*, in which Hamilton wrote about the benefit of the Constitution's two-year limit on congressional appropriations for the Army combined with two-year terms for members of the House of Representatives:

Schemes to subvert the liberties of a great community *require time* to mature them for execution. An army, so large as seriously to menace those liberties, could only be formed by progressive augmentations; which would suppose not merely a temporary combination between the legislature and executive, but a continued conspiracy for a series of time.

THE FEDERALIST NO. 23, at 140 (Alexander Hamilton) (Clinton Rossiter ed., 1999).

404. GAO RED BOOK, *supra* note 402, at 1-4.

405. *Id.* at 1-6.

The obligation and expenditure must be within the amounts Congress has established.”⁴⁰⁶ These elements are often referred to, respectively, as purpose, time, and amount.

The purpose statute is codified at 31 U.S.C. § 1301(a). It states: “Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law.”⁴⁰⁷ The GAO has succinctly stated the constitutional principle as follows: “Since money cannot be paid from the Treasury except under an appropriation . . . , and since an appropriation must be derived from an act of Congress, it is for Congress to determine the purposes for which an appropriation may be used.”⁴⁰⁸ The Supreme Court has held that “the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress.”⁴⁰⁹

Congress authorizes funds to be spent for specific purposes in organic legislation, authorization acts, and appropriation acts.⁴¹⁰ Organic legislation is used to create agencies, programs, or functions and often does not provide any funds. Appropriation authorization legislation permits the appropriation of funds to carry out organic legislation.⁴¹¹ Authorization acts may be contained in organic legislation, or they may be separate legislative actions.⁴¹² An authorization act does not appropriate funds; rather, it “contemplates subsequent legislation by the Congress actually appropriating the funds.”⁴¹³ An appropriation act provides the budget authority.

To determine how a federal agency may lawfully spend its funds, locating and examining the legislation authorizing the function is necessary. This authority may be located in organic legislation, authorization acts, or appropriation acts, along with the appropriate legislative history.⁴¹⁴ This statutory authority, by implication, confers with it both the express authority of the statute and the authority to incur expenses that are neces-

406. *Id.* at 4-2.

407. 31 U.S.C. § 1301(a) (2000).

408. GAO RED BOOK, *supra* note 402, at 4-2 (citing U.S. CONST. art. I, § 9, cl. 7).

409. *United States v. MacCollum*, 429 U.S. 317, 321 (1976) (citing *Reeside v. Walker*, 52 U.S. (11 How.) 272, 291 (1850)).

410. *See generally* GAO RED BOOK, *supra* note 402, ch. 2.

411. *See id.* at 2-33.

412. *See id.* at 2-35.

413. *Id.* at 2-34 (citing 35 Comp. Gen. 306 (1955); 27 Comp. Gen. 923 (1921)).

414. *See id.* at 4-5.

sary or proper or incident to the purpose of the statute.⁴¹⁵ This is known as the necessary expense doctrine.

The Comptroller General's modern version of the necessary expense doctrine is set out in volume I, chapter 4 of the *GAO Red Book*. It states:

For an expenditure to be justified under the necessary expense theory, three tests must be met:

- (1) The expenditure must bear a logical relationship to the appropriation sought to be charged. In other words, it must make a direct contribution to carrying out either a specific appropriation or an authorized agency function for which more general appropriations are available.
- (2) The expenditure must not be prohibited by law.
- (3) The expenditure must not be otherwise provided for, that is, it must be an item that falls within the scope of some other appropriation or statutory funding scheme.⁴¹⁶

The determination of whether an expenditure is logically related to an appropriation is made by the agency.⁴¹⁷ The *GAO Red Book* states that "[a] decision on a 'necessary expense' question therefore involves (1) analyzing the agency's appropriations and other statutory authority to determine whether the purpose is authorized, and (2) evaluating the adequacy of the administrative justification, to decide whether the agency has properly exercised, or exceeded, its discretion."⁴¹⁸ The GAO will defer to the agency when reviewing an agency determination.⁴¹⁹

There are several possible consequences for violations of the purpose statute. The Comptroller General may disallow an expenditure,⁴²⁰ admonish an agency,⁴²¹ adjust accounts,⁴²² or take exception to an account.⁴²³ In addition, a violation of the purpose statute may lead to an Anti-Deficiency

415. 6 Comp. Gen. 619 (1927).

416. GAO RED BOOK, *supra* note 402, at 4-16.

417. *See id.* at 4-17.

418. *Id.*

419. *See id.*

420. *See* Hon. Bill Alexander, B-213137, 1984 U.S. Comp. Gen. LEXIS 972, at *4 (June 22, 1984) (citing 32 Comp. Gen. 71 (1952)).

421. *See id.* (citing 17 Comp. Gen. 1020 (1938)).

422. *See id.* (citing 14 Comp. Gen. 103 (1934)).

423. *See id.* (citing 17 Comp. Gen. 748 (1938)).

Act violation. The Anti-Deficiency Act prohibits expending or obligating funds in excess of an appropriation or in advance of an appropriation.⁴²⁴ Therefore, if funds were not authorized for a purpose, or if the wrong appropriation was charged and the adjustment of accounts caused the agency to exceed the appropriated funds, then both the purpose statute and the Anti-Deficiency Act have been violated.⁴²⁵ A violation of the Anti-Deficiency Act may lead to adverse personnel actions, including suspension without pay or removal,⁴²⁶ or criminal penalties.⁴²⁷

b. Application to the DOD Armed Forces

A detailed discussion of the fiscal law limits on the domestic law enforcement role of the U.S. military is beyond the scope of this article; however, a preliminary examination of this framework shows that fiscal law could be a very powerful control. On the one hand, the basic purpose of the Army and Air Force listed in 10 U.S.C. is to: (1) preserve the peace and security, and provide for the defense of the United States, the Territories, Commonwealths and possessions, and any areas occupied by the United States; (2) support national policies; (3) implement national objectives; and (4) overcome any nations responsible for aggressive acts that imperil the peace and security of the United States.⁴²⁸ The plain language of the statute is clear: the Army and Air Force have some domestic purposes.

Moreover, Congress has given the military various direct domestic law enforcement authorities.⁴²⁹ 10 U.S.C. §§ 331 to 335 gives the President broad authority to use the military to enforce federal authority.⁴³⁰ 14 U.S.C. § 91 permits Navy enforcement of a statute providing for the safety and security of U.S. naval vessels.⁴³¹ 16 U.S.C. § 1861 provides explicit authority for DOD personnel to arrest individuals; board, search, and inspect fishing vessels; seize vessels; seize catch; seize evidence; and exe-

424. See 31 U.S.C. § 1341(a) (2000).

425. See *Hon. Bill Alexander*, 1984 U.S. Comp. Gen. LEXIS 972, at *4.

426. See 31 U.S.C. § 1349.

427. See *id.* § 1350.

428. See 10 U.S.C. §§ 3062, 8062 (2000). The Navy portion of 10 U.S.C. does not contain a similar provision.

429. See DOD DIR. 5525.5, *supra* note 7, encl. 4, sec. E4.1.2.5 (listing many other express law enforcement authorities).

430. See *supra* section III.B.

431. See 14 U.S.C. § 91 (2000); *supra* section V.D.

cute warrants.⁴³² 33 U.S.C. §§ 1 and 3 have been used in conjunction with the trespass statute to permit the military to enforce restricted areas around military installations and danger zones around ranges.⁴³³ 49 U.S.C. § 324 permits the detailing of military members to the Department of Transportation for any duty.⁴³⁴ 50 U.S.C. § 194 gives the President the authority, which the President has exercised,⁴³⁵ to use the military to enforce both the Espionage Act and Magnuson Act.⁴³⁶ Congress has also established a system for the DOD military services to support civilian law enforcement efforts within certain limits.⁴³⁷

On the other hand, Congress has not given the DOD military services arrest authority or authority to conduct criminal investigations.⁴³⁸ Congress also limits the intelligence element of the military from gathering information on U.S. persons.⁴³⁹ While the list of laws that DOD forces may enforce is extensive, the most significant involve national security and self-protection. The authorized enforcement actions do not even imply a general police or investigation power. If a law is not on the list, then fiscal law principles bar DOD military forces from taking enforcement action unless the activity is otherwise authorized. Moreover, the continuing impact of laws such as the Posse Comitatus Act that prohibit certain activities may also have fiscal law implications.⁴⁴⁰

4. *Standards of Ethical Conduct*

While not currently used in this manner, the Standards of Ethical Conduct provide an additional conceptual framework to limit DOD law enforcement actions. The Standards of Conduct, in its broadest sense, consist of a recently created system of Executive Orders,⁴⁴¹ published Office of Government Ethics (OGE) regulations,⁴⁴² and internal DOD regulations.⁴⁴³ These orders and regulations limit the use of DOD personnel or

432. See 16 U.S.C. § 1861 (2000); *supra* section V.F.

433. See 33 U.S.C. §§ 1, 3 (2000); *supra* sections V.A, V.C.

434. See 49 U.S.C. § 324 (2000); *supra* section V.G.

435. See 33 C.F.R. pt. 6 (LEXIS 2003).

436. See 50 U.S.C. §§ 191, 194 (2000); *supra* sections V.B, V.E.

437. See *supra* section VII.

438. See *supra* section X.B(2).

439. A very large body of law governs the conduct of intelligence agencies, including military intelligence; however, the President has issued a succinct summary of primary protections for U.S. persons in Executive Order 12,333. See *generally* Exec. Order No. 12,333, 3 C.F.R. 200 (1982), *reprinted in* 50 U.S.C. § 401 (2000).

property to authorized activities only. Government property, moreover, is defined broadly, extending to any property right or interest purchased with government funds. It includes vehicles, office supplies, communications

440. Once it is determined that the expenditure bears a logical relationship to an authorized function, it is necessary to determine whether the expenditure is prohibited by law. The Posse Comitatus Act, when enacted as part of the Army Appropriation Act of 1878, contained three provisions: the first established the criminal provision; the second was a prohibition on expending funds to employ troops as a posse comitatus; and the third established the criminal penalty. The criminal provision begins with the phrase, "From and after the passage of this act it shall not be lawful" Act of June 18, 1878, 20 Stat. 152. This language expresses a clear intent of futurity and the permanence of the provision. The prohibition on expending funds, on the other hand, has clear language indicating that the provision applied only to the funds appropriated by that Act. The plain language of the statute suggests that the prohibition on expending funds expired at the end of the fiscal year. *See id.* One could argue, however, that to read the provision as such would lead to absurd results. In other words, it is illegal for Army troops to be part of the marshal's posse comitatus, however, there is no permanent fiscal law prohibition against the practice.

There is a line of Comptroller General Decisions that stand for the proposition that absent a clear statement of futurity a provision may be considered permanent if not doing so would render the provision meaningless or produce an absurd result. *See* Federal Judges IV—Reexamination of Appropriations Rider Limitation on Pay Increases, 65 Comp. Gen. 352 (1986) (finding that a provision is permanent otherwise it would be stripped of any legal effect); Federal Judges—Applicability of October 1982 Pay Increase, 62 Comp. Gen. 54 (1982) (same); Hon. Will R. Wood, 9 Comp. Gen. 248 (1929) (finding that a provision in an Army Appropriation was permanent even though it did not contain any words of futurity because an alternate construction would mean that the proviso was effective for only one day).

In the case of the Posse Comitatus Act, however, the general rule should apply. The plain language of the Act is clear that the prohibition on expending funds applied only for that fiscal year. Furthermore, interpreting the proviso consistent with the plain language will not render the provision meaningless or provide an absurd result. The plain language makes the fiscal prohibition effective for the fiscal year intended; this is not a situation in which the statute would be wholly ineffective if not permanent. The criminal provision, which does indicate futurity, creates an express exception to the prohibition when authorized by Congress. One can view this language as an express indication that monies may be expended in the future when Congress provides authorization.

441. Exec. Order No. 12,674, pt. I, § 101(i), 54 Fed. Reg. 15,159 (Apr. 14, 1989) (as modified by Exec. Order No. 12,731, 55 Fed. Reg. 42,547 (Oct. 19, 1990)).

442. 5 C.F.R. § 2635.704-.705 (LEXIS 2003).

443. U.S. DEP'T OF DEFENSE, DIR. 5500.7, STANDARDS OF CONDUCT (30 Aug. 1993) [hereinafter DOD DIR. 5500.7]; U.S. DEP'T OF DEFENSE, DIR. 5500.7-R, JOINT ETHICS REGULATION §§ 2-100, 2-301 (30 Aug. 1993) [hereinafter JER]. While the Office of Government Ethics (OGE) regulations at 5 C.F.R. part 2635 are only directly applicable to military officers, *see* 5 C.F.R. § 2635.103, these DOD directives apply the OGE regulations to all service members, including enlisted personnel. *See* DOD DIR. 5500.7, *supra*; JER, *supra*.

equipment, and the services of government contractors.⁴⁴⁴ The default rule is, therefore, that every proposed use of DOD property or personnel requires affirmative authority. Moreover, this authority may only come from a law or regulation.⁴⁴⁵ A military commander has no inherent authority to authorize the use of government property for any purpose.⁴⁴⁶ So while it would be a significant mitigating factor, a superior's permission of an activity does not entirely insulate subordinates from potential responsibility for the misuse of equipment. Potential sanctions for the use of DOD property or personnel to conduct unauthorized activities include criminal prosecution of military personnel.⁴⁴⁷ Civilian employees face a full range of negative job actions, including termination for cause.⁴⁴⁸

The Standards of Conduct capture the spirit of the purpose statute by limiting executive agency activities to those authorized by law or regulation.⁴⁴⁹ This principle could be applied to DOD law enforcement actions. The list of authorized DOD law enforcement activities, while extensive,⁴⁵⁰ does not include a general domestic police power or even arrest authority. Any use of DOD equipment or personnel along these lines, therefore, is prohibited.

In many ways, the controls imposed by the Standards of Conduct resemble those incorrectly attributed to the Posse Comitatus Act. The Standards of Conduct directives, however, do so within a legally supportable framework that has a robust enforcement program. While published enforcement actions under the Standards of Conduct appear focused on instances in which individuals misuse government resources for personal gain, this need not be the case. A Standards of Conduct violation could be used to sanction DOD military personnel who engage in unauthorized law enforcement activities. In fact, it would be far easier to prosecute a service

444. 5 C.F.R. § 2635.704(b)(1).

445. *Id.* § 2635.704(b)(2), .705 (b).

446. *Id.* § 2635.704. The OGE explicitly rejected changing the definition of authorized purposes, to include any purpose authorized by an employee's supervisor. *Id.*

447. DOD DIR. 5500.7, *supra* note 443, at B.2. This directive makes portions of the JER a lawful general order. Military personnel may be prosecuted for violating a lawful general order without having to prove actual knowledge of the order. *See* UCMJ art. 92 (2002). Other provisions of the JER, including the OGE regulations incorporated at section 2-100, *see* JER, *supra* note 443, § 2-100, may be prosecuted as a dereliction of duty under article 92, UCMJ. *See* UCMJ art. 92.

448. DOD DIR. 5500.7, *supra* note 443, at B.2.

449. *See supra* notes 408-09 and accompanying text.

450. *See supra* section V.

member for violating the Standards of Conduct than for violating the Posse Comitatus Act as the Act is currently interpreted.⁴⁵¹

5. Federal Election Law

A number of federal election laws, the weakened descendants of an 1865 civil rights law and the 1870 enforcement act, strictly limit actions by all military personnel near polling places and in elections. Originally, RS 2002 prohibited any person in the military, naval, or civil service of the United States from bringing troops or armed men to the place of an election in any state.⁴⁵² Revised Statute 5528 imposed criminal sanctions of up to five years' imprisonment at hard labor for violations.⁴⁵³ Both laws, however, contained exceptions that permitted troops or naval forces at polling places if necessary to repel armed enemies of the United States or to keep the peace at the polls. Ironically, some of the most passionate debate in support of the Posse Comitatus Act centered on President Grant's use of troops at some Southern polling places to prevent voter intimidation and fraud during the 1876 election.⁴⁵⁴ The practice, however, was not actually prohibited until thirty-one years after passage of the Act, when a 1909 revision of the penal code removed the exception from RS 2002 and 5528 permitting the use of the military or naval forces to keep the peace at polling places.⁴⁵⁵

This twentieth century prohibition, along with related laws from the Civil War era that prohibit Army and Navy officers from interfering with elections, remains in place today.⁴⁵⁶ While these laws have been virtually invisible,⁴⁵⁷ they prohibit one of the primary "evils" cited by supporters of the Posse Comitatus Act: keeping the armed forces out of the electoral process. This is probably the most significant statutory restriction imposed

451. It is also possible for the DOD to prosecute a Standards of Conduct violation under the theory that DOD Directive 5525.5, *supra* note 7, prohibits the activity. Department of Defense Directive 5525.5, however, is deeply entwined with the Act, making it potentially quite difficult to prove a violation beyond a reasonable doubt without having to litigate the Act itself. Moreover, no part of DOD Directive 5525.5 is a general order. *See id.*; *see also supra* note 447 (discussing the implication of a general order).

452. REVISED STATUTES, *supra* note 108, at 352.

453. *Id.* at 1071.

454. *See supra* notes 125-26 and accompanying text.

455. XXXV STATUTES AT LARGE OF THE UNITED STATES OF AMERICA FROM DECEMBER 1907 TO MARCH 1909, pt. 1, at xix, 1088.

456. *See* 18 U.S.C. §§ 592-593 (2000); 42 U.S.C. § 1972 (2000).

by Congress since it enhances civilian control over the armed forces. Alexander Hamilton said it best when he wrote:

Independent of all other reasonings upon the subject, it is a full answer to those who require a more peremptory provision against military establishments in time of peace to say that the whole power of the proposed government is to be in the hands of the representatives of the people. This is the essential, and after all, the only efficacious security for the rights and privileges of the people which is attainable in civil society.⁴⁵⁸

The Cushing Doctrine violated this important principle by permitting minor, unelected civilian officials to control parts of the standing army and spend federal funds contrary to congressional instructions without even the elected Commander in Chief's knowledge. The revocation of the Cushing Doctrine via passage of the Posse Comitatus Act reinvigorated elected civilian control over the armed forces. Federal election law keeps the armed forces from turning civilian control into a mere formality.

XI. Conclusion

*Unless we act to prevent it, a new wave of terrorism, potentially involving the world's most destructive weapons, looms in America's future. It is a challenge as formidable as any ever faced by our nation. . . . Today's terrorists can strike at any place, at any time, and with virtually any weapon. Securing the American homeland is a challenge of monumental scale and complexity. But the U.S. government has no more important mission.*⁴⁵⁹

457. Much like the Posse Comitatus Act, it does not appear that anyone has ever been prosecuted for violating these laws. Delaware attempted to prosecute some deputy U.S. marshals under a similar provision related to the marshals in 1881; however, the defendants removed the case to federal court as permitted by law, and the State declined to participate in that forum. *See Delaware v. Emerson*, 8 F. 411 (D. Del. 1881). No one appears to have written about 18 U.S.C. §§ 592 or 593 except to note that a violation disqualifies one from ever holding a position with the United States in addition to the criminal penalties. *See* 2000 OLC LEXIS 11 (Aug. 18, 2000).

458. THE FEDERALIST No. 28, at 147-48 (Alexander Hamilton) (Clinton Rossiter ed., 1999).

459. OFFICE OF HOMELAND SECURITY, *supra* note 4, at 1.

Unfortunately, the current interpretation of the Posse Comitatus Act, namely, a set of overbroad limits that bear little resemblance to the actual law combined with a bewildering patchwork of “practical” exceptions, both impedes this important mission and does little to protect civil liberties. Sustained congressional action to increase DOD participation in domestic law enforcement with no overarching policy framework has only compounded the problem.⁴⁶⁰ In many cases, the actual application of the Act rests largely on ad hoc decisions and, hopefully, good judgment.

Hope, however, is not a sound basis for a Homeland Security strategy. In many critical situations, such as responding to nuclear terrorism, the current interpretation of the Act may create “a convoluted command and control structure, decreased response time, and continuity-of-operations problems; it also leaves the federal response vulnerable to exploitation by the adversary.”⁴⁶¹ It also creates bizarre situations in which the U.S. Navy perceives itself to have less authority to conduct some national defense missions as threats get closer to America’s shores.⁴⁶²

The current misinterpretation of the Posse Comitatus Act is also infecting NORTHCOM when this important new military organization is barely out of the gate.⁴⁶³ NORTHCOM’s mission is to “conduct operations to deter, prevent, and defeat threats and aggression aimed at the United States . . . and as directed by the President or Secretary of Defense, provide military assistance to civil authorities.”⁴⁶⁴ Despite this broadly worded purpose, NORTHCOM specifies that its Homeland Security mission is limited to Homeland Defense and civil support. The distinction being that Homeland Defense is “the protection of U.S. territory, domestic population and critical infrastructure against military attacks emanating from outside the United States,” whereas Homeland Security is “the prevention, preemption, and deterrence of, and defense against, aggression targeted at U.S. territory, sovereignty, domestic population, and infrastruc-

460. *See supra* section V.

461. Chris Quillen, *Posse Comitatus and Nuclear Terrorism*, PARAMETERS, Spring 2002, at 71.

462. *See supra* note 10 (discussing the boarding of the *Hajji Rahmeh*).

463. *See generally* U.S. Northern Command, *Who We Are—Mission*, at <http://www.northcom.mil/index.cfm?fuseaction=s.whoweare§ion=3> (last visited Mar. 2, 2003).

464. *Id.* *See also* Message, R 011337Z Oct 2002, Sec’y of Defense, Washington, D.C., OASD-PA, subject: Public Affairs Guidance (PAG)—Initial Operating Capability (IOC) of United States Northern Command (USNORTHCOM) [hereinafter NORTHCOM Message].

ture as well as the management of the consequences of such aggression and other domestic emergencies.”⁴⁶⁵ The stated requirement for this distinction between “military attacks” and terrorist “aggression” is the Posse Comitatus Act.⁴⁶⁶

NORTHCOM’s distinction between Homeland Security and Homeland Defense, therefore, has the same inherent conflicts and inconsistencies as the DOD’s current interpretation of the Posse Comitatus Act.⁴⁶⁷ Both appear to be based on the logic that the Posse Comitatus Act prohibits the DOD from performing any activities related to law enforcement, such as “interdicting vehicles, vessels and aircraft; conducting surveillance, searches, pursuit and seizures; or making arrests on behalf of civilian law enforcement authorities.”⁴⁶⁸ Therefore, those activities must be Homeland Security, not Homeland Defense; the DOD can only engage in Homeland Defense.

The DOD further states that terrorist attacks against the United States are fundamentally a matter of Homeland Security to be addressed by law enforcement and that the President or Secretary of Defense will direct NORTHCOM’s role in relation to Homeland Security.⁴⁶⁹ In other words, the world’s premier military organization is distancing itself from the “concerted national effort to prevent terrorist attacks within the United States”⁴⁷⁰ until the President or Secretary of Defense directs such participation. While requiring the President or Secretary of Defense to approve all DOD participation in Homeland Security may be a sound policy decision, the Posse Comitatus Act does not require this result.

In addition to potentially impeding national security, this misapplication of the Act is dangerous to American civil liberties and erodes respect for the rule of law. It holds up the Act as a strict legal and quasi-constitutional limit, yet one that is easy to discard or ignore when practical necessity appears to require it.⁴⁷¹ The current DOD doctrine on the Act is rife with implied exceptions for “inherent” military authority.⁴⁷² In the end, the

465. U.S. Northern Command, *Homeland Defense*, at <http://www.northcom.mil/index.cfm?fuseaction=s.homeland> (last visited Mar. 2, 2003).

466. *Id.*

467. *See supra* sections VIII.B-VIII.C.

468. U.S. Northern Command, *Who We Are—Operating Within the Law*, at <http://www.northcom.mil/index.cfm?fuseaction=s.whoweare§ion=10> (last visited Mar. 2, 2003).

469. *See* NORTHCOM Message, *supra* note 464.

470. OFFICE OF HOMELAND SECURITY, *supra* note 4, at 2.

law becomes in some military eyes a “procedural formality,” used to ward off undesired and potentially resource-depleting missions while not imposing any real controls.⁴⁷³ As shown in section IV, this lack of genuine control has frequently left American citizens at the mercy of the military’s and executive branch’s good judgment with respect to civil liberties.

This, of course, need not be the case. A key first step in resolving the current confusion is to distinguish consistently between the Posse Comitatus Act and the general principle of limiting military involvement in civil affairs. The Posse Comitatus Act has long been misconstrued as embodying respected constitutional principles. The actual Act, however, is mostly a remnant of Reconstruction bitterness.

Once the Act is accurately viewed in its true historical background and distinguished from other principles, its current role can be determined through the normal tools of statutory interpretation. This article’s thorough analysis addresses several important issues: (1) the actual wording of the entire Act as passed in 1878; (2) Congress’s rejection of language applying the Act to the naval forces; (3) Congress’s rejection of language that would have simply made it illegal to use the Army to execute the laws which retained limiting words that must be given meaning; (4) the contemporaneous congressional and presidential interpretations of the Act and associated actions; (5) that a significant portion of the Act expired in the nineteenth century; and (6) Congress’s steady increase of the military’s role in regulatory action and law enforcement since 1878.

With the Posse Comitatus Act accurately defined, the DOD should revise its overly restrictive regulations that purport to be based on the Act. Revised DOD regulations should address fiscal law and the Standards of Conduct, reinvigorating these other long-neglected controls. These “other” legal theories will likely prove far more effective in protecting civil liberties, while clearly permitting legitimate national security missions such as near-shore Maritime Interception Operations.⁴⁷⁴ Congress, of

471. Quillen, *supra* note 461, at 62; *see also* OFFICE OF HOMELAND SECURITY, *supra* note 4, at 13, 48 (stating that the law prohibits military personnel from enforcing the law within the United States, but listing a series of broadly defined domestic military and defensive missions difficult to distinguish from law enforcement); NORTHCOM Message, *supra* note 464; text accompanying note 469.

472. *See supra* notes 333-35 and accompanying text.

473. Quillen, *supra* note 461, at 62-63.

474. *See supra* note 10.

course, retains the power to regulate how the executive branch spends appropriated funds to deploy the armed services domestically.

Congress should further empower the DOD to enforce select national security laws fully, perhaps in the areas of nuclear, chemical, and biological terrorism, and create a comprehensive statutory framework addressing the military's role in domestic affairs. The Magnuson Fisheries and Conservation Management Act of 1976, while perhaps not fitting with such a carefully thought-out framework, provides the best model statute for granting DOD law enforcement authority in situations where it makes sense. For example, this approach could resolve significant issues concerning the military's role, via NORTHCOM, in responding to domestic nuclear terrorism.⁴⁷⁵

Once a Department of Homeland Security (HLS) is established,⁴⁷⁶ Congress should also empower the Secretary of HLS to use DOD personnel temporarily detailed to the Department of Homeland Security in any role. This authority should be similar to that granted to the Department of Transportation in 49 U.S.C. § 324.⁴⁷⁷

The President recently stated in his Homeland Security Strategy that “the threat of catastrophic terrorism requires a thorough review of the laws permitting the military to act within the United States in order to determine whether domestic preparedness and response efforts would benefit from greater involvement of military personnel and, if so, how.”⁴⁷⁸ The nation has a unique opportunity to clear up the current legal quagmire, set the record straight on the Posse Comitatus Act, and build a solid legal foundation for the new Northern Command that both enhances Homeland Security and protects civil liberties. Let's roll.

475. Quillen, *supra* note 461, at 71-72.

476. President Bush signed the Homeland Security Act of 2002 into law on 25 November 2002. *See* Pub. L. No. 107-296, 116 Stat. 2135 (2002). In addition to creating the new Department, the Homeland Security Act of 2002 contains a section titled “Sense of Congress Reaffirming the Continued Importance and Applicability of the Posse Comitatus Act.” *Id.* § 886. Unfortunately, Section 886 is a mixed bag of positive steps forward alongside a number of errors and partially correct statements that may add yet another layer of confusion to the Posse Comitatus Act.

For example, Section 886(a)(1) states: “Section 1385 of title 18, United States Code (commonly known as the ‘Posse Comitatus Act’), prohibits the use of the Armed Forces as a posse comitatus to execute the laws except in cases and under circumstances expressly authorized by the Constitution or Act of Congress.” *Id.* § 886(a)(1). As discussed *supra*

476. (continued)

section IV of this article, the focus on law enforcement as part of a traditional posse comitatus is correct. The Act was designed, in large measure, to overturn the Cushing Doctrine. *See supra* section III.C. The Posse Comitatus Act, however, has never applied, as a matter of law, to the Navy, Marines, or Coast Guard. Thus, the statements throughout Section 886 linking the Act's prohibitions to the "Armed Forces" are incorrect.

Section 886(a)(2) correctly notes that the Act "was expressly intended to prevent United States Marshals, on their own initiative, from calling on the Army for assistance in enforcing federal law." Pub. L. No. 107-296, § 886(a)(2). Section 886(a)(2) would be more accurate, however, if it noted that the Act was intended to prevent the U.S. Marshals from *requiring* the Army to render assistance, using Army funds, under the command of the marshals. *See supra* notes 48, 137 and accompanying text. Also, traditionally the local sheriff also had the power to call upon the Army to form a posse. *See supra* note 36 and accompanying text.

Section 886(a)(3) states that the Act has served the nation well in limiting the use of the armed forces in enforcing federal law. Pub. L. No. 107-296, § 886(a)(3). As was shown *supra* section IV, however, historically the Act has not been an impediment to direct Army participation in law enforcement or the administration's domestic use of the Army. The Secretary of Defense may even have authority to suspend application of the Act and reestablish the Cushing Doctrine. *See supra* notes 185-88 and accompanying text. Section 886(a)(4) appears to acknowledge this almost unlimited presidential authority to use the armed forces domestically to meet his constitutional obligations.

In the end, Section 886 sheds little actual light upon the Act since Section 886 explicitly preserves the status quo; it does not alter the Posse Comitatus Act. *See id.* § 886(b); Statement of President Bush Concerning the Homeland Security Act of 2002 (Nov. 25, 2002), <http://www.fas.org/sgp/news/2002/11/wh112502.html>. Thus, few of the many problems discussed in this article have been addressed. The nation still needs a comprehensive framework or unifying policy theme addressing the military's role in domestic affairs. Reliance upon many unconnected laws, a general sense that the United States does not want a military national police force, and a distinction between "military" and "terrorist" activities supposedly mandated by the Posse Comitatus Act is potentially dangerous. *See supra* note 463 and accompanying text; *see also* Pub. L. No. 107-296, § 876 (Department of HLS not given authority to engage in "military" defense or activities).

477. *See supra* section V.G. Section 875(b) of the Homeland Security Act of 2002 provides the Secretary of HLS identical authority to that currently held by the Secretary of Transportation under 49 U.S.C. § 324. *Compare* Pub. L. No. 107-296, § 875(b), *with* 49 U.S.C. § 324 (2000).

478. OFFICE OF HOMELAND SECURITY, *supra* note 4, at 48.

THE EVOLUTION OF THE LAW OF BELLIGERENT REPRISALS

SHANE DARCY¹

Revenge is a kind of wild justice; which the more mans nature runs to, the more ought law to weed it out. For as for the first wrong, it doth but offend the law; but the revenge of that wrong putteth the law out of office.

—Francis Bacon, *Essays: Of Revenge* (1597).

I. Introduction

One of the major shortcomings of the laws of armed conflict is the failure of that regime to provide for adequate means of enforcing those laws. Belligerent reprisals have been employed on the battlefield for centuries and are one of the few available sanctions of the laws of war. They are defined as “intentional violations of a given rule of the law of armed conflict, committed by a Party to the conflict with the aim of inducing the authorities of the adverse party to discontinue a policy of violation of the same or another rule of that body of law.”² Effectively, belligerent reprisals allow for derogation from the laws of armed conflict to ensure compliance with those same laws. It is unsurprising, therefore, that modern international humanitarian law has increasingly sought to restrict the extent to which those laws may be breached by way of belligerent reprisal. This article examines the evolution of the law of belligerent reprisals and

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2. FRITS KALSHOVEN, CONSTRAINTS ON THE WAGING OF WAR 65 (Geneva 1987).

assesses the desirability of those laws governing recourse to belligerent reprisals.

Section II begins by establishing the various customary requirements that must be met before any reprisal actions may be undertaken. This section also discusses the important established principles that must be observed in the exercising of belligerent reprisals. Having set out these basic rules, Section III examines the numerous restrictions that international humanitarian law treaties have placed on a belligerent's right to take reprisals. Section IV then enumerates those remaining permissible belligerent reprisals that may lawfully be taken. The discussion here differentiates between reprisals permitted in international armed conflicts and those allowed in non-international conflicts. Section V seeks to establish the customary law of belligerent reprisals. This section examines some of the more recent developments in the law of belligerent reprisals, in particular, some recent jurisprudence of the International Criminal Tribunal for the former Yugoslavia. The final section discusses some of the main arguments for and against the use of belligerent reprisals and also alludes to other means of enforcing compliance with the laws of armed conflict. First, however, it is necessary to discuss briefly the concept of reprisals under international law generally and to distinguish belligerent reprisals from some similar concepts.

A. Reprisals Under International Law

Belligerent reprisals under the laws of armed conflict are closely related to reprisals under international law generally; as Kalshoven puts it, "belligerent reprisals . . . are a species of the genus reprisals."³ Belligerent reprisals, therefore, bear many of the characteristics of reprisals in general and are bound by similar principles that govern use of the latter. Reprisals under international law are *prima facie* unlawful measures taken by one State against another in response to a prior violation by the latter and for the purpose of coercing that State to observe the laws in force.⁴ It is this law enforcement function that places reprisals in the category of sanctions of international law and that grants them legitimacy, despite their inherently unlawful character. To maintain this legitimacy, the act of reprisal must respect the "conditions and limits laid down in international law for justifiable recourse to reprisals; that is, first of all, objectivity, subsidiarity,

3. FRITS KALSHOVEN, *BELLIGERENT REPRISALS* 1 (Leyden 1971).

4. *See id.* at 33 (providing a full definition).

and proportionality.”⁵ In addition to their law enforcement function, reprisals are seen as a forcible means of settling disputes between States and for securing redress from another State for its misdeeds.⁶ These functions would be more properly classified, however, as subsidiary effects of the primary goal of law enforcement.

B. Closely Related Concepts

One must distinguish reprisals from the closely related concepts of retaliation and retorsion. The law of retaliation, the *lex talionis*, demands that a wrongdoer be inflicted with the same injury as that which he has caused to another.⁷ The term *retaliation* does not find a place in modern legal terminology; instead, the word tends to mean any action taken in response to the earlier conduct of another State. Hence, one can view reprisals as measures taken in retaliation, although not in revenge, for an earlier unlawful act. Similarly, acts of retorsion are retaliatory in nature, although they differ from reprisals in that they are lawful responses to prior unfriendly, yet lawful, acts of another State. The aim of retorsion is to induce the other State to cease its harmful conduct. Examples of acts of retorsion include severance of diplomatic relations and withdrawal of fiscal or trade concessions.⁸

C. Belligerent Reprisals as Distinct from Armed Reprisals

One category of reprisals that must be distinguished from belligerent reprisals are armed or peacetime reprisals. These reprisals are measures of force, falling short of war, taken by one State against another in response to a prior violation of international law by the latter.⁹ The legality of the resort to armed reprisals is within the proper remit of the *jus ad bellum*, although the actual military action taken must be “guided by the basic

5. *Id.*

6. J.G. STARKE, INTRODUCTION TO INTERNATIONAL LAW 549 (8th ed. 1977).

7. BLACK'S LAW DICTIONARY 913 (6th ed. 1990).

8. See STARKE, *supra* note 6, at 549.

9. See generally YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 215-26 (2d ed. 1994); Philip A. Seymour, *The Legitimacy of Peacetime Reprisal as a Tool Against State-Sponsored Terrorism*, 39 NAVAL L. REV. 221 (1990); Derek Bowett, *Reprisals Involving Recourse to Armed Force*, 66 AM. J. INT'L L. 1, 1 (1972).

norms of the *jus in bello*.”¹⁰ Despite their proximity, this article confines its analysis to the law of belligerent reprisals.

II. Customary Rules Governing Recourse to Belligerent Reprisals

A number of conditions that must be met for an act to qualify as a legitimate reprisal are implicit in any correct definition of belligerent reprisals. For example, McDougal and Feliciano set out that legitimate “war reprisals” are “acts directed against the enemy which are conceded to be generally unlawful, but which constitute an authorized reaction to prior unlawful acts of the enemy for the purpose of deterring repetition of antecedent acts.”¹¹ Two primary requirements emerge from this formulation: (1) the reprisal measures must be in response to a prior violation of international humanitarian law; and (2) they must be for the purpose of enforcing compliance with those laws. Customary international law also demands that any resort to belligerent reprisals must be in strict observance of the principles of proportionality and subsidiarity.

Early codifications of the laws of war specify that retaliatory actions must be in conformity with these basic principles. The Lieber Code¹² of 1863, although clearly not a treaty, is regarded as the first attempt to codify the laws of war. In this regard, the document acknowledges retaliation as a common wartime practice and attempts to set some basic limitations on the use of retaliatory measures:

Article 27. The law of war can no more wholly dispense with retaliation than can the law of nations, of which it is a branch. Yet civilized nations acknowledge retaliation as the sternest feature of war. A reckless enemy often leaves to his opponent no other means of securing himself against the repetition of barbarous outrage.

10. DINSTEIN, *supra* note 9, at 217.

11. MYRES S. MCDUGAL & FLORENTINO P. FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER: THE LEGAL REGULATION OF INTERNATIONAL COERCION* 679 (New Haven 1961).

12. U.S. Dep’t of Army, Gen. Orders No. 100, Instructions for the Government of Armies of the United States in the Field, art. 28(2) (Government Printing Office 1898) (1863) [hereinafter Lieber Code], *reprinted in* THE LAWS OF ARMED CONFLICT: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS 3 (Dietrich Schindler & Jiří Toman eds., 1988).

Article 28. Retaliation will, therefore, never be resorted to as a measure of mere revenge, but only as a means of protective retribution, and moreover, cautiously and unavoidably; that is to say, retaliation shall only be resorted to after careful inquiry into the real occurrence, and the character of the misdeeds that may demand retribution. Unjust or inconsiderate retaliation removes the belligerents farther and farther from the mitigating rules of regular war, and by rapid steps leads them nearer to the intestine war of savages.¹³

Although the Lieber Code does not expressly use the term reprisal, it is clear from these provisions that the retaliation taken must be in response to prior violations or “misdeeds” and that those measures are not for the purpose of revenge but “as a means of protective retribution,” namely, to halt and prevent the recurrence of the original, or similar, offending acts.

In a similar vein, the *Oxford Manual (Manual)*,¹⁴ adopted by the Institute of International Law in 1880, gave express consideration to the issue of belligerent reprisals as a means of sanction. Article 84 of the *Manual* sets out *inter alia* that

if the injured party deem the misdeed so serious in character as to make it necessary to recall the enemy to a respect for law, no other recourse than a resort to reprisals remains.

Reprisals are an exception to the general rule of equity, that an innocent person ought not to suffer for the guilty. They are also at variance with the rule that each belligerent should conform to the rules of war, without reciprocity on the part of the enemy.¹⁵

Having enumerated a right of retaliation, the *Manual* then proceeds to set a number of limits on the exercise of that right. It stipulates that resort to reprisals is prohibited when “the injury complained of has been repaired.”¹⁶ In deference to the principle of proportionality, Article 86 establishes that the “nature and scope” of the reprisal must “never exceed the measure of the infraction of the laws of war committed by the enemy.”¹⁷ Furthermore, the exercise of this right must be in observance of

13. *Id.* arts. 27-28.

14. INSTITUTE OF INTERNATIONAL LAW, OXFORD MANUAL (1880).

15. *Id.* art. 85.

16. *Id.*

17. *Id.* art. 86.

the “laws of humanity and morality,” and the authorization for such measures can only be given by the commander in chief.¹⁸

The template for the customary law of belligerent reprisals can be found in these two historically important documents. The drafters of the Lieber Code and the *Manual* clearly endorsed the principles of proportionality, subsidiarity, and humanity. They also established that resort to belligerent reprisals must be for the purpose of law enforcement and that such measures must be in response to a prior violation of the laws of war. These next sections examine those various conditions and principles imposed on the use of belligerent reprisals.

A. Prior Violation

The stimulus for any reprisal action is an initial violation of the laws of armed conflict by the opposing party. Thus, the aggrieved party must establish that the actions of the aggressor were clearly unlawful before making any legitimate resort to a reprisal. Greenwood poses the question as to whether the original unlawful acts must be in violation of the same body of law as that set aside by way of belligerent reprisal.¹⁹ Specifically, he asks if a State that is the victim of aggression (in violation of the *jus ad bellum*) may respond by employing unlawful methods of warfare (contrary to the *jus in bello*). Greenwood points out that the correct answer, in the negative, rests on the principle that the laws of armed conflict apply equally to all parties regardless of the legality of their resort to force.²⁰ Thus, belligerent reprisals may only be lawfully taken in response to a violation of international humanitarian law and not one of the *jus ad bellum*.

Establishing if there has been a violation of international humanitarian law may prove difficult in “real-war conditions”; communications and inter-belligerent relations, unsurprisingly, tend to be poor, and the tendency for allegations, counter-allegations, and denials runs quite high. The situation is further compounded when a dispute exists over the status of the legal rule purportedly violated. As Kalshoven outlines, although “the validity of a number rules of warfare cannot reasonably be denied[,] . . . other rules are of doubtful validity and, while wholeheartedly accepted by

18. *Id.*

19. Christopher Greenwood, *The Twilight of the Law of Belligerent Reprisals*, 1989 NETH. Y.B. INT’L L. 35, 40-41.

20. *Id.*

some, are just as emphatically rejected by others.”²¹ He suggests that in the absence of an independent fact-finding and adjudicating body, when uncertainty exists, “either of the parties is entitled to act on the ground of its own *reasonable* conception of the law governing the actions of both sides.”²² When disagreements exist as to facts or law, the justification for resort to belligerent reprisals may be unclear, and the party against whom the reprisal is taken might resort to a counter-reprisal in response to what it sees as unlawful action. This situation highlights one of the unfortunate traits of belligerent reprisals: they have the tendency to lead to further reprisals and an escalating level of violence and law-breaking.

A final point on the issue of prior violation is that the original unlawful action under consideration must be imputable to the party against whom the reprisal actions are subsequently taken. Greenwood sets out that allies of a violating State may also be the lawful subjects of reprisals “where they are themselves implicated in the violation and probably even where they have no direct involvement if the violation takes the form of a policy of conducting hostilities in a particular way.”²³ Notably, a belligerent is precluded from taking reprisals against a State for the actions of non-State actors operating on the territory of that State. In 1948, the Italian Military Tribunal held in *In re Kappler* (the Ardeatine Cave case) that “the right to take reprisals arises only in consequence of an illegal act which can be attributed, directly or indirectly, to a State.”²⁴ This case concerns retaliatory actions taken by German troops in response to a bombing carried out by a “secret military organization” in Rome in March 1944 that killed thirty-two German police. The Tribunal found that there was a prior violation imputable to the State. Although the secret organization, a corps of volunteers, was not a legitimate belligerent force, the Tribunal deemed the attack an unlawful act of warfare imputable to Germany because volunteers carried out the bombing “in consequence of orders of a general nature given by a section of the Military Directorate.”²⁵

21. KALSHOVEN, *BELLIGERENT REPRISALS*, *supra* note 3, at 41.

22. *Id.* (emphasis added).

23. Greenwood, *The Twilight of the Law of Belligerent Reprisals*, *supra* note 19, at 43.

24. *In re Kappler*, Military Tribunal of Rome (20 July 1948) [hereinafter *Ardeatine Cave Case*], in 1948 ANN. DIG. & REP. OF PUB. INT’L LAW CASES 471, 472 (Hersch Lauterpacht ed., 1948).

25. *Id.* at 472.

B. Law Enforcement

The second major requirement of any resort to a belligerent reprisal is that it must be for the purpose of securing observance of the laws of armed conflict. One cannot discount the fact that the taking of reprisals may also be done in revenge or for the appeasement of an aggrieved public; such motivations, however, can only be tolerated by the presence of the original, genuine goal of law enforcement. Actions wanting in this law enforcement aspect cannot be properly viewed as lawful belligerent reprisals.

To conform with this requirement, a belligerent must pronounce that the course of action being taken is one of reprisal, aimed at bringing about the cessation of the unlawful conduct of the other party. An otherwise ignorant belligerent would view this action as itself unlawful and perhaps, in turn, seek to take reprisal action. There is a clear need for public notification, therefore, as reprisals which are "carried out in secret can have no deterrent effect and should, on that account be deemed illegitimate."²⁶ It is also suggested that a warning of reprisal measures should precede the taking of any action itself.²⁷ This threat of reprisal may be sufficient to halt the unlawful course of action; obviously, then, removing the need to take reprisals. In conformity with this law enforcement requirement, any course of reprisal action must be terminated once the targeted party has brought its conduct in line with the laws of armed conflict. Once the offender has desisted in its law-breaking, the previously injured party must itself return to observance of those laws.

C. Counter-Reprisals

Close adherence to the customary international law of belligerent reprisals disallows a subject of *lawful* belligerent reprisals to respond by taking counter-reprisals. Such actions would be unlawful because they are in response to acts which although *prima facie* unlawful, are deemed legitimate because of their law enforcement purpose. Therefore, no prior violation exists that would justify the taking of further reprisal measures. The Nuremberg Tribunal addressed this issue directly in the *Einsatzgruppen* case: "Under international law, as in domestic law, there can be no reprisal against reprisal. The assassin who is being repulsed by his intended victim

26. McDUGAL & FELICIANO, *supra* note 11, at 689.

27. G.I.A.D. Draper, *The Enforcement and Implementation of the Geneva Conventions of 1949 and the Additional Protocols of 1977*, 163 HAGUE RECUEIL II, at 9, 34 (1978).

may not slay him and then, in turn, plead self-defense.”²⁸ The “prohibition of counter-reprisals,” as such, is not a legal norm, but a mere consequence of strict observance of the law of belligerent reprisals. Bristol points out that the actual problem is the fact that assessment of the lawfulness of both the initial act and of the ensuing reprisal is almost always done unilaterally.²⁹

D. Authorization

The authority to pursue a course of reprisal measures does not rest with all participants of an armed conflict. Such power, it has been contended, might only be exercised by “the commander in chief,”³⁰ by “a competent decision-maker,”³¹ “by the authority of a government,”³² or at “the highest political level.”³³ According to the 1956 *United States Department of the Army Field Manual*:

[Reprisals] should never be employed by individual soldiers except by direct orders of a commander, and the latter should give such orders only after careful inquiry into the alleged offense. The highest accessible military authority should be consulted unless immediate action is demanded as a matter of military necessity, but in the latter event a subordinate commander may order appropriate reprisals upon his own initiative.³⁴

Albrecht points out that a “subordinate commander” or “the highest accessible military authority” may in fact be “of almost any military rank depending on the circumstances.”³⁵ Notwithstanding, it has been recommended that the level of authority should be based upon the “character and magnitude of the original illegality and of the reprisal measure contem-

28. *United States v. Ohlendorf*, 4 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS 1, 493-94 (1950) [hereinafter *Ohlendorf Trial*].

29. Major Matt C.C. Bristol III, *The Laws of War and Belligerent Reprisals Against Enemy Civilian Populations*, 21 A.F. L. REV. 397, 418 (1979).

30. OXFORD MANUAL, *supra* note 14, art. 86.

31. McDUGAL & FELICIANO, *supra* note 11, at 686.

32. Draper, *supra* note 27, at 34.

33. DIETER FLECK, *THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICT* 205 (Oxford 1995).

34. U. S. DEP'T OF ARMY, FIELD MANUAL 27-10, *THE LAW OF LAND WARFARE* para. 497(d) (1956) [hereinafter *AR 27-10*].

35. A.R. Albrecht, *War Reprisals in the War Crimes Trials and in the Geneva Conventions of 1949*, 47 AM. J. INT'L L. 4, 590, 600 (1953).

plated in response.”³⁶ There does not seem to be a clear customary rule on this issue, although for the most part, one could conclude that the authority to order reprisals must rest with a person in a position to assess the legality of the original act, to ensure that the goal of the reprisal is one of law-enforcement, and to oversee that the measures taken are in observance of the principles of subsidiarity, proportionality, and humanity.

E. Subsidiarity

The principle of subsidiarity demands that an aggrieved belligerent pursue less stringent forms of redress before resorting to belligerent reprisals. In seeking to induce an enemy to conform with the law, there are various alternatives to reprisal actions. For example, the injured party may make a formal complaint to the opposite party, requesting that it desist in its unlawful activities and that it initiate proceedings against the perpetrators of same. Similarly, protests to the enemy, appeals to international bodies, the rallying of public opinion behind the wronged party, or the threat of criminal prosecution may be sufficient to persuade the enemy to cease its lawless conduct. Probably one of the most effective means of securing observance of the laws of armed conflict, short of actual reprisals, is the *threat* of those reprisals. The efficacy of this threat, of course, relies on the ability and willingness of the injured party to actually take reprisal action.

In his discussion on the principle of subsidiarity, Kalshoven acknowledges that “the possibility cannot be excluded of situations where the fruitlessness of any other remedy but reprisals is apparent from the outset. In such exceptional circumstances . . . recourse to reprisals can be regarded as an ultimate remedy and, hence, as meeting the requirement of subsidiarity.”³⁷ Hampson asserts that if the intention is to deter repetition of an offense, a belligerent would be reluctant to allow the enemy any time to “strike again.”³⁸ When there is an immediate risk of further unlawful acts, and in particular, when any delay associated with the “prior exhaustion of alternative procedures entails grave danger,” the subsidiarity requirement may legitimately be set aside.³⁹ Aside from instances in which the futility of alternative courses of action is readily apparent, the opinion of one commentator is worth considering: “[T]he use of reprisals in an armed conflict

36. McDUGAL & FELICIANO, *supra* note 11, at 686-87.

37. KALSHOVEN, *BELLIGERENT REPRISALS*, *supra* note 3, at 340.

38. Francoise J. Hampson, *Belligerent Reprisals and the 1977 Protocols to the Geneva Conventions of 1949*, 37 INT’L & COMP. L. Q. 818, 823 (1988).

39. McDUGAL & FELICIANO, *supra* note 11, at 688.

is such a serious step and may have such disastrous consequences that the requirement that all reasonable steps be taken to achieve redress by other means before reprisals is probably one that should be strictly insisted upon.”⁴⁰

F. Proportionality

Customary international law prescribes that the execution of any reprisal action must be done with adherence to the principle of proportionality. It is less clear, however, as to precisely what that belligerent reprisal must be proportionate to. An initial assessment might conclude that the reprisal must be proportionate to the original unlawful act that triggered the reprisal. Kalshoven adopts this position, and he stresses that this is the only acceptable legal approach to the proportionality issue.⁴¹ Other commentators have advanced a different thesis on this issue; some contend that the reprisal action must be measured, not against the past illegality, but rather in light of the purpose of that action, namely, ensuring observance of the laws in force. McDougal and Feliciano, for example, assert that “the kind and amount of permissible reprisal violence is that which is reasonably designed so as to affect the enemy’s expectations about the costs and gains of reiteration or continuation of his unlawful act so as to induce the termination of and future abstention from such act.”⁴² Both approaches have merit, although the latter may be open to abuse by an unscrupulous belligerent because it is more difficult to quantify.

A certain degree of discretion for parties on this issue is accepted, although this “freedom of appreciation . . . is restricted by the requirement of reasonableness.”⁴³ A somewhat cautious approach is taken by Greenwood, who amalgamates the above two different approaches to proportionality and recommends that reprisals “should exceed neither what is proportionate to the prior violation nor what is necessary if they are to achieve their aim of restoring respect for the law.”⁴⁴ Although straightforward rules have not been formulated for assessing the proportionality of any specific act, applying the principle is far from an insurmountable task.

40. Greenwood, *The Twilight of the Law of Belligerent Reprisals*, *supra* note 19, at 47.

41. KALSHOVEN, *BELLIGERENT REPRISALS*, *supra* note 3, at 341.

42. MCDUGAL & FELICIANO, *supra* note 11, at 682.

43. KALSHOVEN, *BELLIGERENT REPRISALS*, *supra* note 3, at 342.

44. Greenwood, *The Twilight of the Law of Belligerent Reprisals*, *supra* note 19, at 44.

In particular, one may take account of Kalshoven's approach; he advocates that in this area, proportionality "means the absence of obvious disproportionality, as opposed to strict proportionality."⁴⁵

In situations in which all the other customary rules relating to belligerent reprisals have been met, it is often a failure to observe the principle of proportionality that has rendered the reprisal measures unlawful. *In re Kappler*, for example, exhibits one of the numerous claims of legitimate reprisal during the Second World War declared unlawful because of their blatant disproportionality. In *Kappler*, the Security Service headed by Lieutenant Colonel Kappler executed ten Italian prisoners for every German policeman killed in a particular bombing. In all, the Security Service retaliated for the bombing by executing 335 prisoners in the Adreatine caves; 320 killed for the thirty-two policemen killed in the bomb attack, ten for another German killed subsequently, and five others murdered "due to a culpable mistake."⁴⁶ The court concluded that the executions were disproportionate "not only as regards numbers, but also for the reason that those shot in the Ardeatine caves included five generals, eleven senior officers, . . . twenty-one subalterns and six non-commissioned officers."⁴⁷ In adopting both a quantitative and a qualitative approach to the requirement of proportionality, the court could not sustain the claim of a legitimate reprisal. In the *Einsatzgruppen* case, the ratio was even more disproportionate: the Nazis executed 2100 people purportedly in reprisal for the killing of twenty-one German soldiers. The tribunal found that this "obvious disproportionality" "only further magnifies the criminality of this savage and inhuman so-called reprisal."⁴⁸

G. Humanity and Morality

The *Oxford Manual* recommends in Article 86 that measures of reprisal "must conform in all cases with the laws of humanity and morality."⁴⁹ While it seems doubtful that the "laws of morality" would sanction wars at all, the notion of "laws of humanity" does have some bearing on the issue of belligerent reprisals. Although the phrase "laws of humanity" is used in the Martens clause⁵⁰ and in articles of each of the four Geneva Conventions of 1949,⁵¹ the term is somewhat archaic and has been

45. KALSHOVEN, BELLIGERENT REPRISALS, *supra* note 3, at 341-42.

46. Ardeatine Cave Case, *supra* note 24, at 471.

47. *Id.* at 476.

48. Ohlendorf Trial, *supra* note 28, at 493-94.

49. OXFORD MANUAL, *supra* note 14, art. 86.

replaced in modern usage by the phrase "principles of humanity." Kalshoven views the principle of humanity as one of "the fundamental principles governing justifiable recourse to belligerent reprisals," while noting abruptly that "inhumanity . . . is more or less by definition a characteristic of belligerent reprisals."⁵² The principle of humanity demands that persons not directly engaged in combat should not be made the objects of reprisal attacks. The next section shows how the treaty law of belligerent reprisals has taken account of this principle in its progressive codification of numerous prohibitions of reprisals against specific classes of persons and objects.

III. International Treaty Law of Belligerent Reprisals

This section sets out the restrictions imposed by international treaties on the use of reprisal measures by belligerents during armed conflict. For the purpose of this study, examining the treatment of the issue by each relevant instrument in great detail is unnecessary, as several able commentators on the subject have already carried this out.⁵³ Tracing the development of the treaty law of belligerent reprisals will suffice, highlighting the various prohibitions on the use of reprisals with recourse to the legislative histories of those more relevant provisions.

While neither the Lieber Code nor the *Oxford Manual* are legally binding instruments, they do provide a useful illustration of the attitudes held towards belligerent reprisals at a time when the codification of the

50. Convention (II) with Respect to the Laws and Customs of War on Land, pmbl., signed at The Hague, 29 July 1899, reprinted in A. PEARCE HIGGINS, *THE HAGUE PEACE CONFERENCES AND OTHER INTERNATIONAL CONFERENCES CONCERNING THE LAWS AND CUSTOMS OF WAR: TEXTS OF CONVENTIONS WITH COMMENTARIES* 206-56 (Cambridge 1909).

51. Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field, art. 63, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter First Geneva Convention]; Geneva Convention II for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, art. 62, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Second Geneva Convention]; Geneva Convention III Relative to the Treatment of Prisoners of War, art. 142, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention]; Geneva Convention IV Relative to the Protection of Civilians in Time of War, art. 158, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention].

52. Frits Kalshoven, *Human Rights, the Law of Armed Conflict, and Reprisals*, INT'L REV. RED CROSS 183, 189 (1971).

53. See KALSHOVEN, *BELLIGERENT REPRISALS*, *supra* note 3, at 45-114, 263-88; Edward Kwakwa, *Belligerent Reprisals in the Law of Armed Conflict*, 27 STAN. J. INT'L L. 49, 52-71 (1990).

laws of war was in its infancy. Both view reprisals as indispensable sanctions for violations of the law, yet, owing to the harshness of the measures, each insists that any resort to such must be subject to certain limitations.

The Hague Conventions of 1899 and 1907 avoided the issue of reprisals for “fear that express regulation might be interpreted as a legitimization of their use.”⁵⁴ Some contend, however, that Article 50 of the 1907 Hague Regulations is the first primitive effort to codify the law of belligerent reprisals. That article reads: “No general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible.”⁵⁵

Kwakwa views Article 50 as a “clear, albeit feeble, attempt to grapple with the problem of belligerent reprisals.”⁵⁶ Although this provision does not by any means outlaw reprisals and, moreover, while a belligerent may disregard the prohibition laid down therein in a legitimate act of reprisal, one cannot completely discount the relevance of Article 50 to this issue. The crux of this provision is that it aims to reduce instances of unwarranted cruelty inflicted on innocent persons; it is an attempt to outlaw acts of collective punishment. This desire to protect innocents is one of several major factors that have influenced the legal restriction on the use of belligerent reprisals.

A. Prisoners of War Convention, 1929

The aftermath of the First World War saw the first absolute prohibition on the taking of reprisals against a particular class of persons set down in international law. The 1929 Convention Relative to the Treatment of Prisoners of War states in Article 2, paragraph 3, that “[m]easures of reprisal against [prisoners of war] are forbidden.”⁵⁷ Highly innovative at that time, this categorical prohibition of reprisals against prisoners of war brought about a situation in which “the illegality of such actions would be

54. KALSHOVEN, *BELLIGERENT REPRISALS*, *supra* note 3, at 67.

55. Hague Convention IV Respecting the Laws and Customs of War on Land, Annexed Regulations, art. 50, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539 [hereinafter Hague Convention IV].

56. Kwakwa, *supra* note 53, at 54 n.23.

57. Geneva Convention Relative to the Treatment of Prisoners of War, art. 2, para. 3, July 27, 1929, 47 Stat. 2021, T.S. 846.

incontestable; and, more important, the frequency of such reprisals would certainly diminish considerably through the sheer force of the rule.”⁵⁸

During the Second World War, despite the existence of this rule, a number of incidents of reprisal measures were taken against prisoners of war.⁵⁹ One such incident involved the summary shooting of fifteen American prisoners of war by German troops in March 1944, near La Spezia in Italy. The United States Military Commission in Rome tried General Anton Dostler for ordering the execution.⁶⁰ The Commission rejected a defense of superior orders raised on Dostler’s behalf and held that “under the law as codified by the 1929 Convention there can be no legitimate reprisals against prisoners of war. No soldier, and still less a Commanding General, can be heard to say that he considered the summary shooting of prisoners of war legitimate even as a reprisal.”⁶¹

In the *High Command* case, the Nuernberg Military Tribunal viewed numerous provisions of the 1929 Convention as being “clearly an expression of the accepted views of civilized nations and [as] binding . . . in the conduct of the war.”⁶² Strangely, the list of nineteen various provisions so designated did not include the prohibition of reprisals contained in that treaty.⁶³ Article 2, paragraph 3, clearly was not a “codification of existing customary practice” at the time the Convention was introduced,⁶⁴ and this judgment also casts a shadow of doubt over the provision’s status following World War II. Notwithstanding, Greenwood has asserted that the prohibition was accepted as being a customary norm of international law in the immediate aftermath of the war.⁶⁵ This uncertainty would not, however, have reduced by any degree the obligation imposed upon those parties who had ratified the Convention to observe the unequivocal prohibition of Article 2, paragraph 3, on the taking of reprisals against pris-

58. KALSHOVEN, *BELLIGERENT REPRISALS*, *supra* note 3, at 80-81.

59. *See id.* at 178-99.

60. Trial of General Anton Dostler, Commander of the 75th German Army Corps, United States Military Commission, Rome, Oct. 8-12, 1945, in 1 UNITED NATIONS WAR CRIMES COMMISSION, *LAW REPORTS OF TRIALS OF WAR CRIMINALS* 22 (London 1947).

61. *Id.* at 31.

62. United States v. von Leeb, 11 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS 535 (1950).

63. *See id.* at 536-38.

64. Kwakwa, *supra* note 53, at 55.

65. *See* Greenwood, *The Twilight of the Law of Belligerent Reprisals*, *supra* note 19, at 50; *see also* Theodor Meron, *The Geneva Conventions as Customary International Law*, 81 AM. J. INT’L L. 348, 360 (1987).

oners of war. A landslide of like reprisal provisions in each of the four Geneva Conventions of 1949 followed this first codification.

B. Geneva Conventions, 1949

The Geneva Conventions of 1949 expanded considerably the classes of persons against whom it is forbidden to take reprisals. The Third Geneva Convention reaffirmed the 1929 prohibition of reprisals against prisoners of war,⁶⁶ while the other Conventions introduced new provisions offering protection from reprisals to the wounded and sick under the First Geneva Convention;⁶⁷ for the wounded, sick, or shipwrecked protected by the Second Geneva Convention;⁶⁸ and for those civilian persons coming under the protection of the Fourth Geneva Convention.⁶⁹ These treaties were also innovative in that they expressly forbid the taking of reprisal measures against vessels, equipment, or property protected by the Conventions. Of note, the decision to include these expansive provisions was almost unanimous, with Kalshoven admitting surprise as to “how little discussion was needed to achieve these results.”⁷⁰

Article 46 of the First Geneva Convention sets out that “[r]eprisals against the wounded, sick, personnel, buildings or equipment protected by the Convention are prohibited.”⁷¹ The Official Commentary to this Convention affirms that this prohibition is absolute; therefore, it proscribes any reprisal measures whatsoever, including retaliations-in-kind “which public opinion, basing itself on the ‘lex talionis,’ would be more readily inclined to accept.”⁷²

Article 47 of the Second Geneva Convention is almost identical in its specific outlawing of reprisals: “Reprisals against the wounded, sick and shipwrecked persons, the personnel, the vessels or the equipment protected by the Convention are prohibited.”⁷³ Similarly, the Third Geneva Convention confirms in Article 13, paragraph 3, that “[m]easures of reprisal

66. Third Geneva Convention, *supra* note 51, art. 13(3).

67. First Geneva Convention, *supra* note 51, art. 46.

68. Second Geneva Convention, *supra* note 51, art. 46.

69. Fourth Geneva Convention, *supra* note 51, art. 33(3).

70. KALSHOVEN, *BELLIGERENT REPRISALS*, *supra* note 3, at 263.

71. First Geneva Convention, *supra* note 51, art. 46.

72. COMMENTARY: I GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 345 (Jean Pictet ed., 1952).

73. Second Geneva Convention, *supra* note 51, art. 47.

against prisoners of war are prohibited.”⁷⁴ The Official Commentary attaches great importance to this provision and interprets the prohibition of reprisals as being “part of the general obligation to treat prisoners humanely.”⁷⁵

The restrictions placed on the use of reprisals by the Fourth Geneva Convention are regarded as the most significant development in the law of belligerent reprisals to arise at that time.⁷⁶ Article 33, paragraph 3, of the Fourth Geneva Convention has a clear humanitarian focus and establishes that “[r]eprisals against protected persons and their property are prohibited.”⁷⁷ Pictet has lauded both the scope and the strength of this provision:

The prohibition of reprisals is a safeguard for all protected persons, whether in the territory of a Party to the conflict or in occupied territory. It is absolute and mandatory in character and thus cannot be interpreted as containing tacit reservations with regard to military necessity.⁷⁸

The solemn and unconditional character of the undertaking entered into by the States Parties to the Convention must be emphasized. To infringe this provision with the idea of restoring law and order would only add one more violation to those with which the enemy is reproached.⁷⁹

74. Third Geneva Convention, *supra* note 51, art. 13, para. 3.

75. COMMENTARY: III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 142 (Jean Pictet ed., 1960).

76. Greenwood, *The Twilight of the Law of Belligerent Reprisals*, *supra* note 19, at 51.

77. Fourth Geneva Convention, *supra* note 51, art. 33(3). Article 4 of that treaty establishes that

[p]ersons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.

Id. art. 4.

78. COMMENTARY ON GENEVA CONVENTION IV OF 1949, RELATIVE TO THE PROTECTION OF CIVILIAN PERSON IN TIMES OF WAR 228 (Jean Pictet ed., 1958) [hereinafter COMMENTARY TO THE FOURTH GENEVA CONVENTION].

79. *Id.*

Article 33, paragraph 1, also lays a clear prohibition on the commission of acts of collective punishment against protected persons.⁸⁰ The treaty enumerates this prohibition separately from the prohibition of reprisals, although the Official Commentary recognizes their proximity, observing that reprisals involve the imposition of a “collective penalty bearing on those who least deserve it.”⁸¹

Notably, this provision does not offer any protection from belligerent reprisals to the civilian population or civilian objects of a party to an international armed conflict. As the remit of Article 33, paragraph 3, is limited primarily to those civilians in occupied territory and civilian internees, the taking of proportionate reprisals against an enemy’s civilian population would seem to be *prima facie* lawful in the light of the Fourth Geneva Convention. As shown below, however, this was one of the several lacunae in the law addressed by the Geneva Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (1974-1977).

C. Hague Cultural Property Convention, 1954

Five years after the landmark 1949 Geneva Conventions saw another important development of relevance to the burgeoning law of belligerent reprisals. The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, 1954,⁸² introduced a series of far-reaching protections for cultural property during wartime. Included among these provisions is Article 4, paragraph 4, which establishes that the contracting parties “shall refrain from any act directed by way of reprisals against cultural property.”⁸³ In contrast to the 1949 Geneva Conventions, this treaty makes it quite clear that its provisions are binding in both international and non-international armed conflicts.⁸⁴

This “comprehensive and absolute” prohibition of reprisals against cultural property would have been most welcome forty years earlier in light of one particularly reprehensible reprisal action carried out during the

80. See Fourth Geneva Convention, *supra* note 51, art. 33(1). Article 33(1) reads: “No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited.” *Id.*

81. COMMENTARY TO THE FOURTH GENEVA CONVENTION, *supra* note 78, at 228.

82. Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240.

First World War. In 1915, the German High Command burned to the ground the famous University of Louvain library in Belgium in reprisal for the alleged firing on German troops by Belgian civilians.⁸⁵ Had Article 4, paragraph 4, been in force at that time, it may have persuaded the perpetrators to choose an alternative reprisal target. Kalshoven has concluded that the introduction of the 1954 Hague Convention “represents an innovation comparable to that brought about by the Civilian Convention of Geneva of 1949.”⁸⁶

D. Additional Protocol I, 1977

The upward trend of prohibiting belligerent reprisals against certain persons and objects continued with the inclusion of a batch of new prohibitions in the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed

83. *Id.* art. 4(4). Cultural property is defined in Article 1 as:

(a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above;

(b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in subparagraph (a);

(c) centres containing a large amount of cultural property as defined in sub-paragraphs (a) and (b), to be known as “centres containing monuments.”

Id. art. 1.

84. *Id.* arts. 18-19. Kalshoven contends that Article 19, requiring observance of “the provisions of the present Convention which relate to respect for cultural property” during an internal armed conflict, *id.* art. 19, may not categorically demand observance of the reprisal prohibition. He admits, however, that this is a “formalistic and consciously restrictive interpretation, in the face of an apparently clear text.” KALSHOVEN, *BELLIGERENT REPRISALS*, *supra* note 3, at 276-77.

85. Kwakwa, *supra* note 53, at 54-55.

86. KALSHOVEN, *BELLIGERENT REPRISALS*, *supra* note 3, at 273.

Conflicts (Protocol I), 8 June 1977.⁸⁷ The issue of belligerent reprisals was a source of considerable debate and disagreement during the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 1974-1977,⁸⁸ and in numerous academic writings thereafter.⁸⁹ Much of the discontent has been with the overall progressive narrowing of the scope for the taking of belligerent reprisals, rather than with the individual prohibitions themselves. As will be seen below, however, these individual prohibitions have also been subjected to a certain degree of criticism.

Part II of Protocol I, which offers protection to the wounded, sick, and shipwrecked, provides in Article 20 that “[r]eprisals against the persons and objects protected by this Part are prohibited.”⁹⁰ This article is both a re-affirmation and an expansion of the rules set down in the First and Second Geneva Conventions. Protocol I extends the sphere of protected persons by widening the definitions of wounded, sick, and shipwrecked persons in Article 8,⁹¹ and by including several new objects and persons for protection: medical personnel, religious personnel, medical units, medical transports and transportations, medical vehicles, ships, craft, and aircraft.⁹² The delegates to the conference accepted these new prohibitions with “almost no discussion”;⁹³ a reflection of the fact that they are a “logical extension” of the earlier prohibitions of reprisals against such persons and objects under Geneva law.⁹⁴

Protocol I makes its most substantial contribution to the law of belligerent reprisals in Part IV of the instrument dealing with protections for the civilian population. The rules relating to belligerent reprisals in an international armed conflict set down in Part IV are as follows:

87. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I].

88. For an in-depth discussion on the drafting of the reprisals provisions of Additional Protocol I, see S.E. Nahlik, *Belligerent Reprisals as Seen in the Light of the Diplomatic Conference on Humanitarian Law, Geneva, 1974-1977*, 42 L. & CONTEMP. PRAC. 2, 36, 43-66 (1978).

89. See, e.g., Greenwood, *The Twilight of the Law of Belligerent Reprisals*, *supra* note 19, at 51-67; Hampson, *supra* note 38; Kwakwa, *supra* note 53, at 53-71; Frits Kalshoven, *Belligerent Reprisals Revisited*, 21 NETH. Y. B. INT'L L. 43, 47-73 (1990); Remigiusz Bierzanek, *Reprisals as a Means of Enforcing the Laws of Warfare: The Old and the New Law*, in NEW INT'L ARMED CONFLICT 232, 247-57 (Cassese ed., 1979).

90. Protocol I, *supra* note 87, pt. II, art. 20.

Article 51 *Protection of the civilian population*

. . . .

6. Attacks against the civilian population or civilians by way of reprisals are prohibited.⁹⁵

. . . .

Article 52 *General Protection of civilian objects*

1. Civilian objects shall not be the object of attack or of reprisals.⁹⁶

. . . .

Article 53 *Protection of cultural objects and of places of worship*

. . . .

(c) [It is prohibited] to make such objects the object of reprisals.⁹⁷

. . . .

Article 54 *Protection of objects indispensable to the survival of the civilian population*

. . . .

91. *See id.* art. 8. Article 8 states:

(1) "Wounded" and "sick" mean persons, whether military or civilian, who, because of trauma, disease or other physical or mental disorder or disability, are in need of medical assistance or care and who refrain from any act of hostility. These terms also cover maternity cases, new-born babies and other persons who may be in need of immediate medical assistance or care, such as the infirm or expectant mothers, and who refrain from any act of hostility;

(2) "Shipwrecked" means persons, whether military or civilian, who are in peril at sea or in other waters as a result of misfortune affecting them or the vessel or aircraft carrying them and who refrain from any act of hostility. These persons, provided that they continue to refrain from any act of hostility, shall continue to be considered shipwrecked during their rescue until they acquire another status under the Conventions or this Protocol.

Id.

92. *Id.* art. 20.

93. Nahlik, *supra* note 88, at 46.

94. Greenwood, *The Twilight of the Law of Belligerent Reprisals*, *supra* note 19, at

53.

95. Protocol I, *supra* note 87, art. 51(6).

96. *Id.* art. 52(1).

97. *Id.* art. 53(c).

4. These objects shall not be made the object of reprisals.⁹⁸

....

Article 55 *Protection of the natural environment*

....

2. Attacks against the natural environment by way of reprisals are prohibited.⁹⁹

....

Article 56 *Protection of works and installations containing dangerous forces*

....

4. It is prohibited to make any of the works, installations or military objectives mentioned in paragraph 1 the object of reprisals.¹⁰⁰

Save for Article 53, paragraph (c), which adds little to those prohibitions already established under the 1954 Hague Cultural Property Convention, each of these provisions is a significant development in the law of belligerent reprisals.

Undoubtedly, the most significant and most controversial provision is Article 51, paragraph 6, which renders unlawful the taking of reprisals against “the civilian population or civilians.”¹⁰¹ Whereas Article 33, paragraph 3, of the Fourth Geneva Convention only protects civilians who find themselves “in the hands of a Party to the conflict or Occupying Power of which they are not nationals,”¹⁰² this new provision guarantees protection to *all* civilians. Thus, belligerents are now forbidden by Protocol I from taking reprisal measures against an enemy’s civilian population.¹⁰³ Of equal importance is the applicability of this provision to the actual military hostilities of an international armed conflict, as opposed to only instances of occupation as under the Fourth Geneva Convention. The Official Commentary states that this prohibition is absolute and peremptory, and it

98. *Id.* art. 54(4).

99. *Id.* art. 55(2).

100. *Id.* art. 56(4).

101. *Id.* art. 51(6).

102. Fourth Geneva Convention, *supra* note 51, art. 4.

103. *See* Protocol I, *supra* note 87, art. 51(6).

would reject any claim that such actions might be permissible on grounds of military necessity.¹⁰⁴

One author contends that the prohibition of reprisals in Article 51, paragraph 6, is negated by the previous provision in paragraph 5(b), which prohibits attacks “which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”¹⁰⁵ Kwakwa claims that attacks justified by military necessity under this provision are legitimate and that because reprisals are otherwise illegitimate attacks which are justified *qua* reprisals, then, “[i]n effect, article 51(5)(b) seems to permit the very reprisals that are prohibited under article 51(6).”¹⁰⁶ Kwakwa’s interpretation, however, is erroneous. The Official Commentary states clearly that a theory that this provision would authorize “any type of attack, provided that this did not result in losses or damage which were excessive in relation to the military advantage anticipated . . . is manifestly incorrect.”¹⁰⁷ Moreover, the damage envisaged by that article is *incidental*; reprisals directed against civilians, if undertaken, would cause direct and deliberate loss of life, injury, or damage to civilian objects. One may conclude therefore, that the prohibition of reprisals against civilians in international armed conflicts is categorical and without exception under treaty law.

This landmark provision was followed by the prohibition in Article 52, paragraph 1, against making civilian objects the object of reprisals; these are curtly defined as “all objects which are not military objects.”¹⁰⁸ This article is viewed as “a logical corollary of the prohibition concerning civilian persons.”¹⁰⁹ In a similar vein, Article 54, paragraph 4, prohibits the taking of reprisals against those objects “indispensable to the survival of the civilian population.”¹¹⁰ Examples given of such objects include foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies, and irrigation works.¹¹¹ This article is closely related to the prohibition of reprisals against civil-

104. COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 626 (Yves Sandoz et al. eds., 1987) [hereinafter COMMENTARY TO THE ADDITIONAL PROTOCOLS].

105. Protocol I, *supra* note 87, art. 51(5)(b).

106. EDWARD KWAKWA, THE INTERNATIONAL LAW OF ARMED CONFLICT: PERSONAL AND MATERIAL FIELDS OF APPLICATION 140-41 (Dordrecht/Boston/London 1992).

107. COMMENTARY TO THE ADDITIONAL PROTOCOLS, *supra* note 104, at 626.

ians; a reprisal attack on those essential objects is tantamount to a violation of the latter provision.

Article 55, paragraph 2, prohibits attacks against the natural environment by way of reprisals.¹¹² Paragraph 1 of that article has as its aim the prevention of “widespread, long-term and severe damage” that would “prejudice the health or survival of the population.”¹¹³ One can see that the outlawing of reprisals against the environment also has at its root the protection of the welfare of the civilian population. Article 56, paragraph 4, of Protocol I prohibits reprisals against works and installations containing dangerous forces. The protected objects in question here are dams, dykes, and nuclear electrical generating stations, and also any military objectives “located at or in the vicinity of these works or installations” upon which an attack “may cause the release of dangerous forces from the works or installations and consequent severe losses among the civilian population.”¹¹⁴ Once again, the overarching concern was the avoidance of any unnecessary suffering by the civilian population. In this respect, these reprisal provisions clearly show the humanitarian-guided desire to dispose of a sanction of the laws of armed conflict that would impose heavily on persons innocent of any unlawful activity.

E. Mines Protocol, 1980

The relative landslide of prohibitions against belligerent reprisals in Protocol I has been followed by just one other treaty ban on the taking of

108. Protocol I, *supra* note 87, art. 52(1). Article 52, paragraphs 1 and 2, define military objects:

Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture . . . or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

Id.

109. Nahlik, *supra* note 88, at 48.

110. Protocol I, *supra* note 87, art. 54(4).

111. *Id.* art. 54(2).

112. *Id.* art. 55(2).

113. *Id.* art. 55(1).

114. *Id.* art. 56(1).

reprisals. The 1980 Protocol on Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices¹¹⁵ states in Article 2, paragraph 3, that “[i]t is prohibited in all circumstances to direct weapons to which this Article applies, either in offence, defence or by way of reprisals, against the civilian population as such or against individual civilians.”¹¹⁶

This article affirms the prohibition that was laid down previously in Article 51, paragraph 6, of Protocol I, and simultaneously provides a clear illustration of one specific type of belligerent reprisal that, if directed against civilians, is plainly unlawful. The 1996 Amended Mines Protocol sets down that the “prohibitions and restrictions” of the instrument are applicable in both international and non-international armed conflicts.¹¹⁷

This section has outlined the codification of the law of belligerent reprisals, which has progressively reduced the persons and objects against which a belligerent may take *prima facie* unlawful action in response to earlier unlawful action and for the purpose of enforcing compliance with the law of armed conflict. The above provisions establish that under inter-

115. Protocol II, Annexed to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, adopted at Geneva, Oct. 10, 1980, *entered into force* Dec. 2, 1983, 1342 U.N.T.S. 137-255 [hereinafter 1980 Mines Protocol]; *reprinted in* THE LAWS OF ARMED CONFLICT 179 (Dietrich Schindler & Jirí Toman eds., 1988).

116. Protocol I, *supra* note 87, art. 2(3). Article 2 defines those weapons to which this protocol applies:

1. “Mine” means any munition placed under, on or near the ground or other surface area and designed to be detonated or exploded by the presence, proximity or contact of a person or vehicle, and “remotely delivered mine” means any mine so defined delivered by artillery, rocket, mortar or similar means or dropped from an aircraft.
2. “Booby-trap” means any device or material which is designed, constructed or adapted to kill or injure and which functions unexpectedly when a person disturbs or approaches an apparently harmless object or performs an apparently safe act.
3. “Other devices” means manually-emplaced munitions and devices designed to kill, injure or damage and which are actuated by remote control or automatically after a lapse of time.

Id. art. 2(1)-(3).

117. Protocol on the Prohibitions or Restriction on the Use of Mines, Booby-Traps and Other Devices (Amended Protocol II), *amended* May 3, 1996, art. 1(3), U.S. TREATY Doc. No. 105-1, at 37, 35 I.L.M. 1206.

national law, it is unlawful for the parties bound by those treaties to take reprisals against, *inter alia*, prisoners of war, the wounded, sick, and shipwrecked, medical and religious personnel, cultural property, the natural environment, works and installations containing dangerous forces, the civilian population, individual civilians, civilian objects, and any of those objects indispensable for a civilian population's survival. Impressive as this list may be, the opportunity does remain under international law for an aggrieved party to resort to belligerent reprisals against certain persons and objects. Moreover, some of those persons and objects protected during international armed conflicts may not be afforded the same safeguards during situations of internal armed conflict. The next section examines those few remaining lawful belligerent reprisals in international conflicts and explores the issue in the somewhat more controversial context of armed conflicts not of an international nature.

IV. Permissible Belligerent Reprisals Under International Treaty Law

A. International Armed Conflicts

Although international humanitarian law highly restricts the freedom to resort to belligerent reprisals in response to unlawful activity, the employment of such measures has not been totally outlawed. In a limited number of situations, the treaty law is silent on reprisals, thus inferring that their use in such instances would be lawful. It seems that the only remaining lawful targets of belligerent reprisals are military objectives or the armed forces of the enemy. One commentator, Nahlik, views the failure to include a proposed general prohibition of reprisals in Protocol I as having left open "a chink through which a wolf would be able to penetrate into our sheep-fold," meaning that an interpretation in bad faith might expose certain persons or objects to reprisals.¹¹⁸ He enumerates the following as not covered by any specific reprisal prohibition: the remains of the deceased; enemies *hors de combat*; members of the armed forces and military units assigned to civil defense organizations; women and children vulnerable to rape, forced prostitution, or indecent assault; and undefended localities and demilitarized zones.¹¹⁹

While one can make such an interpretation, an instrument whose ultimate goal is one of "protecting the victims of armed conflicts"¹²⁰ could

118. Nahlik, *supra* note 88, at 56-57.

119. *Id.* at 56.

hardly sanction taking such reprisals, particularly against those in the fourth category. The Commentary to Protocol I states clearly that the Geneva Conventions and Protocol I “incontestably prohibit any reprisals against any person who is not a combatant in the sense of Article 43 and against any object which is not a military objective.”¹²¹ Nahlik here probably seeks to show the desirability of a general prohibition on reprisals, rather than to give specific examples of actual lawful reprisals.

Although the preponderance of literature on this issue concludes that military objectives and enemy armed forces are the only permissible targets of lawful belligerent reprisals,¹²² one may assert that such a general rule applies only to land warfare, and that in instances of naval or air warfare, there is considerably more scope for the taking of reprisals. Part IV of Protocol I, which contains all the reprisal prohibitions (except those in Article 20), also contains an important provision, which states:

The provisions of this Section [Part IV] apply to any land, air or sea warfare which may affect the civilian population, individual civilians or civilian objects on land. They further apply to all attacks from the sea or from the air against objectives on land but do not otherwise affect the rules of international law applicable in armed conflict at sea or in the air.¹²³

One author would view this provision as implying that the prohibitions on reprisals in Protocol I “do not apply to ship-to-ship, ship-to-air or air-to-air combat unless that has an incidental effect on civilians or civilian objects on land.”¹²⁴ In this regard, he continues, it may be possible to make enemy merchant ships or civilian aircraft the objects of belligerent reprisals.¹²⁵ This divergence between the law of land warfare and that of air and naval warfare has been criticized on the grounds that “the civilian persons and objects Protocol I seeks to protect against reprisals require protection in the air and at sea just as they do on land.”¹²⁶ While it would be clearly unlawful to make merchant ships or civilian aircraft the objects of attack,

120. Protocol I, *supra* note 87, pmbl.

121. COMMENTARY TO THE ADDITIONAL PROTOCOLS, *supra* note 104, at 987.

122. See, e.g., *id.* at 627; Hampson, *supra* note 38, at 828-29; Greenwood, *The Twilight of the Law of Belligerent Reprisals*, *supra* note 19, at 65; Draper, *supra* note 27, at 35; Bristol, *supra* note 29, at 401.

123. Protocol I, *supra* note 87, art. 49(3).

124. Greenwood, *The Twilight of the Law of Belligerent Reprisals*, *supra* note 19, at 53-54.

125. *Id.* at 54.

it cannot be stated conclusively that such cannot be made the objects of a reprisal attack, especially in light of the fact that “there are hardly any specific rules relating to sea or air warfare, and insofar as they do exist, they are controversial or have fallen into disuse.”¹²⁷ It is worth noting Green’s approach, while not conclusive, to the shortcomings in air warfare laws:

It must be remembered at all times that, where there are no specific rules relating to air warfare as such, the basic rules of armed conflict . . . as well as the general rules governing land warfare and the selection of targets, are equally applicable to aerial attacks directed against enemy personnel and ground or sea targets.¹²⁸

The only residual means of reprisal are said to consist of “either the unlawful use of a lawful weapon or the use of an unlawful weapon.”¹²⁹ Because armed forces and military objectives are legitimate targets under the laws of armed conflict, it is the choice of weapons and methods of combat that would form the unlawful aspect of any reprisal action taken against them. Those taking reprisals may not disregard restrictions on weapons or methods of warfare in place specifically to protect certain groups of persons, where those categories of persons are already immune from reprisals by virtue of belonging to that category. For example, Article 4, paragraph 2, of the Mines Protocol outlaws the laying of mines in areas that contain a concentration of civilians, such as a city, town, or village.¹³⁰ While this rule covers a method of warfare, it may not be broken by way of reprisal because this would be in contravention of the prohibition on reprisals against the civilian population as set down in Article 51, paragraph 6, of Protocol I. Where the prohibited weapons or means of warfare have no effect on protected persons, however, the question as to whether they

126. Andrew D. Mitchell, *Does One Illegality Merit Another?: The Law of Belligerent Reprisals in International Law*, 170 MIL. L. REV. 155, 170 (2001).

127. COMMENTARY TO THE ADDITIONAL PROTOCOLS, *supra* note 104, at 606. Mitchell points out that the *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (Louise Doswald-Beck ed., 1995), “which represents the only major attempt to restate the law of armed conflicts at sea,” failed to deal in any way with the issue of belligerent reprisals. Mitchell, *supra* note 126, at 170 n.78.

128. Leslie C. Green, *Aerial Considerations in the Law of Armed Conflict*, in *ESSAYS ON THE MODERN LAW OF WAR* 577, 594-95 (1999).

129. Hampson, *supra* note 38, at 829.

130. 1980 Mines Protocol *supra* note 115; see Kalshoven, *Belligerent Reprisals Revisited*, *supra* note 89, at 70.

might be employed by way of reprisal in response to prior unlawful action is somewhat more difficult to answer.

The employment of prohibited weapons or methods of combat will first and foremost be a breach of the particular treaty that established the illegality of their use. Article 60, paragraph 2, of the Vienna Convention on the Laws of Treaties establishes that "a material breach of a multilateral treaty by one of the parties entitles . . . a party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting state."¹³¹ Paragraph 5 of that same article makes it clear, however, that this rule does not apply to "provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties."¹³² Therefore, one may lawfully disregard a rule that does not protect the human person *and* is found in a treaty of a humanitarian character when a previous material breach by the other party already suspended the operation thereof. In such a case, there is no need to justify this breach with the excuse of reprisal, as the responding party was no longer bound by that particular set of laws. Kalshoven points out that the suspension of the operation of a treaty or a part thereof goes further than a reprisal as it "effectively frees the 'party specially affected' from all its obligations connected with the suspended (part of the) treaty."¹³³

Where a treaty or part thereof may not be suspended in response to a material breach, the rules of that instrument may be abandoned by way of belligerent reprisal provided the target of that action is either enemy armed forces, military objects, or, as is most likely, a combination of both. Moreover, this reprisal must obey the customary rules governing resort to reprisals: there must have been a prior violation; the reprisal must be for the purpose of enforcing compliance with the law; it must cease when the illegality has ended; and as the International Committee of the Red Cross

131. Vienna Convention on the Law of Treaties, art. 60(2), *opened for signature* May 23, 1969, *entered into force* Jan. 27, 1980, 1155 U.N.T.S. 331 [hereinafter Vienna Convention], *reprinted in* 8 I.L.M. 679 (1969).

132. *Id.* art. 60(5).

133. Kalshoven, *Belligerent Reprisals Revisited*, *supra* note 89, at 71.

has re-affirmed, such a resort to reprisals must be in full observance of the established principles of subsidiarity, proportionality, and humanity.¹³⁴

On this issue, discussion frequently reverts to the 1925 Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare.¹³⁵ Upon ratification of this instrument, numerous States parties made reservations stipulating that they would cease to be bound by the provisions of the Gas Protocol when an enemy State, who had also ratified, acted in disregard of the rules set down therein.¹³⁶ The effect of these reservations is that the Gas Protocol has been reduced to operating on the basis of reciprocity, a notion that sits uncomfortably within the realm of modern international humanitarian law, and that is not subject to those customary restrictions placed on the use of reprisals. What of a situation in which a belligerent is a victim of unlawful conduct that is not in breach of the Gas Protocol: may that party retaliate by way of a reprisal which violates that instrument? Greenwood asserts that because the reservations serve to “undermine, if not destroy, any absolute character the prohibitions in the Gas Protocol might have possessed[,] . . . measures derogating from those prohibitions might also be justified under the doctrine of reprisals.”¹³⁷ He also points out that the fact that a belligerent may not normally have ready access to prohibited weapons hinders any resort to the use of such armaments for the purpose of reprisal.¹³⁸

When discussing the subject of weapons and means of warfare, one cannot avoid the omnipresent spectre of nuclear weapons. Without argument these are the ultimate weapons of mass destruction; their deployment has had and would again have, if used, devastating effects for the whole of humanity. While the nuclear debate is demonstrably broader than the issue

134. COMMENTARY TO THE ADDITIONAL PROTOCOLS, *supra* note 104, at 984.

135. Protocol for the Prohibition of the Use of Asphyxiation, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, *signed* June 7, 1925, *entered into force* Feb. 8, 1928 [hereinafter Gas Protocol], 94 L.N.T.S. 65 (1929), *reprinted in* THE LAWS OF ARMED CONFLICT, *supra* note 115, at 115.

136. For a list of ratifications and reservations, see *id.* at 121-27. On 10 February 1978, Ireland withdrew the reservation it made to the 1925 Gas Protocol upon ratification of that instrument on 29 August 1930. *Id.* at 118.

137. Greenwood, *The Twilight of the Law of Belligerent Reprisals*, *supra* note 19, at 54.

138. *Id.* at 65.

of belligerent reprisals, for the sake of completeness, this article must briefly address the issue here.

In its advisory opinion on the issue of nuclear weapons, the International Court of Justice (ICJ) stated that it did not have to “pronounce on the question of belligerent reprisals save to observe that in any case any right of recourse to such reprisals would, like self-defence, be governed *inter alia* by the principle of proportionality.”¹³⁹ Any use of nuclear weapons in reprisal would invariably come into conflict with the customary principle of proportionality. Envisaging a nuclear reprisal being proportional to any prior unlawful non-nuclear act is quite difficult. Singh and McWhinney state that the use of nuclear weapons “as a reprisal for any normal violation of the laws of war would clearly be excessive.”¹⁴⁰ In this respect, Lauterpacht has maintained that resort to the use of nuclear weapons “must be regarded as permissible as a reprisal for its actual prior use by the enemy or his allies.”¹⁴¹ Advocating the use of reprisals-in-kind would satisfy the proportionality requirement, but any contemporary use, it may first seem, would run afoul of the numerous reprisal prohibitions set down in the treaty law of armed conflict. The negotiations leading to Protocol I, however, were carried out on the basis that any reference to weapons applied only to conventional weapons, and not to nuclear weapons. This so-called “nuclear understanding” led to States entering a number of declarations upon the signing of Protocol I, to the effect that the instrument did not place any restrictions on the use of nuclear weapons.¹⁴²

Singh and McWhinney have discussed the subject of nuclear reprisals vis-à-vis the protections offered by the Geneva Conventions, in which no such understanding seems to have existed. They would maintain that

if the first user of nuclear weapons destroys protected persons and property, there would appear to be justification to retaliate in

139. Advisory Opinion, *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226, 259, para. 46 (July 8).

140. NAGENDRA SINGH & EDWARD MCWHINNEY, *NUCLEAR WEAPONS AND CONTEMPORARY INTERNATIONAL LAW* 172 (Dordrecht/Boston/London 1989).

141. 2 LASSA OPPENHEIM, *INTERNATIONAL LAW* 350-51 (Hersch Lauterpacht ed., 7th ed. 1952). Oppenheim also held the somewhat contentious view that a nuclear reprisal “may be justified against an enemy who violates the rules of the law of war on a scale so vast as to put himself altogether outside the orbit of considerations of humanity and compassion.” *Id.*

142. See, for example, the understanding of the United States made on signing Protocol I, *reprinted in* DOCUMENTS ON THE LAWS OF WAR 512 (Adam Roberts & Richard Guelff eds., 3d ed. 2000).

kind, both as a measure of self-defence and in reprisal, even though the provisions of the Geneva Conventions were being violated. This would appear a warranted conclusion because, short of surrender to the first user of these prohibited weapons, the victim would have retaliation in kind as the only remedy. As the first user would be clearly guilty of a crime, to allow him the laurels of victory by surrendering to him with a stockpile of nuclear weapons, which cannot be used by the victim for fear of violation of the provisions of the Geneva Conventions, would be to encourage the first use of the prohibited weapon. Thus, short of destruction of the human race and the world, the only permissible use of thermo-nuclear weapons would appear to be retaliation in kind alone.¹⁴³

Advocating an approach based on reciprocity, these writers seem to focus on military supremacy, rather than humanitarian concerns, as evidenced when they speak of allowing the enemy "the laurels of victory by surrendering to him."¹⁴⁴ These authors understand the difficulty of fitting the use of nuclear weapons into the framework of legitimate belligerent reprisals; they discuss retaliation in kind, as opposed to reprisal in kind, as the only remedy available. Belligerent reprisals are a sanction of the laws of war primarily; any remedying characteristic must be subordinate to this central function. In the event of a nuclear confrontation, the doctrine of belligerent reprisals, if it was even raised, would offer little justification for the use of these weapons of mass destruction.

Because the majority of the literature on belligerent reprisals focuses on those reprisals that are prohibited, there is little discussion on the issue of permissible reprisals during international armed conflicts. Only a few commentators, notably Greenwood and Kalshoven, have broached this thorny issue. Perhaps writers have deliberately avoided the issue, as it was by the drafters of the Hague Conventions of 1899 and 1907, in fear that such a discussion "might be interpreted as a legitimation of their use."¹⁴⁵ Although the law of naval and air warfare does seem to leave room for reprisals, one may conclude that in any land operations of an international armed conflict, the sphere of permissible belligerent reprisals is limited to

143. SINGH & McWHINNEY, *supra* note 140, at 174.

144. *Id.*

145. KALSHOVEN, BELLIGERENT REPRISALS, *supra* note 3, at 67.

the use of certain prohibited weapons or methods of warfare against military objectives, including the armed forces of an enemy belligerent.

B. Internal Armed Conflicts

The treaty law on the use of belligerent reprisals during non-international armed conflicts is notorious by its absence. Apart from the reprisal prohibitions contained in the 1954 Hague Convention on Cultural Property and the 1996 Amended Mines Protocol, there are no other express treaty provisions restricting the use of reprisals in internal armed conflicts. Neither common Article 3 of the 1949 Geneva Conventions¹⁴⁶ nor Additional Protocol II to those conventions,¹⁴⁷ the veritable nuclei of the law of internal armed conflicts, contain any reference, prohibitory or otherwise, to belligerent reprisals. This section examines that treaty law pertaining to internal conflicts and seeks to decipher the treatment, if any, of the issue of belligerent reprisals within that regime.

Article 3, common to each of the 1949 Geneva Conventions, is the only article in those landmark instruments that deals in any way with the issue of non-international armed conflicts. This article establishes a number of rules which must be observed, as a minimum, in armed conflicts which are not of an international character. It stipulates that persons who are taking no active part in hostilities “shall in all circumstances be treated humanely.”¹⁴⁸ To give effect to this statement, common Article 3, paragraph 1, demands that “the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to [those] above-mentioned persons:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and

146. See, e.g., Fourth Geneva Convention, *supra* note 51, art. 3 [hereinafter Common Article 3].

147. Additional Protocol II to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, *adopted* June 8, 1977, *entered into force* Dec. 7, 1978, U.N. Doc. A/32/144 Annex II, 1125 U.N.T.S. 609 [hereinafter Protocol II].

148. Common Article 3, *supra* note 146 (stating in paragraph 1 that such persons would include members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause; and demanding in paragraph 2 that “the wounded and sick shall be collected and cared for”).

degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.¹⁴⁹

The language of this article is precise and unambiguous; there is no room for doubt as to the definite and concrete nature of the various prohibitions laid down therein. One must ask, however, whether those strict rules in common Article 3 can be set aside in response to a violation of those same or other rules by an enemy to persuade the offending party to observe them.

The International Committee of the Red Cross (ICRC) has adopted the stance that disregarding any of this article's provisions by way of reprisals is impermissible. The official commentary gives the reasoning behind this approach:

[T]he acts referred to under items (a) to (d) are prohibited absolutely and permanently, no exception or excuse being tolerated. Consequently, any reprisal which entails one of these acts is prohibited, and so, speaking generally, is any reprisal incompatible with the "humane treatment" demanded unconditionally in the first clause of sub-paragraph (1).¹⁵⁰

Although desirable from a humanitarian perspective, this interpretation is hardly that which the signatories, who were notoriously reluctant to concede to interference in their domestic affairs, would have envisioned. States would be highly unwilling to restrict their capacity to resort to belligerent reprisals against a potential law-breaking force that is operating against them within their own borders; as Kalshoven observes, the "implicit waiver of such a power cannot lightly be assumed."¹⁵¹ One may

149. *Id.*

150. COMMENTARY TO THE FOURTH GENEVA CONVENTION, *supra* note 78, at 39-40. Article 3, paragraph 1, states:

Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

Common Article 3, *supra* note 146, para. 1.

also contend that the absolute nature of a particular rule is irrelevant where reprisals are concerned; they consist of actions which are *prima facie* unlawful, that is to say, belligerent reprisals, when taken, deliberately break the rules. Unless there is a rule that specifically outlaws their use, reprisals, however objectionable, may for the most part legitimately continue on their (*prima facie*) law-breaking course.

On this issue Moir sides with the approach taken by the ICRC, concurring that “the protection afforded by common Article 3 would thus accord with the position [of reprisals] in international armed conflicts.”¹⁵² Kalshoven is a bit more hesitant, drawing the safer conclusion that this difficult question cannot be satisfactorily answered.¹⁵³

Rather than resolve the issue, Protocol II served only to add to the uncertainty surrounding the issue of belligerent reprisals in internal armed conflicts. The silence in Protocol II on the subject of belligerent reprisals was clearly not an oversight on the part of the delegates to the 1974-1977 Diplomatic Conference at Geneva. Nahlik points out that the draft of Protocol II submitted by the ICRC had originally included several reprisal prohibitions, but that these and other provisions had to be discarded “when it was clear that Protocol II could be saved only at the price of being considerably shortened.”¹⁵⁴ Some delegates argued that the doctrine of reprisals has no place in an internal armed conflict because reprisals are interstate law enforcement devices, and thus could not apply between a government and a rebel force; that a rebel force might be given the power to take reprisals against a government was seen as out of the question.¹⁵⁵

Once again it is necessary to consider the extent to which, if any, this instrument might restrict the use of belligerent reprisals during a non-international armed conflict. The argument pertaining to common Article 3 regarding the absolute nature of its prohibitions has similarly been proffered to support the contention that Protocol II contains an implicit ban on the taking of reprisals. Article 4, paragraph 2, is an expansion of the rules

151. KALSHOVEN, *BELLIGERENT REPRISALS*, *supra* note 3, at 269.

152. LINDSAY MOIR, *THE LAW OF INTERNAL ARMED CONFLICTS* 241 (2002).

153. KALSHOVEN, *BELLIGERENT REPRISALS*, *supra* note 3, at 269.

154. Nahlik, *supra* note 88, at 64.

155. *Id.* at 63.

set out by its predecessor in 1949; it prohibits “at any time and in any place whatsoever”:

(a) violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment; (b) collective punishments; (c) taking of hostages; (d) acts of terrorism; (e) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault; (f) slavery and the slave trade in all their forms; (g) pillage; (h) threats to commit any of the foregoing acts.¹⁵⁶

The ICRC, in view of the “absolute obligations” of this article, contends that “there is in fact no room left at all for carrying out ‘reprisals’ against protected persons.”¹⁵⁷ The commentary also gives considerable credence to the inclusion of a prohibition against acts of collective punishment; this is seen as “virtually equivalent to prohibiting ‘reprisals’ against protected persons.”¹⁵⁸ Kalshoven would favor the stance of the ICRC that reprisals are forbidden in internal armed conflicts, but he would base his argument on different grounds. He is not convinced that a prohibition of collective punishment is analogous to a prohibition of reprisals; he points out that the purpose of reprisals is not punishment but law enforcement. Instead, he would like to see reprisals prohibited on account of “their general futility and escalating effect.”¹⁵⁹

One cannot conclusively argue, however, that either common Article 3 or Protocol II prohibit belligerent reprisals. Kalshoven reluctantly concludes that he “would not venture to argue . . . that *as a matter of law*, measures resembling reprisals against the civilian population are prohibited in internal armed conflicts.”¹⁶⁰ However undesirable reprisals may be from a humanitarian perspective, a strictly legal interpretation of the foregoing instruments would show that their use during a non-international armed conflict is not completely proscribed. At this point in the discussion, it is

156. Protocol II, *supra* note 147, art. 4(2).

157. COMMENTARY TO THE ADDITIONAL PROTOCOLS, *supra* note 104, at 1373. They acknowledge that “[f]or reasons of a legal and political nature, there are no provisions prohibiting ‘reprisals’ in Protocol II.” *Id.*

158. *Id.* at 1374.

159. Kalshoven, *Belligerent Reprisals Revisited*, *supra* note 89, at 78.

160. *Id.* at 79 (emphasis added).

necessary to examine the current state of the customary international law of belligerent reprisals to address properly the question of their legality.

V. Belligerent Reprisals and Customary International Law

The foregoing sections have examined the extent to which the treaty law of belligerent reprisals either prohibits or permits the use of reprisals as a sanction of the laws of armed conflict. One must bear in mind that as conventional law, the above provisions are only binding on the parties who have ratified those instruments in which the reprisal provisions are found, except where those particular provisions are deemed to be declaratory of customary international law. There are several other important effects that flow from a rule being characterized as one of customary international law. In addition to binding states that are not parties to an instrument, a customary rule must be observed even if an enemy has broken that same rule. A party may not circumscribe a particular customary rule, which is also a treaty rule, by denouncing the instrument in which that rule is found. It has also been established that reservations to a treaty do not affect a party's obligations under provisions therein that reflect custom, as that party would already be bound by those provisions independently of that instrument.¹⁶¹ This section examines the customary status of the various norms relating to belligerent reprisals and seeks to establish which, if any, of those rules are in fact customary norms.

A. State Practice

The Statute of the International Court of Justice in Article 38, paragraph 1(b), describes international custom "as evidence of a general practice accepted as law."¹⁶² Primarily, therefore, it is State practice "which is accepted and observed as law . . . [that] builds norms of customary international law."¹⁶³ The acceptance that a particular rule is binding as law, the *opinio juris*, must accompany State practice to bring about the creation

161. THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 7 (Oxford 1989).

162. STATUTE OF THE INT'L COURT OF JUSTICE art. 38, para. 1(b).

163. MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW, *supra* note 161, at 1.

of custom. In the context of belligerent reprisals, as in many other contexts, accurately establishing State practice is often difficult.

The ICTY acknowledged this problem in the infamous *Prosecutor v. Tadić* case:

When attempting to ascertain State practice with a view to establishing the existence of a customary rule or general principle, it is difficult, if not impossible, to pinpoint the actual behaviour of the troops in the field for the purpose of establishing whether they in fact comply with, or disregard certain standards of behaviour. This examination is rendered extremely difficult by the fact that not only is access to the theatre of military operations normally refused to independent observers (often even to the ICRC) but information on the actual conduct of hostilities is withheld by the parties to the conflict; what is worse, often recourse is had to misinformation with a view to misleading the enemy as well as public opinion and foreign Governments.¹⁶⁴

In the context of the present article, the term “reprisal,” despite having a highly-specific legal meaning, frequently surfaces in NGO reports and in media dispatches to connote the broader notion of retaliation, which exacerbates this difficulty.

Although a comprehensive assessment of the State practice relative to belligerent reprisals is outside the scope of this article, it is necessary to make a number of observations on this issue. First, the International Court of Justice has addressed this specific issue, holding that “[it] does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule.”¹⁶⁵ This finding allows a certain latitude between the rules and the practice. In this respect, Meron has observed that “for human rights or humanitarian conventions[,] . . . the gap between norms stated and actual practice tends to be especially wide.”¹⁶⁶ Where the practice is completely at odds with the rule in question, however, it is obvious that the rule has not crystallised into custom. Second, some have argued that the motives of the State in ques-

164. *Prosecutor v. Tadić*, No. IT-94-1-AR2, para. 112 (Oct. 2, 1995) (Appeals Chamber).

165. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 98 (June 27) (Merits).

166. MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW, *supra* note 161, at 43.

tion are irrelevant in determining *opinio juris*; “What counts is that a State has openly taken position or revealed a sense of legal obligation, regardless of the underlying motivation.”¹⁶⁷ Finally, the relevance of State practice has been qualified as being only “a subsidiary means whereby the rules which guide the conduct of States are ascertained.”¹⁶⁸ Baxter advocates that “[t]he firm statement by the State of what it considers to be the rule is far better evidence of its position than what can be pieced together from the actions of that country at different times and in a variety of contexts.”¹⁶⁹

On the subject of belligerent reprisals, the State practice in the war between Iran and Iraq from 1980 to 1988 is worth considering. At that time, and at the time of this article, neither State was a party to Protocol I, although they had ratified the four Geneva Conventions. Despite pleas by the United Nations Security Council and the ICRC,¹⁷⁰ both parties to the conflict reserved the right to take reprisals in response to violations of the laws of war by their opponent. Kalshoven asserts that the so-called “reprisal bombardments” were not genuine reprisals, but willful attacks on the civilian population of the enemy, “with the reprisal argument merely serving as a flimsy excuse.”¹⁷¹ This duplicitous use of the reprisals doctrine may render this evidence of State practice useless.

While assessing State practice with regard to conduct during international armed conflicts may be difficult, to do so with respect to internal armed conflicts may be next to impossible. States, for example, would understandably be hesitant towards claiming the right to take reprisals against civilians in their own territory. In this respect, Kalshoven points out that

[t]he actions of parties to several recent internal armed conflicts regrettably serve to reinforce the impression that more than one government interprets the vacuum in the treaty law in force as an

167. Georges Abi-Saab, *The 1977 Additional Protocols and General International Law: Some Preliminary Reflections*, in ASTRID J.M. DELISSEN & GERARD J. TANJA, *HUMANITARIAN LAW OF ARMED CONFLICT: CHALLENGES AHEAD: ESSAYS IN HONOUR OF FRITS KALSHOVEN* 115, 124 (Dordrecht 1991).

168. Baxter, *Multilateral Treaties as Evidence of Customary International Law*, 41 BRIT. Y.B. INT'L L. 275, 300 (1965-1966), cited in MERON, *HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW*, *supra* note 161, at 43.

169. *Id.*

170. U.N. Doc S/RES/0540 (1983); 1983 ICRC ANNUAL REPORT 58 (Geneva 1983).

171. Kalshoven, *Belligerent Reprisals Revisited*, *supra* note 89, at 62.

indication that in such a situation, whether of the Article 3 or Protocol II variety, their right to take reprisal-type measures (although of course not so named) continues unabated.¹⁷²

Due to the inherent difficulties in assessing State practice during conflict situations and owing to the limited scope of this article, other factors must also be considered in examining the customary status of the law of belligerent reprisals. Specifically, this next section examines the level of ratification of treaties containing those rules and any reservations thereto; the approach to the issue taken by international organizations; the treatment of belligerent reprisals in major military manuals; and most importantly, some recent ICTY jurisprudence pertaining to the issue at hand.

B. Adoption of Instruments

In assessing the customary character of treaty provisions, considering the number of States that have adopted the particular instrument in which those provisions are found is worthwhile. Abi-Saab maintains that “the larger the conventional community, the more the treaty approximates the status of general international law.”¹⁷³ The Geneva Conventions of 1949 have received almost universal ratification, and in this regard, many of the norms set out therein are declaratory of customary international law. Few, if any, would disagree that the prohibition of reprisals in the four Geneva Convention are now well-established customary rules. Currently, 160 States are parties to Protocol I.¹⁷⁴ Although not as numerous as those to the Geneva Conventions, this is still a substantial figure, and such a level of acceptance would strengthen any claim toward the customary character of norms set out therein. The 1980 Mines Protocol has had eighty ratifications, while the 1996 Amended Mines Protocol has been ratified by a staggering sixty-five States since its adoption only six years ago.¹⁷⁵

Merón advocates that for any particular treaty, its “ratifications should be evaluated from the perspective of the relevance and weight of

172. *Id.* at 77.

173. Abi-Saab, *supra* note 167, at 117.

174. See International Committee of the Red Cross, *Treaty Database*, at <http://www.icrc.org/ihl> (last visited Aug. 20, 2002) [hereinafter ICRC *Treaty Database*]. Although over 100 States have ratified the Hague Cultural Property Convention of 1954, *id.*, it is more pertinent to focus on the like prohibition of reprisals against cultural property in Protocol I to decipher the customary nature of this rule.

175. *Id.*

the ratifying states.”¹⁷⁶ In this respect, one must note that four of the five permanent members of the United Nations Security Council have ratified or acceded to Protocol I: China, Russia, the United Kingdom, and most recently, France. Seventeen of the nineteen members of NATO have also become parties to the protocol. While these are indeed major military powers, one must also consider those States that have not signed Protocol I. The United States is the most obvious example of a State that has refused to ratify this instrument. Other significant military powers who have not become party to Protocol I include Iran, Iraq, India, Pakistan, Israel, and Turkey.¹⁷⁷

The United States has based her refusal on various grounds. Among these, the instrument’s treatment of reprisals has been “singled out for particularly severe criticism.”¹⁷⁸ The United States position has been set out thus:

The Joint Chiefs of Staff, after a careful and extensive study, concluded that Protocol I is unacceptable from the point of view of military operations. The reasons . . . include the fact . . . that it eliminates significant remedies in cases where an enemy violates the Protocol. The total elimination of the right of reprisal, for example, would hamper the ability of the United States to respond to an enemy’s intentional disregard of the limitations established in the Geneva Conventions of 1949 or Protocol I, for the purpose of deterring such disregard.¹⁷⁹

As the world’s foremost superpower, the reluctance of the United States to accept the reprisal provisions in Protocol I may cast doubt on any claim that those prohibitions might be customary in nature.

C. Reservations

In assessing the customary nature of the rules pertaining to belligerent reprisals, one must consider whether States parties to the relevant treaty

176. MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW, *supra* note 161, at 74.

177. See ICRC *Treaty Database*, *supra* note 174.

178. MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW, *supra* note 161, at 66.

179. Abraham D. Sofaer, *The Rationale for the United States Decision*, 82 AM. J. INT’L L. 784, 785 (1988).

provisions have entered any reservations. It would seem that if a particular rule is reservable, this considerably weakens any assertion that this rule is customary. Meron contends that “[u]nquestionably, reservations may adversely affect the claims to customary law status of those norms which they address.”¹⁸⁰ States, however, do not have unfettered discretion in this reserving process because they must adhere to the rules set out in Article 19 of the Vienna Convention of the Law of Treaties:

A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:

- (a) the reservation is prohibited by the treaty;
- (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or
- (c) in cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.¹⁸¹

Regarding the present discussion, neither the Geneva Conventions nor the Additional Protocols contain any article dealing with reservations. The permissibility of reservations to those treaties thus rests upon paragraph (c) of Article 19, which stipulates that the reservation must be compatible with the “object and purpose” of the instrument.¹⁸² To date, none of the parties to the four Geneva Conventions has made a reservation toward the reprisal provisions contained therein. The reprisal provisions of Protocol I, however, have been the subject of one reservation and a number of declarations.¹⁸³ From the perspective of their effect on the customary international law status of those reprisal prohibitions, “the number and depth of the reservations actually made must be considered.”¹⁸⁴ Also, the compatibility of these reserving statements with the object and purpose of Protocol I must be examined.

Upon ratification of Protocol I on 27 February 1986, Italy made the following declaration: “Italy will react to serious and systematic violations by an enemy of the obligations imposed by Additional Protocol I and in particular its Articles 51 and 52 with all means admissible under interna-

180. MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW, *supra* note 161, at 16.

181. Vienna Convention, *supra* note 131, art. 19.

182. *Id.* art. 19(c).

183. ICRC *Treaty Database*, *supra* note 174.

184. MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW, *supra* note 161, at 16.

tional law in order to prevent any further violation.”¹⁸⁵ Germany, upon its ratification on 14 February 1991, made a declaration almost identical to that made earlier by Italy.¹⁸⁶ Egypt, upon ratification of Protocol I, declared that “on the basis of reciprocity[,] . . . it upholds the right to react against any violation by any party of the obligations imposed by Additional Protocols I and II with all means admissible under international law in order to prevent any further violation.”¹⁸⁷ France acceded to Protocol I on 11 April 2001 and made the following declaration:

The Government of the French Republic declares that it will apply the provisions of Article 51, paragraph 8, in such a way that the interpretation of those will not be an obstacle to the employment, in conformity with international law, of those means which it estimates are indispensable for protecting its civilian population from serious, manifest and deliberate violations of the Geneva Conventions and this Protocol by the enemy.¹⁸⁸

While these declarations are somewhat ambiguous, they do seem to indicate that these States will resort to reprisals in the face of serious violations of humanitarian law against their civilian populations. The wording of each statement incorporates the customary requirements of prior violation and of law enforcement pertaining to the use of belligerent reprisals. The assertion that the means pursued will be in observance of international law seems to imply that those States view customary international

185. Protocol I, *supra* note 87, Reservations, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 142, at 507.

186. *See id.* at 505.

187. *Id.* at 504.

188. See the International Committee of the Red Cross Web site, *supra* note 174 (author’s translation of French text). Article 51, paragraph 8, of Protocol I reads: “Any violation of these prohibitions shall not release the Parties to the conflict from their legal obligations with respect to the civilian population and civilians, including the obligation to take the precautionary measures provided for in Article 57.” Protocol I, *supra* note 87, art. 51(8).

law as permitting the use of reprisals against those targets which Protocol I seeks to protect.

Much less ambiguous is the strong reservation entered by the United Kingdom upon ratification of Protocol I on 28 January 1998:

The obligations of Articles 51 and 55 are accepted on the basis that any adverse party against which the United Kingdom might be engaged will itself scrupulously observe those obligations. If an adverse party makes serious and deliberate attacks, in violation of Article 51 or Article 52 against the civilian population or civilians or against civilian objects, or, in violation of Articles 53, 54 and 55, on objects or items protected by those Articles, the United Kingdom will regard itself as entitled to take measures otherwise prohibited by the Articles in question to the extent that it considers such measures necessary for the sole purpose of compelling the adverse party to cease committing violations under those Articles, but only after formal warning to the adverse party requiring cessation of the violations has been disregarded and then only after a decision taken at the highest level of government. Any measures thus taken by the United Kingdom will not be disproportionate to the violations giving rise there to and will not involve any action prohibited by the Geneva Conventions of 1949 nor will such measures be continued after the violations have ceased. The United Kingdom will notify the Protecting Powers of any such formal warning given to an adverse party, and if that warning has been disregarded, of any measures taken as a result.¹⁸⁹

Without any direct reference to the doctrine, it is clear that the United Kingdom here fully endorses the use of belligerent reprisals against the persons and objects protected by Part IV of Protocol I, when they are undertaken in conformity with the established customary requirements for such use, and when in response to “serious and deliberate attacks” in violation of Articles 51-55.

Is the United Kingdom’s reservation compatible with the object and purpose of Protocol I? Notably, at the Diplomatic Conference a representative of the German Democratic Republic declared that his government would find any reservation to Article 51, paragraph 6, incompatible with

189. DOCUMENTS ON THE LAWS OF WAR, *supra* note 142, at 511.

the object and purpose of the Protocol.¹⁹⁰ The “object and purpose” of Part IV of Protocol I is predominantly the protection of the civilian population. As such, one could view this as one of the main goals of the entire instrument. It has been argued that belligerent reprisals are a means to achieving that goal and are therefore compatible with the object and purpose of Protocol I.¹⁹¹

Hampson believes that the issue of compatibility of a reservation depends on the attitude and actions of non-reserving States.¹⁹² Article 20, paragraph 5, of the Vienna Convention sets out that “a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation.”¹⁹³ As no State has objected to the United Kingdom’s reservation or the various declarations, this may indicate their compatibility with the object and purpose of Protocol I. Indeed, academic opinion on this issue seems to consider reservations to the reprisal prohibitions of Protocol I as being permissible.¹⁹⁴

One must take account of the effect of these statements on the customary status of the reprisal prohibitions. The clear statement of the United Kingdom’s reservation and the implied posture from the four declarations is that these States do not consider themselves precluded from taking belligerent reprisals against those targets protected by Protocol I. While this implies that the reprisal provisions are not rules of custom, the existence of these statements cannot be seen as conclusive in that regard. The reason Italy, Germany, Egypt, and France refrained from taking the firmer position of making a reservation to the articles prohibiting reprisals against certain persons and objects is uncertain. Furthermore, the presence of just one reservation, arguably, is insufficient to defeat a claim of custom. Despite the fact that “[c]haracteristically, states do not object to reservations made

190. Nahlik, *supra* note 88, at 50.

191. See Greenwood, *The Twilight of the Law of Belligerent Reprisals*, *supra* note 19, at 64.

192. Hampson, *supra* note 38, at 833.

193. Vienna Convention, *supra* note 131, art. 5.

194. See Greenwood, *The Twilight of the Law of Belligerent Reprisals*, *supra* note 19, at 64; Theodor Meron, *The Time Has Come for the United States to Ratify Geneva Protocol I*, in THEODOR MERON, *WAR CRIMES LAW COMES OF AGE* 175, 183 (Oxford/New York 1998). One author has drafted a reservation to Article 51 for suggested use by the United States, quite similar to the United Kingdom reservation. He asserts that this would be “defensible as not incompatible with the object and purpose of the Protocol.” George H. Aldrich, *Prospects for United States Ratification of Additional Protocol I to the 1949 Geneva Conventions*, 85 AM. J. INT’L L. 1, 17 (1991).

by other states,”¹⁹⁵ the distinct lack of any objections to these statements, and their very presence, might indicate a widely-held opinion that the reprisal provisions of Protocol I are not declaratory of customary international law.

D. International Organizations

On 9 December 1970, the General Assembly of the United Nations adopted Resolution 2675 (XXV) on the Basic Principles for the Protection of Civilian Populations in Armed Conflicts.¹⁹⁶ Paragraph 7 of the resolution sets out that “[c]ivilian populations, or individual members thereof, should not be the object of reprisals.”¹⁹⁷ While General Assembly resolutions are a source of soft rather than hard law, the Appeals Chamber of the ICTY in *Tadić* held that Resolution 2675 was “declaratory of the principles of customary international law regarding the protection of civilian populations and property in armed conflicts of any kind.”¹⁹⁸ This statement continued that “at the same time, [this resolution was] intended to promote the adoption of treaties on the matter, designed to specify and elaborate upon such principles.”¹⁹⁹ This latter assertion, that forthcoming treaties will “specify and elaborate” on those principles, may seem to weaken their status as principles of customary law. It is doubtful that a customary rule prohibiting belligerent reprisals against civilian populations in both international and internal armed conflicts existed in 1970; the treaty law at the time only extended to civilians in the hands of an adversary, while almost a decade later Protocol II deliberately remained silent on the subject of reprisals in non-international conflicts.

The position taken by the ICRC toward belligerent reprisals has been discussed frequently above, but will be briefly reiterated here. The Committee’s most important postulation is that the prohibitions against reprisals in the four Geneva Conventions and Protocol I relevant to international armed conflicts extend to internal armed conflicts by virtue of the absolute and concrete nature of the prohibitions in common Article 3 and Article 4,

195. MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW, *supra* note 161, at 25.

196. G.A. Res. 2675, U.N. GOAR, 25th Sess., Supp. No. 28, U.N. Doc. A/8028 (1970), *reprinted in* THE LAWS OF ARMED CONFLICT, *supra* note 12, at 267-68.

197. *Id.* para. 7.

198. Prosecutor v. Tadić, No. IT-94-1-AR2, para. 112 (Oct. 2, 1995) (Appeals Chamber).

199. *Id.*

paragraph 2, of Protocol II. The views of the ICRC, while ultimately humanitarian in nature, must be accorded their due weight considering the massive contribution this organization has made to the codification of international humanitarian law.²⁰⁰

E. Military Manuals and National Legislation

Military manuals are an important source for gauging the attitude of States toward particular rules of international humanitarian law. Similarly, national legislation implementing the laws of armed conflict into domestic law often show the particular norms which that State feels its own troops are bound to observe. Meron's opinion is that

manuals of military law and national legislation providing for the implementation of humanitarian law norms as internal law should be accepted as among the best types of evidence of [state] practice, and sometimes as statements of *opinio juris* as well. This is especially so because military manuals frequently not only state government policy but establish obligations binding on members of the armed forces, violations of which are punishable under military penal codes.²⁰¹

The 1956 United States Department of the Army Field Manual sets out that country's position as regards belligerent reprisals:

Reprisals against the persons or property of prisoners of war, including the wounded and sick, and protected civilians are forbidden (GPW, art. 13, GC; art. 33) However, reprisals may still be visited on enemy troops who have not yet fallen into the hands of the forces making the reprisals.²⁰²

One of the most recent United States Army manuals, the *2002 Operational Law Handbook*, reaffirms that "the U.S. position is that reprisals are prohibited only when directed against protected persons as defined in the Geneva Conventions."²⁰³ Similarly, the 1958 United Kingdom manual

200. On the role of the ICRC, see Theodor Meron, *Editorial Comment: The Continuing Role of Custom in the Formation of International Humanitarian Law*, 90 AM. J. INT'L L. 238, 244-49 (1996).

201. MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW, *supra* note 161, at 41.

202. FM 27-10, *supra* note 34, at 497.

also does not endorse a prohibition of reprisals against all civilians.²⁰⁴ The stances espoused by the United States and United Kingdom manuals are commensurate with the stances those States have adopted toward Protocol I. A detailed examination of the manuals of all the numerous military powers and a comprehensive survey of the relevant national legislation would further reveal the extent to which States consider that they are lawfully permitted to take belligerent reprisals.

F. Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia

The International Criminal Tribunal for the former Yugoslavia (ICTY) has twice addressed the issue of belligerent reprisals: in *Prosecutor v. Martić (Rule 61)*²⁰⁵ and in the later case of *Prosecutor v. Kupreskic*.²⁰⁶ The *Martić* case was effectively what is known as a Rule 61 procedure, a process whereby the indictment against an accused not yet in custody is submitted to the Trial Chamber to determine whether “there are reasonable grounds for believing that the accused has committed all or any of the crimes charged.”²⁰⁷ This procedure does not make any determinations of guilt or innocence; it merely reaffirms the indictment, and an international arrest warrant is issued if the court is satisfied that the necessary “reasonable grounds” are present.²⁰⁸

Milan Martić was the president of the “self-proclaimed Republic of Serbian Krajina.”²⁰⁹ Martić allegedly ordered attacks against civilians in the Croatian capital, Zagreb, in retaliation for an assault on 1 May 1995, by Croatian Forces against the territory of the Republic. The Army of the Republic carried out two attacks on 2 and 3 May 1995, using Orkan rockets

203. INT’L & OPERATIONAL LAW DEP’T, THE JUDGE ADVOCATE GENERAL’S SCHOOL, U.S. ARMY, JA 422, OPERATIONAL LAW HANDBOOK 20 (2002).

204. Christopher Greenwood, *Belligerent Reprisals in the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia*, in Horst Fishcer, INTERNATIONAL AND NATIONAL PROSECUTION OF CRIMES UNDER INTERNATIONAL LAW: CURRENT DEVELOPMENTS 15 (Claus Kress & Sascha Rolk Lüder eds., 2001) (author’s draft on file).

205. No. IT-95-11-R61 (Mar. 8, 1996) (Decision) (Jorda, J. (presiding); Odio Benito, J.; Riad, J.), 108 I.L.R. 39 (1996).

206. No. IT-95-16-T (Jan. 14, 2000) (Judgment) (Cassese, J. (presiding); May, J.; Mumba, J.).

207. RULES OF PROCEDURE AND EVIDENCE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA R.61, para. (c), U.N. Doc. IT/32/Rev.7 (as amended) (1996).

208. *Id.* R. 61, para. (d).

209. *Martić*, 108 I.L.R. at 40.

armed with cluster-bomb warheads, resulting in numerous civilian deaths and injuries in Zagreb.²¹⁰ Martić, as president, was accused of having ordered those attacks or, alternatively, with command responsibility for the attacks for failing “to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.”²¹¹ During this procedure, the Trial Chamber addressed the issue of belligerent reprisals, and although brief, this discussion could have serious implications for the law of belligerent reprisals.

Having discussed the unlawfulness of attacks against civilians, the Trial Chamber then asked whether such attacks might be legal if they were carried out in reprisal.²¹² Viewing the prohibition of attacks on civilians as applicable in all circumstances, the Chamber claimed that “no circumstances would legitimise an attack against civilians even if it were a response proportionate to a similar violation.”²¹³ The Chamber cited Article 1 common to the four Geneva Conventions, which instructs parties “to respect and to ensure respect for the Conventions in all circumstances,”²¹⁴ in support of this assertion. The Chamber then contended that this prohibition on reprisals is applicable in all armed conflicts and that various instruments serve to “reinforce” this interpretation.²¹⁵ Referring to the inclusion of a reprisal prohibition in General Assembly Resolution 2675; the “unqualified prohibition” in Article 51, paragraph 6, of Protocol I; and the absolute and non-derogable nature of the prohibitions, including that against collective punishments in Article 4, paragraph 2(b), of Protocol II, the Trial Chamber concluded that “the rule which states that reprisals against the civilian population as such, or individual civilians, are prohibited in all circumstances, even when confronted by wrongful behaviour of

210. *Id.*

211. STATUTE OF THE INTERNATIONAL TRIBUNAL FOR THE PROSECUTION OF PERSONS RESPONSIBLE FOR SERIOUS VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW COMMITTED IN THE TERRITORY OF THE FORMER YUGOSLAVIA SINCE 1991, art. 7, para. 3, U.N. Doc. S/25704, at 36, Annex (1993); S/25704/Add.1, U.N. Doc. S/RES/827 (1993) [hereinafter STATUTE OF THE ICTY].

212. *Martić*, 108 I.L.R. at 46, para. 15.

213. *Id.*

214. *See, e.g.*, Fourth Geneva Convention, *supra* note 51, art. 1.

215. *Martić*, 108 I.L.R. at 47, para. 16.

the other party, is an integral part of customary international law and must be respected in all armed conflicts.”²¹⁶

This conclusion has serious ramifications for the law of belligerent reprisals. It claims that the prohibition of reprisals against civilians, as set down in Protocol I, is a norm of customary international law, and, thus, binding on all parties, irrespective of whether they have ratified that instrument. Also, it contends that there is a like prohibition implicit in Article 4 of Protocol II relative to non-international armed conflicts and, moreover, that this reprisal prohibition is also a rule of customary international law. The Trial Chamber went into very little detail before arriving at such a major conclusion. Therefore, the strong stance that it has taken on the issue of belligerent reprisals, one quite similar to that espoused by the ICRC, is considerably weakened. The Trial Chamber’s assertions are unconvincing because there is little concrete support for the conclusion it reached. In particular, the brief arguments relating to Protocol II, previously discussed above, seem to hold little water.

Two of the foremost experts on belligerent reprisals, Professors Kalshoven and Greenwood, have heavily criticized the conclusions concerning the doctrine of reprisals reached by the ICTY in *Prosecutor v. Martić*. Kalshoven, notoriously an ardent opponent of any use of belligerent reprisals, rather than welcoming the court’s approach in *Martić*, derides the Trial Chamber’s findings as unsubstantiated.²¹⁷ Similarly, Greenwood views the assertions of the ICTY in this case as unfounded and “open to criticism on several grounds.”²¹⁸

First, they see the reference by the Chamber to Article 1 of the Geneva Conventions as misplaced in the context of belligerent reprisals. This article refers only to the norms contained in the Convention, “none of which deal with the protection of the civilian population against the effects of hostilities, or *a fortiori* with the issue of reprisals in that context.”²¹⁹ An attempt to find justification for a broad prohibition of reprisals in common

216. *Id.* at 47, paras. 16-17.

217. See FRITS KALSHOVEN, TWO RECENT DECISIONS OF THE YUGOSLAVIA TRIBUNAL (forthcoming 2003) (manuscript at 8, on file with author).

218. Christopher Greenwood, *Belligerent Reprisals in the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia*, in HORST FISCHER, CLAUS KRESS & SASCHA ROLF LÜDER, INTERNATIONAL AND NATIONAL PROSECUTION OF CRIMES UNDER INTERNATIONAL LAW: CURRENT DEVELOPMENTS 539, 555 (Berlin 2001).

219. KALSHOVEN, TWO RECENT DECISIONS OF THE YUGOSLAVIA TRIBUNAL, *supra* note 217, at 7.

Article 1 is bound to fail because were it to imply such a prohibition, the reprisal provisions contained in each of the four Conventions would effectively be deemed redundant.²²⁰ As Greenwood points out, the Fourth Geneva Convention offers protection to a limited category of civilians; the population of Zagreb did not fall into this category of protected persons as they were not “in the hands of a Party to the conflict or Occupying Power of which they [were] not nationals.”²²¹ On the subject of internal armed conflicts, Kalshoven again registers his disagreement that the prohibition of collective punishments in Article 4, paragraph 2(b), of Protocol II implies a prohibition of reprisals against the civilian population. He stipulates that “this specific clause belongs to the realm of Geneva-style ‘humane treatment,’ not to that of the Hague-style protection of civilian populations ‘against the dangers arising from military operations.’”²²²

Kalshoven concludes that the Trial Chamber failed to show conclusively that customary international law prohibits reprisals against the civilian population or that the treaty prohibitions of reprisals apply outside of situations of international armed conflicts.²²³ Both of the above eminent authors concur that the issue of reprisals should not have been dealt with at all in the *Martić* case, considering that for a Rule 61 procedure, it would have been sufficient to set out the evidence that may have established the accused’s responsibility and “the matter of a possible excuse could have been left to the time the defence was actually raised.”²²⁴ Although the Prosecutor did initiate the discussion on the doctrine of belligerent reprisals,²²⁵ one must wonder why the Trial Chamber decided to address this problematic issue, especially in light of the fact that it was superfluous for those particular proceedings. Were the judges so distressed by the possibility of such an unjust practice being carried out that they felt it necessary

220. Greenwood, *Belligerent Reprisals in the Jurisprudence of the ICTY*, *supra* note 218, at 555.

221. *Id.* at 555.

222. KALSHOVEN, TWO RECENT DECISIONS OF THE YUGOSLAVIA TRIBUNAL, *supra* note 217, at 7.

223. *Id.* at 8.

224. *Id.* at 18; *see also* Greenwood, *Belligerent Reprisals in the Jurisprudence of the ICTY*, *supra* note 218, at 555.

225. *See* KALSHOVEN, TWO RECENT DECISIONS OF THE YUGOSLAVIA TRIBUNAL, *supra* note 217, at 5-7.

to interpret the instruments creatively to hold belligerent reprisals against civilians as being completely outlawed?

After *Martić*, the ICTY once more addressed the issue of belligerent reprisals in *Prosecutor v. Kupreskic*.²²⁶ The accused in *Kupreskic*,²²⁷ all Croatian Defence Council (HVO) soldiers, were charged with nineteen counts, including persecution as a crime against humanity committed against the Bosnian Muslim population of Ahmici, Central Bosnia, from October 1992 to April 1993, and murder, inhumane acts, and cruel treatment for an attack on that village on 16 April 1993.²²⁸ The attack of 16 April 1993, was directed against the Muslim population of Ahmici; 116 people were killed, the majority of whom were civilians; Muslim houses and mosques were destroyed; and the remaining Muslim population forced to flee. The Trial Chamber found that the attack by the Croatian HVO against Ahmici, a village with no Muslim military forces or establishments, “was aimed at civilians for the purpose of ethnic cleansing.”²²⁹ The defense “indirectly or implicitly” relied on the argument of *tu quoque*, claiming that the attacks were justifiable because the Muslims carried out similar attacks against the Croat population.²³⁰ The Trial Chamber rejected this argument outright, commenting that “[t]he defining characteristic of modern international humanitarian law is . . . the obligation to uphold key tenets of this body of law regardless of the conduct of enemy combatants.”²³¹ Although the Defense team did not raise the defense of belligerent reprisals, the Trial Chamber noted the close relationship between this doctrine and the principle of *tu quoque* and also ruled reprisals out as a possible defense in this case.²³² Notwithstanding, the court then proceeded to examine the issue of reprisals in some detail.

At the outset of the discussion, the Trial Chamber, having pointed to the customary rule that civilians in the hands of an adversary may not be made the subjects of reprisals, asked whether the broader prohibitions of Protocol I, “assuming that they were not declaratory of customary international law, have subsequently been transformed into general rules of inter-

226. *Prosecutor v. Kupreskic*, No. IT-95-16-T (Jan. 14, 2000) (Judgment).

227. Zoran Kupreskic, Mirjan Kupreskic, Vlatko Kupreskic, Drago Josipovic, Dragan Papic, and Vladimir Santic. *See id.*

228. *Id.* annex A (Amended Indictment).

229. *Id.* paras. 333-38.

230. *See id.* paras. 511, 515.

231. *Id.* para. 511.

232. *Id.*

national law.”²³³ Acknowledging a distinct lack of State practice to support a positive answer, the Trial Chamber then ventured to state:

This is however an area where *opinio iuris sive necessitatis* may play a much greater role than *usus*, as a result of the . . . Martens Clause. In the light of the way States and courts have implemented it, this Clause clearly shows that principles of international humanitarian law may emerge through a customary process under the pressure of the demands of humanity or the dictates of public conscience, even where State practice is scant or inconsistent. The other element, in the form of *opinio necessitatis*, crystallising as a result of the imperatives of humanity or public conscience, may turn out to be the decisive element heralding the emergence of a general rule or principle of humanitarian law.²³⁴

Here, the Trial Chamber effectively negates the need for State practice to confirm the formation of custom, instead concluding that principles of humanity and the dictates of the public conscience may be the foremost ingredients for establishing that particular rules are customary in nature.

The judgment proceeded to point out that reprisals often strike at innocent persons, in violation of the most fundamental of all human rights. In light of the infusion of human rights principles into the humanitarian law regime, the Trial Chamber felt that “belligerent reprisals against civilians and fundamental rights of human beings are absolutely inconsistent legal concepts.”²³⁵ As a means of enforcing the laws of armed conflict, belligerent reprisals are no longer necessary because they have been superseded by judicial prosecutions and punishments of persons in violation of those laws, a means which has proved “fairly efficacious” at ensuring compliance and, to a more limited extent, for the deterrence of the most blatant violations of international humanitarian law.²³⁶ In support of the conclusion that a customary rule has emerged “on the matter under discussion,” the Trial Chamber noted the inclusion of reprisal provisions in several

233. *Id.* para. 527.

234. *Id.*

235. *Id.* para. 529.

236. *Id.* para. 530.

army manuals that only allow reprisals against enemy armed forces, thus *a contrario*, “admitting that reprisals against civilians are not allowed.”²³⁷

The Trial Chamber cited General Assembly Resolution 2675, the high number of ratifications of Protocol I, the views of the ICRC, and the *Martić* decision in support of the view that the rules in Protocol I concerning reprisals against civilians are declaratory of customary international law.²³⁸ The Chamber also advanced that States involved in recent international or non-international armed conflicts had normally refrained from claiming a right to take reprisals against civilians in combat areas, except by those parties to the Iran-Iraq war and by France and the United Kingdom, but only *in abstracto* and hypothetically, by way of the former’s (then) refusal to ratify and the latter’s strong reservation to Protocol I.²³⁹

The Chamber then set out how the International Law Commission (ILC) has authoritatively confirmed, albeit indirectly, the existence of a customary rule prohibiting reprisals against civilians in international armed conflicts. The Commission noted that common Article 3 to the Geneva Conventions “prohibits any reprisals in non-international armed conflicts with respect to the expressly prohibited acts as well as any other reprisal incompatible with the absolute requirement of humane treatment.”²⁴⁰ The Trial Chamber asserted that it follows that reprisals against civilians in combat zones are also prohibited due to the customary nature of common Article 3 and that this article “encapsulates fundamental legal standards of overarching value applicable both in international and internal armed conflicts” in accordance with the International Court of Justice decision in the *Nicaragua* case.²⁴¹ The Trial Chamber then stated that “it would be absurd to hold that while reprisals against civilians entailing a threat to life and physical safety are prohibited in civil wars, they are allowed in international armed conflicts as long as the civilians are in the combat zone.”²⁴² In concluding the discussion on belligerent reprisals, the

237. *Id.* para. 532. The Trial Chamber also acknowledged that some manuals specifically sanction reprisals against civilians not in the hands of the enemy belligerent. *Id.*

238. *Id.*

239. *Id.* para. 533.

240. International Law Commission, *Comments on Former Article 14 of the Second Part of the Draft Articles on State Responsibility*, [1995] 2 Y.B. Int’l L. Comm’n 72, para. 8, U.N. Doc. A/CN.4/SER.A/1995/Add.1, pt. 2 (State responsibility), *quoted in Kupreskic*, No. IT-95-16-T, para. 534.

241. *Kupreskic*, No. IT-95-16-T, para. 534 (citing Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 113-44, paras. 218-19 (June 27) (Merits)).

242. *Id.*

Trial Chamber set out the requirements that any resort to lawful belligerent reprisals must meet.²⁴³ It also notes that both parties to the conflict in question were signatories to Protocol I and the Geneva Conventions and, thus, bound by their provisions, including those that prohibit resort to belligerent reprisals against certain targets.²⁴⁴

The Trial Chamber's conclusion that a customary rule exists, without State practice, prohibiting reprisals against civilians in international armed conflicts is quite a brave and lofty statement. Having first set out a rule for the establishment of custom, the court weaved together various pieces of evidence and concluded that the above treaty law provisions have been transformed into customary international law. Unsurprisingly, both Professors Greenwood and Kalshoven denounced this judgment with much the same vigor with which they criticized the *Martić* decision.²⁴⁵ Meron, with considerable foresight, had stated that "[a]lthough Cassese's opinion will please most advocates of international humanitarian law, many military experts on the law of armed conflict will probably disagree."²⁴⁶

Setting aside momentarily the actual reasoning of the Trial Chamber that led to its conclusion, it is questionable whether it was necessary for the Chamber to examine the issue of belligerent reprisals at all, and having done so, whether the customary nature of the provisions of Protocol I were of any bearing to the case in hand. Greenwood points out that both belligerents in this conflict were parties to Protocol I and bound by its provisions, therefore, whether the provisions prohibiting reprisals against civilians and civilian objects in that instrument were declaratory of custom was irrelevant. He also points out that because Ahmici was under the control of Croatia, the civilian population could have availed of the protection of Article 33 of the Fourth Geneva Convention, a "universally accepted and uncontroversial provision."²⁴⁷ Furthermore, the Defense team never raised a defense of reprisal, and in any event, the attack did not meet any of the customary requirements governing recourse to reprisals, namely, being undertaken for the purpose of law enforcement and carried out in

243. *Id.* para 535.

244. *Id.* para 536.

245. KALSHOVEN, TWO RECENT DECISIONS OF THE YUGOSLAVIA TRIBUNAL, *supra* note 217, at 9-17; Greenwood, *Belligerent Reprisals in the Jurisprudence of the ICTY*, *supra* note 218, at 549-54.

246. Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239, 250 (2000).

247. Greenwood, *Belligerent Reprisals in the Jurisprudence of the ICTY*, *supra* note 218, at 549.

adherence of the principles of proportionality and subsidiarity. Kalshoven views the discussion of reprisals as “out of order, or at best, as being based on the flimsy excuse of the ‘indirect or implicit reliance’ by the Defence on *tu quoque*.”²⁴⁸

Nevertheless, the Trial Chamber chose to concern itself with whether Article 51, paragraph 6, and Article 52, paragraph 1, of Protocol I, prohibiting reprisals during international armed conflicts against civilians and civilian objects respectively, are declaratory of customary international law. The emphasis placed on the Martens clause by the Trial Chamber has not been met with much approval by the various commentators on this case. Meron contends that “given the scarcity of practice and diverse views of states and commentators, the invocation of the Martens clause can hardly justify [the Trial Chamber’s] conclusion.”²⁴⁹ Greenwood finds no indication that States or courts treat the clause in the manner the Chamber suggests; in particular, he takes offense at the reference to the ICJ’s *Advisory Opinion on Nuclear Weapons* in which the World Court, although having established that the Martens clause states a principle of customary international law, did not treat that clause as “relieving [the court] of the need to establish that not only *opinio juris* but also state practice existed in support of a rule of customary international humanitarian law.”²⁵⁰ And on the issue of State practice, the Trial Chamber “cited virtually no State practice at all and what it did cite does not support the conclusions it drew.”²⁵¹

The tirade of criticism does not cease there: Kalshoven makes little of the Trial Chamber’s assertion that the prosecution of war criminals has led to a decline in the incidence of blatant violations of international humanitarian law.²⁵² Greenwood finds that the high number of ratifications of Protocol I does not transform that instrument’s provisions into customary rules: “the fact that States are prepared to accept an obligation in treaty form in no way suggests that they regard that same obligation as

248. KALSHOVEN, TWO RECENT DECISIONS OF THE YUGOSLAVIA TRIBUNAL, *supra* note 217, at 16.

249. Meron, *The Humanization of Humanitarian Law*, *supra* note 246, at 250.

250. Greenwood, *Belligerent Reprisals in the Jurisprudence of the ICTY*, *supra* note 218, at 554 (construing *Advisory Opinion, Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226, 259, para. 84 (July 8); *see also* KALSHOVEN, TWO RECENT DECISIONS OF THE YUGOSLAVIA TRIBUNAL, *supra* note 217, at 13.

251. Greenwood, *Belligerent Reprisals in the Jurisprudence of the ICTY*, *supra* note 218, at 550.

252. *See* FRITS KALSHOVEN, TWO RECENT DECISIONS OF THE YUGOSLAVIA TRIBUNAL, *supra* note 217, at 13-14.

binding upon them anyway by virtue of customary law; indeed it may suggest the opposite.”²⁵³ While not disregarding the views of the ICRC, Greenwood makes it clear that it is State practice and not the practice of the ICRC that creates customary international law.²⁵⁴

The Trial Chamber’s blithe assertion that States have normally refrained from claiming a right of reprisal, except for Iraq and a few others, is also met with hostility. Kalshoven takes issue with the reference to “numerous” international conflicts and points out that during internal armed conflicts, States would obviously hesitate to *claim* a right of reprisal against their own civilians.²⁵⁵ Greenwood rejects the dismissal of the United Kingdom’s reservation as being only hypothetical; instead, he views this as a clear statement of the United Kingdom’s view of the non-customary nature of the reprisal provision of Protocol I.²⁵⁶ The Trial Chamber’s findings on this issue, one author damningly concludes, “may be founded on quicksand.”²⁵⁷

The Trial Chamber’s attempts to grapple with the issue of reprisals against civilians during internal armed conflicts is marked by a similar lack of success. The court simply ignores the lack of any reference to reprisals in Protocol II; instead, the Chamber focuses on common Article 3 and the ILC’s interpretation of this provision. Kalshoven points out that this article does not govern the conduct of hostilities; therefore, the Chamber’s view that “reprisals against civilians in the combat zone are also prohibited” is unfounded.²⁵⁸ Moreover, he derides the Trial Chamber for disregarding the fact that the original attempts to include reprisal prohibitions against the civilian populations in Protocol II failed miserably at the time.²⁵⁹

As has been shown, two of the most prominent experts on belligerent reprisals are highly dissatisfied with the approach taken by the ICTY toward the doctrine. Commenting on *Kupreskic*, Professor Kalshoven

253. Greenwood, *Belligerent Reprisals in the Jurisprudence of the ICTY*, *supra* note 218, at 552.

254. *See id.*

255. KALSHOVEN, TWO RECENT DECISIONS OF THE YUGOSLAVIA TRIBUNAL, *supra* note 217, at 14.

256. Greenwood, *Belligerent Reprisals in the Jurisprudence of the ICTY*, *supra* note 218, at 552-53.

257. KALSHOVEN, TWO RECENT DECISIONS OF THE YUGOSLAVIA TRIBUNAL, *supra* note 217, at 15.

258. *Id.*

259. *Id.*

concludes that “none of the arguments advanced by the Trial Chamber have succeeded in convincing me that the prohibition of reprisals against the civilian population has acquired any greater force than as treaty law under Protocol I, or that it extends, whether as conventional or customary law, to internal armed conflicts as well.”²⁶⁰ Professor Greenwood draws the similar conclusion that

[t]he reasons advanced in support of [the ICTY’s] assertion in the two decisions are unconvincing. . . . The conclusion that [the relevant provisions of Protocol I] have become customary law in the years since 1977 flies in the face of most of the State practice which exists and is built upon the shaky foundations of an unduly extensive interpretation of the Martens Clause in one case and common Article 1 of the Geneva Conventions in the other. . . . It is to be hoped that the decisions will not be followed on this point either in the ICTY or, in due course, in the ICC.²⁶¹

The issue of belligerent reprisals did not arise when the *Kupreskic* case went to the Appeals Chamber of the ICTY, and no proceedings have yet been taken against Milan Martić as the warrant for his arrest is still outstanding.²⁶²

With regard to these two particular decisions, establishing if they are binding is necessary. The discussion of belligerent reprisals in both instances is *obiter dicta*, and as such, not generally binding as precedent. The Trial Chamber in *Kupreskic* acknowledged that Article 38, paragraph 1(d), of the Statute of the International Court of Justice states that judicial decisions are “subsidiary means for the determination of rules of law.”²⁶³ The Chamber also establishes that decisions such as its would only have “persuasive authority concerning the existence of a rule or principle.”²⁶⁴ Nonetheless, in the future, factual circumstances permitting, any defense of reprisal that might be raised before the ICTY is likely to fall foul of these two decisions, and moreover, the judges in such a case might be unwilling

260. *Id.* at 16.

261. Greenwood, *Belligerent Reprisals in the Jurisprudence of the ICTY*, *supra* note 218, at 556.

262. Prosecutor v. Kupreskic, No. IT-95-16-A, at 168-73 (Oct. 23, 2001) (Appeal). On appeal, three of the defendants had their convictions reversed. *See id.*

263. Prosecutor v. Kupreskic, No. IT-95-16-T, para. 540 (Jan. 14, 2000) (Judgment).

264. *Id.*

to dispute the earlier findings of their colleagues in relation to belligerent reprisals.

While the approach taken by international tribunals towards customary international law has not always gone uncriticized,²⁶⁵ it has been recognized that international judicial decisions discussing the customary law nature of international humanitarian law instruments have the tendency

to ignore, for the most part, the availability of evidence concerning state practice scant as it may have been, and to assume that humanitarian principles deserving recognition as the positive law of the international community have in fact been recognized as such by states The more heinous the act, the more willing the tribunal will be to assume that it violates not only a moral principle of humanity but also a positive norm of customary law.²⁶⁶

In this regard, Meron has concluded that despite the “perplexity over the reasoning and, at times, the conclusions of a tribunal, both states and scholarly opinion in general will accept judicial decisions confirming the customary character of some of the provisions of the Geneva Conventions as authoritative statements of the law.”²⁶⁷ Considering the level of criticism that has been directed at the *Martić* and *Kupreskic* findings and the general hostility of some States towards the reprisal provisions of Protocol I,

265. For example, Meron has previously made critical comments of the approach taken by the International Court of Justice in the *Nicaragua* case:

The *Nicaragua* Court’s discussion of the Geneva Conventions is remarkable, indeed, for its complete failure to inquire whether *opinio juris* and practice support the crystallization of Articles 1 and 3 into customary law Nevertheless, it is not so much the Court’s attribution of customary law character to both Articles 1 and 3 of the Geneva Conventions that merits criticism. Rather, the Court should be reproached for its near silence concerning the evidence and reasoning supporting this conclusion.

MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW, *supra* note 161, at 36-37 (construing Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27) (Merits)).

266. *Id.* at 41-42.

267. *Id.* at 43.

acceptance of these two decisions as authoritative statements of the law seems unlikely.

G. Concluding Remarks on the Customary Nature of the Law of Belligerent Reprisals

This section sought to assess the customary character, if any, of the various treaty rules prohibiting recourse to belligerent reprisals. In doing so, this section highlighted the difficulty in assessing State practice, and thus various other subsidiary means of gauging the establishment of custom were examined. The first and safest conclusion one can draw is that the reprisal provisions of the four Geneva Conventions of 1949 (the third of which incorporates the reprisal prohibition of the 1929 Prisoners of War Convention) have undoubtedly crystallized into norms of customary international law. The almost universal ratification of these treaties and the unanimity of academic and judicial opinion confirms that all States are bound, as customary law, to observe the prohibitions of reprisals in international armed conflicts against *inter alia* the wounded, sick, and shipwrecked, as well as prisoners of war and civilians in the hands of the enemy.

It is much less conclusive, however, whether the controversial reprisal provisions of Protocol I, applicable in international armed conflicts, have also been transformed into rules of customary law. On the one hand, the substantial number of ratifications of this instrument, coupled with the opinions of various international organizations and the ICTY, might lead one to conclude that the reprisal provisions, in particular those prohibiting reprisals against enemy civilians and civilian objects, may be considered to have acquired customary status. On the other hand, the refusal of a number of major military powers, most notably the United States, to ratify Protocol I, and the entering of reservations or statements of similar effect by several States parties serve to weaken, if not defeat, any claims that those reprisal prohibitions are of a customary character.

In the context of non-international armed conflicts, it has already been shown that the relative silence of common Article 3 and Protocol II have left the lawfulness of belligerent reprisals in that context open to some debate. Here again, the ICRC, the United Nations General Assembly, and the ICTY would view the treaty provisions applicable in international conflicts as also applying to conflicts of an internal nature. To prove that such a customary rule exists, without the presence of any clear conventional rule

or substantial State practice to that effect, would be an almost insurmountable task.

Interestingly, none of the statutes of recently created international tribunals have deemed the taking of reprisals against any persons or objects as a violation of the laws of armed conflict. The Statutes of the ICTY, the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone, and the highly comprehensive Rome Statute for the International Criminal Court have all refrained, by this omission, from commenting on the legality of reprisals.²⁶⁸

At this point, it may be concluded that the treaty law of belligerent reprisals prohibits the taking of reprisals against a far greater number of categories of persons and objects in comparison with the established customary law of belligerent reprisals. The tendency for conventional law to be more developed and far-reaching than customary law is quite normal, particularly in an area that limits the actions that States may lawfully take during an armed conflict. Given that the progressive codification of norms prohibiting recourse to belligerent reprisals that began almost seventy-five years ago has left little scope for the taking of reprisals, one can easily envisage that over time, customary international law will follow suit. As a matter of urgency, the cloud of ambiguity that presently surrounds reprisals in internal armed conflicts must be dispelled. A binding multilateral treaty that would clarify which classes of persons or objects against whom belligerent reprisals may or may not lawfully be taken during an internal armed conflict is presently most desirable.

VI. Observations and Conclusions

The previous sections of this article have delineated the requirements to be met in any recourse to belligerent reprisals and have examined the extent of the conventional and customary law limitations on their use. Thus far the discussion has refrained from commenting on the desirability

268. See STATUTE OF THE ICTY, *supra* note 211; STATUTE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE PROSECUTION OF PERSONS RESPONSIBLE FOR GENOCIDE AND OTHER SERIOUS VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW COMMITTED IN THE TERRITORY OF RWANDA (1994), U.N. Doc. S/Res/955 (1994); STATUTE OF THE SPECIAL COURT FOR SIERRA LEONE (2000) (established pursuant to Security Council Resolution 1315, of 14 August 2000), available at <http://www.sierra-leone.org/specialcourtstatute.html>; ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT (1998) (entered into force 1 July 2002) [hereinafter ROME STATUTE], U.N. Doc. A/CONF.183/9 (1998).

of belligerent reprisals as an enforcement tool of the laws of armed conflict. The controversial nature of the doctrine of belligerent reprisals is evident in the divergent approach to the issue taken by States and as reflected in the scholarly writings on the matter. Much of the debate centers on the effectiveness of reprisals as a sanction of the laws of armed conflict. On the one hand, belligerent reprisals are viewed as one of the only remaining options available to a State in the face of gross and persistent violations of international humanitarian law. On the other hand, reprisals are often seen as undesirable because their use frequently leads to an escalation of hostilities as assailed opponents take counter-reprisals, thus causing further violations to ensue.²⁶⁹ Also, it is claimed that reprisals by their nature allude to the notion of collective responsibility, and their use is thus “contrary to the principle that no one may be punished for an act that he has not personally committed.”²⁷⁰ This section examines the various arguments made for and against the doctrine of belligerent reprisals.

In tandem with support for the doctrine has been a palpable hostility towards the codification of rules prohibiting reprisals against certain classes of persons or objects. For example, although the reprisal provisions of the Geneva Conventions were adopted with little opposition at that time, one author commented in 1953 that

[o]n the one hand, the trials [after the Second World War] have transformed the previously sketchy rules on reprisals into a more comprehensive and elaborate system of control. On the other hand, the Geneva Conventions have provided for almost the complete abolition of reprisals in the very area for which the rules of control were formulated.²⁷¹

More recently, enmity towards the doctrine on the part of States is apparent in the reservation of the United Kingdom to the reprisal prohibitions of Protocol I, the similar declarations of a number of other States, and the United States’ refusal to ratify that instrument on account of its near “total elimination of the right of reprisal.”²⁷² Some commentators also seem to favor the retention of a limited right to take reprisals against a law-breaking enemy. Kwakwa contends that belligerent reprisals “serve a crucial function. In the present world order, politically independent constitu-

269. See, e.g., KALSHOVEN, CONSTRAINTS ON THE WAGING OF WAR, *supra* note 2, at 65; COMMENTARY TO THE ADDITIONAL PROTOCOLS, *supra* note 104, at 983.

270. COMMENTARY TO THE ADDITIONAL PROTOCOLS, *supra* note 104, at 983.

271. Albrecht, *supra* note 35, at 590.

272. Sofaer, *supra* note 179, at 785.

ent states need a mechanism to enforce the rules of international law.”²⁷³ He also points out that the presence of the sanction of reprisals may act as a deterrent to future violations of humanitarian law.²⁷⁴ In this regard, he concludes that a formal prohibition of reprisals might actually encourage violations, and that however desirable such a ban might be, “it may well be untenable, since it tends to give a significant military advantage to the aggressor side in a conflict.”²⁷⁵ The present writer, however, fails to see how the observance of the prohibition of reprisals would place a belligerent at a significant military disadvantage. The perceived military advantage is gained only through violating the laws of armed conflict; on this reasoning, therefore, one could imply that the observance of any of that regime’s rules is likely to be disadvantageous for a party to an armed conflict.

Proponents of the doctrine of belligerent reprisals claim that such measures are the only sanction available against an enemy who commits gross and persistent violations of humanitarian law against a party’s civilian population. Obviously, a belligerent that finds itself in such a situation is not precluded from retaliating with all its military might against the legitimate military objective of the enemy. If the aggrieved party so desires, it may by way of reprisal lawfully employ a number of outlawed methods or means of warfare against that enemy to bring about a cessation of the original violative activity. The supporters of the doctrine, however, would argue that in a situation involving unlawful attacks against their civilian population, a reprisal in kind is the only means of securing effective compliance with the law.

While it is undeniable that a belligerent’s civilian population, for the most part, is an Achilles heel, one must consider whether the choice of response is of the type espoused by the *lex talionis* rather than one guided by the underlying reprisal objective of law enforcement. While public opinion in the injured State would undoubtedly demand a response in kind, opponents of the doctrine would call for some foresight before resorting to such reprisals because frequently they tend to further inflame the situation, rather than bring about the desired goal of compliance. Also, while considering public opinion in the aggrieved State, it is also necessary to take account of the wider opinion of other States and of international organizations. Bierzanek contends that “the obsolete concept of reprisals is in fla-

273. Kwakwa, *supra* note 53, at 74.

274. *Id.*

275. *Id.* at 76.

grant contradiction with the international law of the contemporary, increasingly integrated international community, for it presupposes that States have, under international law, duties only with regard to one another and not with respect to the international community as a whole.”²⁷⁶

Much of the opposition to the use of belligerent reprisals is based on its perceived ineffectiveness as a sanction of the laws of armed conflict. A resort to reprisal measures is likely to lead to counter-reprisals and the so-called “escalating spiral of violence.” It is not difficult to envisage a ruthless belligerent, who has already chosen the path of targeting civilians, refusing to cease these attacks in the face of similar attacks on its own populace. Moreover, that belligerent may be inclined to step up the intensity of its attacks in response to those reprisals. Furthermore, because the assessment of the prior violation is almost always done unilaterally, a party against whom reprisal measures are taken may view these as original violations that would then be seen of themselves as legitimizing the taking of reprisal action.²⁷⁷ Or, that State may simply choose to retaliate without even considering the relevance or applicability of the doctrine of reprisals. The age-old mantra that violence begets violence would appear to be of marked relevance in the current context.

It is also apparent that reprisals against the civilian population or other classes of protected persons impose hardship and suffering on persons innocent of any transgressions. While lawful belligerent reprisals carried out strictly for law enforcement purposes would not be instances of collective punishment, those employed retributively would clearly contravene the prohibitions against non-individual punishment.²⁷⁸ Notwithstanding, Bierzanek maintains that even legitimate reprisals are based on an “obsolete idea of collective responsibility.”²⁷⁹ It is this striking at innocence that

276. Bierzanek, *supra* note 89, at 244.

277. See McDUGAL & FELICIANO, *supra* note 11, at 681.

278. For example, Article 50 of the Hague Regulations, annexed to the 1907 Hague Convention, establishes that “[n]o general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible.” Hague Convention IV, *supra* note 55, Annexed Regulations, art. 50.

Article 33(1) of the Fourth Geneva Convention provides a more concrete and absolute prohibition of collective punishment by emphasising the principle of individual responsibility: “No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited.” Fourth Geneva Convention, *supra* note 51, art. 33(1).

279. Bierzanek, *supra* note 89, at 257.

is at the heart of humanitarian law's efforts to prohibit belligerent reprisals against a wide range of persons and objects.

It has also been argued that despite the numerous conventional and customary rules governing the use of belligerent reprisals, the doctrine is "vulnerable to perversion and abuse" in view of the significant powers which it allows to belligerents.²⁸⁰ Geoffrey Best offers some cautious words of advice on this subject: "One of the earliest lessons that the student of the law of war has to learn is to be on his guard when he hears the word [reprisal]. Deeper hypocrisy and duplicity attach to it than to any other term of the art."²⁸¹

Belligerents with a penchant for violating the laws of armed conflict would undoubtedly seek the comfort of a doctrine, irrespective of whether circumstances permitted its application, which might ultimately legitimize their unlawful activity. When the risk of such treachery exists, the prohibitions of reprisals against particularly vulnerable classes of persons are especially welcome. Furthermore, the doctrine of belligerent reprisals often serves as a convenient cloak for retaliatory action motivated by revenge rather than by a desire to see an enemy conform with the law. A device deliberately directed at innocent persons has a tendency to provoke similar violent responses and is highly susceptible to ruthless manipulation. Such a device cannot rightly have a place within the humanitarian law regime.

On the whole, one might argue that much of the criticism of the ongoing trend of prohibiting belligerent reprisals is based on the absence of other effective methods of enforcing compliance with the laws of armed conflict, rather than the actual outlawing of reprisals themselves. Greenwood has commented that "the removal of even an imperfect sanction creates problems unless something is put in its place."²⁸² Professor Draper has commented that the prohibition of reprisals, as one of the oldest means of law enforcement, places a heavy strain upon the residual methods of law enforcement.²⁸³ As pointed out at the beginning of this article, the human-

280. McDUGAL & FELICIANO, *supra* note 11, at 681.

281. GEOFFREY BEST, *LAW AND WAR SINCE 1945*, at 203 (Oxford 1994).

282. Greenwood, *The Twilight of the Law of Belligerent Reprisals*, *supra* note 19, at 56.

283. Draper, *supra* note 27, at 35.

itarian law regime is notably lacking in adequate methods of enforcing compliance with those laws.

There are, however, a number of enforcement mechanisms that may be pursued in lieu of belligerent reprisals.²⁸⁴ Primarily, the investigation and prosecution of persons who have committed humanitarian law violations is the most desirable sanction of the laws of war available. Most national legislation provides for the prosecution of members of that State who have violated humanitarian law. States parties to the Geneva Convention are required to “investigate, prosecute or extradite persons suspected of committing ‘grave breaches,’ irrespective of their nationality or the place where the crime was committed.”²⁸⁵ Following the recent entering into force of the Rome Statute of the International Criminal Court,²⁸⁶ the forthcoming creation of that organ may herald in a new era in prosecutions for violations of the laws of armed conflict. Although criminal prosecutions would be less immediate than reprisal measures, if they are to prove effective in securing compliance, then observance of the principle of subsidiarity demands that aggrieved parties adopt this less stringent and more humane means.

Other potential means of securing compliance include exerting diplomatic pressure on States or making appeals to international bodies or organizations. Although the International Humanitarian Fact-Finding Commission created under Article 90 of Protocol I has yet to commence its work, when it does so, and if given enough support by the international community, it may prove highly successful at restoring “an attitude of respect for the Conventions and this Protocol.”²⁸⁷ If a State so desires, it may clearly pursue alternative methods of enforcing compliance. Given that the majority of academic opinion on the issue of belligerent reprisals seems to point to the ineffectiveness of reprisals as a sanction of the laws of armed conflict, an alternative course may in fact be the only acceptable

284. See generally *id.* at 9; Thomas J. Murphy, *Sanctions and Enforcement of the Humanitarian Law of the Four Geneva Conventions and Geneva Protocol 1 of 1977*, 103 MIL. L. REV. 3 (1984).

285. WILLIAM A. SCHABAS, *AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT* 45 (Cambridge 2001).

286. *ROME STATUTE*, *supra* note 268.

287. Protocol I, *supra* note 87, art. 90(2)(c)(ii). The Commission came into being when twenty States parties to Protocol I agreed to accept the competence of the Commission in accordance with Article 90, paragraph 1. At the time of writing, over sixty States parties had declared their acceptance of the Commission's competence. ICRC *Treaty Database*, *supra* note 174.

route. The foremost expert on belligerent reprisals, the oft-quoted Professor Kalshoven, completes his treatise, *Belligerent Reprisals*, by stating that

the conclusion seems inescapable that the balance of the merits and demerits of belligerent reprisals has now become so entirely negative as no longer to allow of their being regarded as even moderately effective sanctions of the laws of war, . . . in the whole of the international legal order, they have become a complete anachronism.²⁸⁸

The findings of Professor Kalshoven are difficult to disagree with. Belligerent reprisals have no place in the modern humanitarian law of armed conflict, a regime that has as its overarching goal the mitigation of the harshness and the excesses that are synonymous with war.

Concluding Remarks

The goal of this article was to explore the evolution of the law of belligerent reprisals. It has shown that international law treaties have steadily restricted the right of belligerents to employ a classic wartime practice over the past seventy-five years. For States parties to those treaties, during an international armed conflict, the only remaining scope for permissible belligerent reprisals is in the choice of weapons or means of warfare employed against an enemy's armed forces and military objectives. As this study has also highlighted, however, there is a glaring absence of conventional law governing the use of reprisals during non-international armed conflicts. The ICRC and, more recently, the International Criminal Tribunal for the former Yugoslavia have sought to extend the application of the reprisal prohibitions pertaining to international conflicts to conflicts that are internal in nature. While this is indeed desirable from a humanitarian perspective, and especially in view of the sanction's ineffectiveness, without the presence of treaty provisions expressly prohibiting the use of reprisals, the approaches adopted by these two institutions are unsustainable. Although already expressed above, it is necessary to reiterate the view that there is an urgent need for clarification of the extent of any right to take belligerent reprisals in this area of the law of armed conflict.

While it has become apparent that the treaty law of belligerent reprisals has all but completely prohibited the use of belligerent reprisals in

288. KALSHOVEN, *BELLIGERENT REPRISALS*, *supra* note 3, at 377.

international conflicts, the customary law governing recourse to reprisals seems markedly less far-reaching. Recent over-zealous judicial opinions aside, it seems that the customary international law of belligerent reprisals is *moving* towards a similar level of prohibition as that guaranteed by treaty law, albeit in the face of some noted hostility. The universal ratification of the Geneva Conventions and the strong acceptance of Protocol I, although clearly not an overwhelming groundswell of support, indicate a steady acceptance by States of those restrictions on their right of reprisal. The stern opposition of a small, albeit powerful, number of States to the reprisal prohibitions of Protocol I is one of the strongest factors hindering the crystallization of those provisions into norms of customary international law.

There remains a long way to go before international law might impose a complete prohibition on the use of belligerent reprisals during armed conflicts. In the context of internal armed conflicts, the resistance to any rules limiting a right of reprisal is quite apparent. The presently uncontested right of belligerents to employ certain prohibited methods of warfare against military objectives and enemy armed forces by way of reprisal is also unlikely to be forfeited in the near future. Although international law has advanced significantly in the abolition of the right of reprisal since the two World Wars, presently there remains a noticeably broad and thus undesirable scope for the employment of this archaic and ineffective “sanction” of the laws of armed conflict.

A PATRIOT'S HEART: A SUMMARY AND ANALYSIS OF *An Oral History of Colonel William S. Fulton, Jr., United States Army (Retired) (1943-1983)*; and Addendum To Oral History, *The Clerk of Court Years (1983-1997)*¹

MAJOR MARY M. FOREMAN²

I. Introduction

pa·tri·ot 'pA-trE-ät, -"ät, chiefly British 'pa-trE-ät

Function: *noun* Etymology: Middle French *patriote* compatriot, from Late Latin *patriota*, from Greek *patriOtEs*, from *patria* lineage, from *patr-*, *patEr* father³

1. Major Wendell A. Hollis, *An Oral History of Colonel William S. Fulton, Jr., United States Army (Retired) (1943-1983)* (March 1990) [hereinafter *Oral History*] (unpublished manuscript on file with The Judge Advocate General's School Library, United States Army, Charlottesville, Virginia). The manuscript was prepared as part of the Oral History Program of the Legal Research and Communications Department at The Judge Advocate General's School, United States Army, Charlottesville, Virginia. This article also incorporates information provided in an addendum to the oral history, entitled "Addendum, *The Clerk of Court Years, 1983-1997*," prepared by Colonel Fulton in February 2001 [hereinafter *Addendum*]; as well as information provided during interviews conducted by the author with Colonel Fulton and several of the individuals mentioned in the oral history, in March through April 2002 [hereinafter *Fulton Interviews*] (on file with author); and personnel documents provided by Colonel Fulton (on file with Colonel Fulton).

2. Judge Advocate General's Corps, United States Army. Presently assigned to the Office of The Judge Advocate General. LL.M., 2002, The Judge Advocate General's School, United States Army, Charlottesville, Virginia; J.D., 1994, Creighton University School of Law; B.S., 1988, United States Military Academy. Previously assigned as Chief of Military Justice, Office of the Staff Judge Advocate, 1st Infantry Division, Würzburg, Germany, 2000-2001; Senior Defense Counsel, Bamberg Field Office, 1999-2000; Trial Defense Counsel, Hohenfels Branch Office, 1997-1999; Trial Counsel and Chief, Administrative and Operational Law, Office of the Staff Judge Advocate, 4th Infantry Division, Fort Hood, 1995-1997; Legal Assistance Attorney, Office of the Staff Judge Advocate, 2d Armored Division, Fort Hood, 1994-1995; Funded Legal Education Program, 1991-1994; Executive Officer and Platoon Leader, 181st Chemical Company, 2d Chemical Battalion, Fort Hood, 1990-1991; Battalion Chemical Officer, 3d Battalion, 1st Air Defense Artillery Regiment, 31st Air Defense Artillery Brigade, Fort Hood, 1988-1990. Member of the bars of the State of Nebraska, the Army Court of Criminal Appeals, the Court of Appeals for the Armed Forces, and the United States Supreme Court.

2a. One who disinterestedly or self-sacrificingly exerts himself to promote the well-being of his country⁴

On 20 January 1961, John F. Kennedy became the thirty-fifth President of the United States; and in his Inaugural Address in Washington, D.C., when the United States was facing difficulties both foreign and domestic, he issued his now famous challenge to the American people: “ask not what your country can do for you—ask what you can do for your country.”⁵

William Sherwin Fulton, Junior, was stationed at Fort Leavenworth, Kansas, the day President Kennedy spoke those words, but already the soldier-lawyer from Iowa was living them, having enlisted in 1943, fought in World War II and Korea, and accepted a battlefield commission that eventually led to a commission in The Judge Advocate General’s Corps. Already Bill Fulton personified those words, and he continued to do so throughout his lifetime of service to the nation. Throughout his fifty-four years of service to the country, his tireless work ethic and selfless response to the call of duty were a model for emulation and significantly impacted the lives of those with whom he worked. While the term “patriot” has since become the name of an air defense artillery system, the title of a motion picture, and most recently the name of anti-terrorist legislation, Bill Fulton’s service to the United States—as an enlisted soldier, a commissioned officer, and a federal civilian—defines the term in its purest sense.

This article is a summary and analysis of interviews conducted with Colonel (Retired) Fulton in March 1990, an addendum that he added to the text of his interviews in February 2001, and interviews conducted with him and others in April 2002. The initial interview and his addendum have been bound in “*An Oral History of Colonel William S. Fulton, Jr., United States Army (Retired)*” and are maintained at the Judge Advocate General’s School in Charlottesville, Virginia. Presented in the context of dedication to country, dedication to the law, and dedication to service, this article examines Colonel Fulton’s fifty-four years of service, from his enlistment

3. WEBSTER’S NEW WORLD DICTIONARY OF AMERICAN ENGLISH (3d. College ed. 1988), <http://www.m-w.com/cgi-bin/dictionary>.

4. THE OXFORD ENGLISH DICTIONARY 349 (2d ed. 1998).

5. President John F. Kennedy, Inaugural Address, Washington, D.C. (Jan. 20, 1961), <http://www.jfklibrary.org/j012061.htm>.

in 1943 to his final retirement from federal service in 1997, a history that both defines and reveals the legacy of a patriot's heart.

II. 1925—1951: Dedication to Service: A Patriot's Duty

I was at home on Sunday afternoon, December 7th, 1941, in our apartment across the street from Drake University, about a half-block from our church, preparing to attend an evening youth service, when we learned the Japanese had attacked Pearl Harbor [I]t wasn't long until the names of some began to appear with gold stars on a wall we had reserved as a memorial at North High . . . [for those] killed in action.⁶

A. Iowa: From Hawkeye Boys' State to Enlistment at Camp Dodge

Born on 14 September 1925, in Des Moines, Iowa, William Sherwin Fulton, Junior, heard the call to duty early in his life. The son of William Sherwin Fulton, Senior, and Hazel Marie (Douglas) Fulton, "Sherwin Junior," as he was known until high school, was attracted to the military lifestyle as a young boy, despite having no military family background. At age eight, having read about a nearby military school in *Boys Life*, he requested literature from the school, explaining in a letter that although the minimum age for admission was eleven, "it might take three years for me to persuade my parents to send me!"⁷

Apparently unsuccessful in convincing his parents to send him to military school, Bill Fulton graduated from North High School, Des Moines, in 1943, having been elected president of his student council. Unable to enlist because he was not yet eighteen, and eager to begin his college education, he enrolled in the summer session at the University of Iowa in 1943. That same summer, the Army established a college training program for enlisted reservists called the Army Specialized Training Reserve Program (ASTRP), which permitted men at least seventeen years of age to enlist in the Enlisted Reserve Corps, a precursor to the Army Reserve. In return for an agreement to serve on active duty once turning eighteen, the program assisted in providing a college education. While attending classes at Iowa, Bill Fulton joined the ASTRP in order to enter the Army as soon as possi-

6. Oral History, *supra* note 1, at 5.

7. *Id.* at 4.

ble, with full knowledge that his enlistment would invariably thrust him into World War II. Indeed, while the program enabled him to attend a semester of college at the University of Kansas, by November 1943, Private Fulton had received active duty orders to Camp Dodge, Iowa, with follow-on orders to basic combat training at Fort Benning, Georgia.

While at North High, Bill Fulton had become interested in attending law school, and it was there that he “tried [his] first case.”⁸ While involved in a mock-government program for high school students called “Hawkeye Boys’ State,” he was elected a county attorney and earned the distinction of prosecuting a fellow county citizen for urinating in the shower, arguably a violation of the Iowa Code.⁹ More noteworthy during his time at North High is that he met Marjorie Porter, who would later become his wife.

B. World War II: The 86th Infantry Division and the European and Asiatic-Pacific Theaters

Just months after his acceptance into the ASTRP, Bill Fulton turned eighteen and was called to active duty. After completing basic training at Fort Benning in March, 1944, Private Fulton was assigned to the 86th Infantry Division at Camp Livingston, Louisiana, a unit that had been largely dismantled to provide replacements for casualties in Europe. As a member of Company F, 341st Infantry Regiment, 86th Infantry Division, Private Fulton served as a rifleman, handling the bazooka and later the flame thrower for his squad, until he was promoted from private first class to sergeant while training at Camp San Luis Obispo, California.¹⁰

The 86th Infantry Division had initially been earmarked for amphibious warfare operations in the Pacific, which resulted in training exercises for the Division at various training camps in California. In February 1945, after the Battle of the Bulge, the 86th Infantry Division was needed in Germany, and Sergeant Fulton soon found himself at Camp Myles Standish, near Boston, Massachusetts, en route to Europe. His life had changed dramatically in the eighteen months since his enlistment. In addition to briefly attending college, completing basic training, and rising to the rank of sergeant, he had become engaged to Marjorie in April 1944, and just

8. *Id.* at 5.

9. *Id.*

10. Colonel Fulton was never an E-4. In light of his squad’s need for an assistant squad leader, he was promoted from E-3 to E-5 upon his promotion to assistant squad leader. Fulton Interviews, *supra* note 1.

months later, had unexpectedly lost his forty-one year-old father to a heart attack.

The Division arrived at Le Havre, France, on 2 March 1945, and settled at Camp Lucky Strike. It was there that Sergeant Fulton's company commander offered him the position as communications chief, which led to a promotion to staff sergeant. Staff Sergeant Fulton was then responsible for managing and maintaining all of the company's internal and external communications equipment when the 86th Division moved east into Germany, relieving the 8th Infantry Division near Köln and occupying the west bank of the Rhine River, opposite what had become the "Ruhr Pocket."¹¹

Staff Sergeant Fulton's service with the 86th Infantry Division took him deep into Nazi Germany, where his division assisted the XVIII Airborne Corps in eliminating the resistance in the Ruhr pocket, then through Frankfurt and south of Würzburg, where the Division joined the III Corps of General Patton's Third Army. In April 1945, the 86th Infantry Division captured Ingolstadt on the Danube, became one of the first divisions to cross that river under fire, then moved in pursuit toward the Austrian border, encountering surrendering German soldiers, displaced persons, POWs, and other casualties of the long-standing war in Europe. Passing north of Berchtesgaden and Hitler's "Eagle's Nest," Sergeant Fulton's unit crossed the Salzach River into Austria on 4 May 1945, just days after Hitler's suicide on 30 April 1945. Germany surrendered unconditionally one week later. The Division was not to return home, however; "[a]s soon as the war in Germany ended, we were told we were going to the Asiatic-Pacific Theatre, for which we had trained and where the war was not yet over."¹²

After returning to the United States for a brief period of leave, the 86th Infantry Division reassembled at Camp Gruber, Oklahoma, for deployment to the Pacific theater, and soon moved to Camp Stoneman, California, for transportation to the Philippines. The Division departed for the Philippines on 21 August 1945, shortly after the dropping of the atomic bomb on Hiroshima on 6 August 1945, and the Japanese surrender a week later. Once in the Philippines, Sergeant Fulton's division patrolled the mountain areas in central Luzon "searching for recalcitrant or uninformed Japanese soldiers."¹³ Sergeant Fulton later learned that his division would

11. Oral History, *supra* note 1, at 17.

12. *Id.* at 18.

have been one of six divisions from Europe constituting follow-on forces for the planned invasion of Japan, had the war not ended when it did.

For his service in the European and Asiatic-Pacific Theaters, Sergeant Fulton's awards included the Combat Infantryman's Badge (CIB), the World War II Victory Medal, and the Bronze Star.¹⁴ He was twenty years-old when he returned to the United States in April 1946.

C. Return to Iowa: Law School

Sergeant Fulton's three-year enlistment was to expire in July 1946. On 23 April 1946, at Fort Leavenworth, Kansas, he enlisted for another three years in the Enlisted Reserve Corps. At that time, there was not yet a reserve retirement system, and notwithstanding having just spent over a year abroad during World War II, Sergeant Fulton believed that reenlisting "was the patriotic thing to do," for no reason "other than my interest in the Army and a desire to serve if and when necessary."¹⁵ He married Marjorie Porter in Des Moines, Iowa, on 1 June 1946.

Immediately following their honeymoon in Chicago, the Fultons moved to Iowa City, where Bill Fulton re-enrolled at the University of Iowa, and Marjorie Fulton worked in the University Library. With the help of the G.I. Bill, Bill Fulton completed his undergraduate studies in 1948¹⁶ and enrolled in law school at the University. He had contracted pneumonia in December 1947 and was advised to move to the southwest to improve his health. The Fultons relocated to Albuquerque, New Mexico, in the summer of 1948, and Bill Fulton graduated from the New Mexico School of Law in 1950. While in Albuquerque, he inquired about service

13. *Id.* at 22.

14. When asked about the Bronze Star Medal, Colonel Fulton said, in his characteristically modest demeanor, that "sometime after the war, it was decided that anyone who had earned the CIB deserved a [Bronze Star Metal]. So . . . I sent in a copy of the orders authorizing my CIB and they sent me a BSM. No citation, no ceremony." E-mail from Colonel Fulton to author (Oct. 8, 2002) (on file with author).

15. Oral History, *supra* note 1, at 25.

16. He did not receive his undergraduate degree until 1972. In late 1947, having almost sufficient credits to enroll in the law school, he was short only language courses. The University permitted him to enroll in law school on the condition that he later satisfy the language requirement. In 1972, the University of Iowa awarded him credit for the Chinese language skills he obtained in Taiwan and awarded him his Bachelor of Arts degree. *Id.* at 32.

as a Navy law specialist with the local Naval Reserve unit, but was turned down due to his poor eyesight.

On 25 June 1950, North Korea invaded South Korea. Not surprisingly, Bill Fulton had reenlisted in the Reserve a year earlier for another term of three years. Uncertain how to tell his young wife that he wanted to go to Korea—"after she had helped put me through college and law school . . . and we were on the verge of a new life"—as it turned out, he didn't have to: "President Truman told both of us. I was recalled to active duty."¹⁷ Ironically, "we inactive reservists were being recalled first because we were taking advantage of a lower selective service category by being in the reserves, but were not participating in the program. Draft dodgers, in other words!"¹⁸

Without hesitation, the Fultons returned to Des Moines, where Marjorie Fulton obtained employment at a life insurance company, and Sergeant Fulton received orders to Fort Hood, Texas.

D. Korea: Battlefield Commission

Sergeant Fulton was disappointed when he arrived at Fort Hood for eleven days of "refresher training" before being shipped to Korea. Expecting "a reunion of World War II veterans," he found himself instead amidst "late-in-the-war draftees who had seen no combat."¹⁹

Arriving in Japan on a troop ship in December 1950, Sergeant Fulton began his second combat tour as an individual replacement rather than as a member of a cohesive unit as he had been during his service in World War II with the 86th Infantry Division.²⁰ The newly admitted member of the New Mexico bar was assigned to Company M, 19th Infantry Regiment, a heavy weapons company in support of the regiment's 3d Battalion. His company had been recently reorganized after the 34th Infantry Regiment "had been decimated early in the war and had been deactivated so that its two battalions could become the previously nonexistent third battalions of the 19th and 21st, respectively."²¹ As it turned out, Company M needed a

17. *Id.* at 36.

18. *Id.* at 36-37. President Truman did not actually use the term "draft dodgers," but that was the perception. Colonel Fulton's selective service category was low not due to his inactive reserve status, but because of his World War II service. Fulton Interviews, *supra* note 1.

19. Oral History, *supra* note 1, at 37.

communications chief of the mortar platoon, and its leaders were quite “pleased to learn that I had been the communications sergeant of my rifle company in World War II.”²² Sergeant Fulton thereby began his tour in Korea as the mortar platoon’s communications chief. During this tour, two events occurred that stayed with him forever, the first touching his sense of honor, and the second moving him toward a new future.

On 4 February 1951, the battalion’s rifle companies came under a fierce Chinese counterattack in the battle of Sesim-ri. After a full day of fighting, contact was broken, and Sergeant Fulton’s mortar platoon was led to the rear.²³ For Sergeant Fulton, this day—when he felt his unit was “running away”—was devastating.

The defeat of American arms, even to that small extent, is I think the most devastating [long pause], worst thing that could ever happen to a man [long pause]. I just felt too ashamed, so heart-broken to be beaten like that, even for a day [very tearful], and I can’t talk about it even now, this many years later, without tears.²⁴

Six months later, after his promotion to Sergeant First Class, Sergeant Fulton’s company commander asked him if he would accept a commis-

20. Colonel Fulton later reflected,

I came away from this movement with the feeling that going overseas as an individual replacement is absolutely the pits; the most miserable, morale-busting experience a soldier can go through. Of course, my previous experience had been crossing the Atlantic and the Pacific as a member of a unit, so that was my model. This was just terrible.

Id. at 40.

21. *Id.* at 41.

22. *Id.*

23. Colonel Fulton later learned, after reading a book by Edward F. Murray entitled *Korean War Heroes* (pages 142-43), that

SFC Stanley Adams of Company A earned the Congressional Medal of Honor that day . . . I’m not clear on whether our 3d Battalion rifle companies were engaged or in reserve. In any event, partly because of Adams, the Chinese broke off the fight. (Of course, I didn’t know this, but apparently neither did our platoon leader, who was leading us to the rear almost “on the double”).

Fulton Interviews, *supra* note 1.

24. Oral History, *supra* note 1, at 43.

sion. The veteran communications sergeant had scoffed when another of the company officers had suggested that he look into a legal officer's position at division: "I didn't think I could ever be at home in division headquarters; I belonged with troops."²⁵ Eventually, due largely to the leadership and inspiration of his commander, Captain Bill Patch,²⁶ Sergeant Fulton did accept a commission, and in Inchon, Korea, on 27 August 1951, he was commissioned a Second Lieutenant of Infantry in the Officers' Reserve Corps. Ordered immediately to active duty, Lieutenant Fulton departed division headquarters and reported back to Captain Patch as the platoon leader of the recoilless rifle platoon.

It was also about this time that the Army commenced its efforts at racial integration. When Sergeant Fulton arrived in Korea in December 1950, there were all-black regiments assigned to the theater, such as the 24th Infantry Regiment of the 25th Infantry Division, as there had been in World War II. While in the Philippines in 1946, Sergeant Fulton had been shocked to learn that his high school classmate and friend, Lonnie Howard, belonged to a unit consisting entirely of black soldiers; he was largely unaware of segregation in the Army until he arrived in Europe. By the spring of 1951, black soldiers were arriving as replacements in Sergeant Fulton's unit, the 19th Infantry Regiment; in fact, Captain Bill Patch's replacement, First Lieutenant Samuel E. Kelley, was a black officer from Seattle, Washington. Sergeant Fulton noted then, as well as years later, that "the Army finally (albeit belatedly) demonstrated there is no proper course other than integration."²⁷

Lieutenant Fulton departed Korea in January 1952, having been promoted to first lieutenant in December 1951. Years later, Colonel Fulton described himself during this time as not "a bold, aggressive leader, nor was I just trying to survive. I was simply trying to excel in whatever I did, and with whatever I could learn, to accomplish my mission with optimum security of the troops committed to my care."²⁸ His awards included a sec-

25. *Id.* at 48.

26. Bill Patch was the nephew of Lieutenant General Alexander Patch, Commander of the Seventh Army in Europe during World War II. Bill Patch later became a general officer and eventually commanded Fort Dix, where then-Colonel Wayne Hansen was his Staff Judge Advocate. *Id.* at 47.

27. *Id.* at 57.

28. *Id.* at 59.

ond CIB, a second Bronze Star Medal, and five battle stars, one for each of the five Korean War campaigns in which he participated.²⁹

After departing Korea, Lieutenant Fulton reported to the Associate Infantry Company Officer Course at Fort Benning, Georgia, where he had attended basic combat training as an enlisted soldier eleven years earlier. Attending the course with mostly lieutenants who “had only recently been commissioned through ROTC and were now entering active duty for the first time,”³⁰ Lieutenant Fulton distinguished himself as the honor graduate of his class.

The circumstances surrounding Bill Fulton’s entry into the Army were an early sign of his devotion to duty: unable to wait to enlist until he was eighteen, the young high school graduate found a program—the ASTRP—that allowed him to enlist at age seventeen. Even after his safe return from World War II, Bill Fulton was unable to sit back while others stepped forward; he re-enlisted before law school and eventually served in combat again during the Korean War. Whereas many, if not most, law school graduates with new families might find two combat tours a sufficient response to duty’s call, for Bill Fulton it was only the beginning of his service to the nation. Headed to the 10th Infantry Division at Fort Riley, Kansas,³¹ he was eager to accept a command³² and to continue his military service as a commissioned officer of infantry.

III. 1952—1983: Dedication to the Law: A Patriot’s Honor

When we arrived [at Fort Riley, Kansas,] in July 1952, I reported to [the Chief of Staff]. In talking about my assignment, he said he had noticed I was a lawyer. He said they needed another lawyer in the Division Staff Judge Advocate Office. I said that I

29. Colonel Fulton earned five battle stars during the Korean War: CCF Intervention (3 Nov. 1950 - 24 Jan. 1951), First UN Counteroffensive (25 Jan. - 21 Apr. 1951), CCF Spring Offensive (22 Apr. - 8 July 1951), UN Summer-Fall Offensive (9 July - 27 Nov. 1951), and Second Korean Winter (28 Nov. 1951 - 30 Apr. 1952). Fulton Interviews, *supra* note 1.

30. Oral History, *supra* note 1, at 60.

31. At that time, the 10th Infantry Division’s primary mission was basic combat training, sending its graduates to Korea as individual replacements. *Id.* at 61.

32. During his first two weeks at Fort Benning, Lieutenant Fulton served as acting commander of a company whose commander was on leave, an experience that enhanced his desire to command at his next assignment. *Id.*

really wanted troop duty. I hoped to command a company. . . .
[He] wanted to know if I would at least go talk to the SJA. I
sensed that the correct answer was “Yes, sir.” So I did.³³

A. An Unexpected Branch Transfer

Lieutenant Fulton’s hopes for a command quickly gave way to the needs of the Division; within weeks of his arrival as an infantry lieutenant at Fort Riley, he was assigned to the Office of the Staff Judge Advocate as the claims officer. Just months later, having been certified by The Judge Advocate General,³⁴ the young infantry officer became a trial counsel, then later a defense counsel.

Moved by the sense of camaraderie, competence, and dedication shared by the five officers in the Office of the Staff Judge Advocate, and impressed with the leadership provided by one of his Staff Judge Advocates (SJA), Colonel Harry J. Engel, Lieutenant Fulton—now having served almost ten years in the Army—debated whether to make the Army a career. Having been recalled to active duty for the Korean War as an enlisted soldier after finishing law school and being admitted to the bar, Lieutenant Fulton had not contemplated a military career, let alone a military legal career; indeed, “[my] only experience was to have had the Articles of War read to me a number of times and, once, in Korea, articles of the new Uniform Code of Military Justice while sitting under some trees in the shadow of a Quad-40-millimeter anti-aircraft half-track.”³⁵ Due largely to the positive influence of Colonel Engel, Lieutenant Fulton applied for a Regular Army (RA) commission in The Judge Advocate General’s Corps in January 1953.

Shortly after submitting his application, Lieutenant Fulton was transferred to the Pentagon, where he would undergo a “90-day observation

33. *Id.*

34. Under the Uniform Code of Military Justice (UCMJ), which was enacted in 1950, judge advocates must be certified by The Judge Advocate General as competent to perform the duties of trial and defense counsel. UCMJ art. 27(b)(2) (2002). Ordinarily, certification occurs during the Judge Advocate Basic Course; however, Colonel Fulton never attended the basic course and did not become a member of the JAG Corps until May 1954. Accordingly, he was required to individually request certification through his Staff Judge Advocate, which he did upon his assignment to the Office of the Staff Judge Advocate at Fort Riley. Oral History, *supra* note 1, at 64, 71.

35. Oral History, *supra* note 1, at 61.

tour, presumably to be followed, if successful, by a permanent assignment there or somewhere.”³⁶ He reported to the Pentagon having never attended the Judge Advocate Basic Course, instead “learning on the job the kinds of things I supposed were taught at the JAG School.”³⁷ Assigned to the Personnel Law Branch of the Military Affairs Division, the predecessor to the Administrative Law Division of the Office of The Judge Advocate General (OTJAG), Lieutenant Fulton arrived in Washington, D.C. in March 1953, with his wife and their daughter, Sheri Marie Fulton, who had been born at Fort Riley in September 1952.

B. The Pentagon

His ninety-day observation tour turned into a three-year tour at the Pentagon, where Lieutenant Fulton saw significant legislative changes that molded the Army into what it is today. The Career Compensation Act of 1949 was still new, and the Military Affairs Division was busy rendering opinions that soon became precedent, concerning special pay, incentive pay, hazardous duty pay, and what later became the new joint travel regulations. The Armed Forces Reserve Act of 1952 had been recently enacted, making reserve commissions permanent rather than for a term of five years. As Lieutenant Fulton’s RA commission application had not yet been accepted, the change permitted him to accept a permanent reserve commission while his RA application was pending. The Act also provided for a new reserve organizational structure, “the legal foundation of the Reserve Components, both the U.S. Army Reserve, and the National Guard of the United States.”³⁸

At the same time, Titles 10 and 32 of the United States Code were being redrafted “for the purpose of enactment into positive law, so that the U.S. Code, rather than statutes scattered throughout the multi-volume Statutes at Large, would be the official version.”³⁹ This was a monumental task, and the Military Affairs Division was intimately involved in the process, checking “each of the source statutes, both those being restated and those they proposed to repeal as obsolete or for other reasons, and all of our office opinions and other sources that had interpreted them.”⁴⁰ It was while at the Pentagon, in September 1954, that Lieutenant Fulton was pro-

36. *Id.* at 64.

37. *Id.*

38. *Id.* at 66.

39. *Id.*

40. *Id.*

moted to captain.⁴¹ His second child, William Sherwin Fulton III,⁴² was born at Fort Belvoir, Virginia, six months earlier.

C. The Judge Advocate General's School

Hoping for an assignment to Germany, the Fultons learned in the summer of 1956 that The Judge Advocate General's School in Charlottesville, Virginia, needed Captain Fulton to fill a position in the Military Affairs Division (what is now the Department of Administrative and Civil Law) of the Academic Department. Shortly after the birth of their third child, Michelle Lynne Fulton, in November 1956, the Fultons moved to Charlottesville for Captain Fulton's first of two assignments to the JAG School.

As an instructor in the Military Affairs Division, Captain Fulton taught the 5th through the 9th Advanced Classes, and the 25th through the 34th Basic Classes. Having attended neither, he found that he had to work "doubly hard."⁴³ The School had recently moved from Fort Myer, Virginia, to the main grounds of the University of Virginia.⁴⁴ There, Captain Fulton enjoyed the leadership of two commandants, Colonel Nathaniel Rieger and Colonel Gordon O'Brien, as well as that of the Director of the

41. He had accepted his RA commission in the JAG Corps in May 1954. *Id.* at 71.

42. W. Sherwin Fulton III enlisted in the Regular Army in 1972 as an armor crewman. He eventually transferred to the JAG Corps as a legal specialist. He was discharged after twenty-two years in 1994, having served throughout the United States, Germany, Korea, and in Desert Storm. He last served in the Virginia Army National Guard for one year in the JAG Office of the National Guard Bureau (Pentagon), retiring as an E-7. He is presently the civilian paralegal for the Army Review Boards Agency in Arlington, Virginia. *Id.* at 30; Fulton Interviews, *supra* note 1.

43. Oral History, *supra* note 1, at 74.

44. The School was first established in temporary quarters at the National University Law School in Washington, D.C., in February 1942. Later that year, it moved to the University of Michigan at Ann Arbor, Michigan, where it remained until 1946, when the School was closed during the general demobilization following World War II. It reopened in 1950 at Fort Myer, Virginia, then moved to the main grounds of the University of Virginia in 1951. It moved to its current location on the North Grounds of the University in 1975. Major Percival D. Park, *The Army Judge Advocate General's Corps, 1975-1982*, 96 MIL. L. REV. 5, 54 (1982); *see also* The Judge Advocate General's School, *History of the Judge Advocate General's Corps*, at <http://www.jagcnet.army.mil/JAGCNETInternet/Homepages/AC/TJAGSAWeb.nsf/bf25ab0f4> (last visited Mar. 13, 2003).

Academic Department, Colonel Waldemar Solf, for whom the School's International Law Chair is named.⁴⁵

While an instructor, because “[i]t was just something that needed to be done for the sake of uniformity,”⁴⁶ Captain Fulton prepared the first *Military Citation* manual in 1959, now in its seventh edition, for use in the thesis program. It was also during this time that the JAG School began conducting training for judge advocate reservists, as well as on-site training for the newly formed Judge Advocate General's Service Organizations (JAGSO), the predecessors to the Legal Service Organizations (LSO).⁴⁷ Captain Fulton was actively involved in the new training programs for Reserve and National Guard judge advocates and would later reflect that “one of the real satisfactions of my Regular Army career has been my contact with and service to our Reserve Components.”⁴⁸

In June 1961, Captain Fulton was promoted, below the zone, to major, and was selected to attend the resident Command and General Staff College (CGSC) at Fort Leavenworth, Kansas. Although he found himself “ill-prepared for the C&GSC course,”⁴⁹ he graduated the following summer and learned that his next assignment was to the Military Assistance Advisory Group (MAAG), Taiwan, Republic of China.

C. Taiwan

The Fultons “arrived in Taipei in the midst of a typhoon and cholera epidemic.”⁵⁰ Having attended a pre-assignment course at the Department of Defense Military Assistance Institute in Washington, D.C., before their

45. A brief military biography of Colonel Solf appears in Park, *supra* note 44, at 60.

46. Oral History, *supra* note 1, at 76.

47. For a discussion of the creation, organization, and training of JAGSOs and their transition into the present day LSOs, see Park, *supra* note 44, at 44-49, and Thomas J. Feeney & Captain Margaret L. Murphy, *The Army Judge Advocate General's Corps, 1982-1987*, 122 MIL. L. REV. 1, 53-56 (1988).

48. Oral History, *supra* note 1, at 79.

49. *Id.* at 82. After taking his “inventory examination,” the academic director at CGSC informed Major Fulton that he had “scored in the bottom fifth of this class[,] . . . and we are concerned that you might not graduate.” *Id.* at 82. In response, Major Fulton “went to work, studied hard, and graduated in the upper fifth (albeit at the bottom of it!)” *Id.* at 82-83.

50. *Id.* at 85.

arrival, Major Fulton faced his first Chinese diplomacy challenge within days of arriving in Taiwan:

In Honolulu we had purchased Mu-Mus for Marjorie and the girls, and colorful shirts for Sherwin and me. One day, late in our stay in the hotel, our youngest daughter's Mu-Mu disappeared. The only person who could have possibly taken it was one of the maids. However, instead of accusing the maid directly or through her employer, I simply let it be known to the management that the Mu-Mu was missing, and that the little girl was very unhappy. Soon, it showed up, back in the suitcase from which it had been removed.⁵¹

During his two-year tour in Taiwan, Major Fulton performed a wide range of duties, from providing legal services to the commander and personnel of the MAAG, to determining how military assistance funds might best be used, and later in his tour, providing legal advice to the American Embassy in connection with on-going negotiations for a status-of-forces agreement that would cover U.S. forces on Taiwan. Because the MAAG personnel enjoyed diplomatic immunity, the judge advocates in Taiwan were also involved in mediating disputes between local nationals and members of the MAAG, "ranging from landlord-tenant problems to paternity matters."⁵² Major Fulton viewed these, as well as his assorted foreign claims and legal assistance responsibilities, as opportunities to "help our image with the Chinese" and to "foster local understanding of our legal system."⁵³

D. Back to the Pentagon

The Fultons departed Taiwan in August 1964, headed back to Washington, D.C., where Major Fulton was to be Chief of Career Management (the predecessor to the Personnel, Plans, and Training Office (PP&TO)). Due to unexpected personnel changes, he became instead the Assistant Executive for Reserve Affairs, responsible for "such Reserve personnel matters as processing applications for appointment without concurrent active duty, branch transfers, and grants of constructive military education credit for promotion purposes."⁵⁴ Given his prior experience with the

51. *Id.*

52. *Id.* at 92.

53. *Id.* at 93.

Reserve Component in his first Pentagon and JAG School tours, he welcomed the opportunity to work with reserve judge advocates again. His new duties brought him into regular contact with the Army Staff, where he served as a liaison with the Chief of Reserve Components (CORC), “a then new (and no longer existing) position with oversight over the Chief, Army Reserve (CAR), and Chief, National Guard Bureau.”⁵⁵

Major Fulton’s duties afforded him unique opportunities to assist in the future role of reserve judge advocates, although reservists were faced with growing challenges during these years. At about this time, the newly established Chief of Reserve Components and the Deputy Chief of Staff for Personnel (DCSPER) made completion of CGSC a requirement for promotion to colonel in all branches, including judge advocates, when previously it had been required only for promotion to brigadier general, “and even that had been waived for [the] specialized branches.”⁵⁶ Shortly thereafter, Secretary of Defense McNamara “directed a screening of the Ready Reserve to remove Federal employees and others who would not be available in the event of mobilization.”⁵⁷ Major Fulton could only watch as the JAG Corps Reserve lost valuable members to these manning changes, and as at least two judge advocate reserve colonels, who had been selected to fill reserve general officer positions, lost that opportunity as a result of the changes in the CGSC completion requirements. He later observed, however, that “imposing the C&GSC requirement . . . put us in step with the rest of the Army. . . . The more you seek exceptions, the more you endanger closer rapport between lawyer and client.”⁵⁸

By the summer of 1967, “[t]hings were heating up in Vietnam, and my natural assumption was that I might be going there next.”⁵⁹ Having been promoted to lieutenant colonel in July 1965, his services were needed in-house, and in August 1967, Lieutenant Colonel Fulton was appointed to a board convened by the Army Chief of Staff to determine “whether there was discrimination in the recruiting process or something about Reserve

54. *Id.* at 95.

55. *Id.*

56. *Id.* at 97.

57. *Id.* at 98.

58. *Id.*

59. *Id.*

service that made it unattractive to black soldiers, especially those leaving active duty.”⁶⁰

Known as the “Williams Board,” as it was chaired by Brigadier General Robert M. Williams, then the Assistant Judge Advocate General for Military Law, the board was convened as a result of disproportionately few black soldiers in the Reserve Component at a time when racial tensions were increasing in the United States. Although Lieutenant Colonel Fulton was initially only “the administrative officer of the board,” he “did such a good job of participating in the analytical and judgmental deliberations of the board” that he “was made a voting member for the second and final phase, and became a signatory to its report” in October 1967.⁶¹ Entitled “Participation of Negroes in the Reserve Components of the Army,” the report included “some 53 recommendations,” and for Lieutenant Colonel Fulton, the task of compiling its data “was a full-time job. . . . I did not see my children for a month although I slept in the same house with them.”⁶²

E. A Long-Awaited Assignment to Germany

Following a brief reassignment to the Military Affairs Division as its Personnel Law Branch Chief, Lieutenant Colonel Fulton learned in early 1968 that his next duty assignment would be at the U.S. Army Europe (USAREUR) headquarters in Heidelberg, Germany, as the Chief of Military Affairs/Legal Assistance Division.⁶³

Returning to the field for the first time in over ten years, Lieutenant Colonel Fulton’s assignment to Germany was one of the most challenging of his military career, but one in which he left his mark for years to come. Working closely with the newly created Armed Forces Disciplinary Control Board, Lieutenant Colonel Fulton actively pursued businesses he suspected were engaging in questionable business practices. He wrote opinions and memoranda on such matters as “the legal precautions to be taken in a [United States Dependent Schools, European Area] student work-study program;” and most notably, he conducted an “intense study of

60. *Id.* at 99.

61. *Id.*

62. *Id.*

63. Colonel Fulton had long anticipated a tour in Vietnam; in 1966, he attended his first and only course at the JAG School, entitled “Law in Vietnam.” When he returned to the United States after his tour in Germany, he reminded his assignments officer that he was “ready, willing, and able to go to Vietnam.” *Id.* at 98, 110.

servicemen's automobile insurance rates in Europe" and developed "comprehensive statistics on accident experiences, driving risks, and essential factors used as insurance rate premium criteria."⁶⁴ As a result of his insurance study, "insurers realized that the Commander-in-Chief [was] interested in providing the individual serviceman the best possible automobile insurance protection at the lowest non-discriminatory rate."⁶⁵

While Colonel Fulton would later credit the resulting changes in overseas insurance practices to his successor, Lieutenant Colonel Darrell Peck, it was Lieutenant Colonel Fulton's exhaustive study that laid the early groundwork for the overseas insurance policies that soldiers enjoy today. After Lieutenant Colonel Fulton had served just one year in Heidelberg, Colonel George S. Prugh, then the USAREUR Judge Advocate, observed that Fulton's "attribute for rendering experienced, learned, and tactful advice to other staff officers" and "imaginative, resourceful, and intensely personal devotion to duty"⁶⁶ resulted in significant quality-of-life improvements for soldiers assigned to Germany in the late 1960s.

In June 1969, having been selected for promotion to colonel from below the zone, Lieutenant Colonel Fulton became the Staff Judge Advocate for V Corps, in Frankfurt, Germany.⁶⁷ In light of the recent enactment of the Military Justice Act of 1968, this was a difficult time to be an SJA. In addition to civil unrest and an increase in on-post violence, "[t]his was before the days of area jurisdiction in USAREUR . . . [and] we were phasing in the Military Justice Act of 1968. Now, we were having judge advocates on both sides in all special courts-martial (and some commanders were beginning to wonder what the Army was coming to)."⁶⁸ Many commanders felt threatened by the changes to the military justice system and believed that lawyers were taking their strongest disciplinary tools away from them.⁶⁹ Colonel Fulton, however, welcomed these challenges and relished the opportunity "to conduct a sort of individualized [Senior Officer Legal Orientation] course" for each of his "some 33 battalion commanders" with special court-martial convening authority.⁷⁰ He similarly enjoyed his unique relationship with Lieutenant General Claire E. Hutchin,

64. U.S. Dep't of Army, Form 638, Recommendation for Award (1 May 1960) Fulton, William S., Jr. (15 May 1969) (Colonel George S. Prugh's narrative description of achievements) (on file with Colonel Fulton).

65. *Id.*

66. *Id.*

67. His Commanding General, Lieutenant General Hutchin, promoted him to Colonel in December 1969. Oral History, *supra* note 1, at 106. V Corps Headquarters is now located in Heidelberg, Germany.

the V Corps Commander, who often called Colonel Fulton to accompany him somewhere on short notice, not “necessarily [for] legal business at all, but [because] he wanted me along.”⁷¹

F. Army War College

Colonel Fulton’s SJA tenure was cut short by his selection to attend the Army War College at Carlisle Barracks, Pennsylvania, “thereby ending what I had hoped would be at least two full years at V Corps.”⁷² With his assignment to the War College in the fall of 1970, Colonel Fulton found that many of the challenges he faced in the administration of military justice in V Corps were present all over the Army, as “[c]ommanders were still concerned about ‘losing control’ of military justice.”⁷³ Again he found himself amidst former and future line commanders who were distrustful of the increased role of lawyers in the military justice system and

68. *Id.* at 104. The Military Justice Act of 1968 brought monumental changes to the military justice system. As noted by Brigadier General John S. Cooke in his comments at the 1999 Judge Advocate General’s School’s Worldwide Continuing Legal Education Program on 8 October 1999,

the Act made the boards of review ‘courts’ of review and gave them powers to act like true appellate courts. It changed the name of the law officer to military judge and extended more judicial authority to the position. It provided for military judges to preside in special as well as general courts-martial. It provided for trial by military judge alone on request by the accused. And it provided for the Article 39(a) sessions at which the judge could hear and decide issues outside the presence of the members. Finally, it required that all judges be assigned and directly responsible to The Judge Advocate General or a designee. Thus, the Act provided the framework for judicial authority and independence that we take for granted today.

Brigadier General (Ret.) John S. Cooke, *Military Justice and the Uniform Code of Military Justice*, ARMY LAW., Mar. 2000, at 1.

69. Oral History, *supra* note 1, at 105. In Colonel Fulton’s experience, commanders seemed particularly concerned about the SJA’s involvement in pretrial confinement, a matter that had largely been left in the hands of commanders before implementation of the Military Justice Act of 1968. *Id.*; Fulton Interviews, *supra* note 1.

70. Oral History, *supra* note 1, at 104.

71. *Id.* at 105.

72. *Id.* at 106.

73. *Id.* at 109.

who viewed him as an appropriate sounding board for their growing concerns.

During this time, legislation was pending before Congress concerning removal of courts-martial from the purview of the commander, and

while [a classmate who later became a general officer] was bugging me about the evils of the Military Justice Act of 1969, I was satisfying the College's writing requirement with a research paper asserting that, contrary to the proposed [legislation], commanders still should be the ones to determine who should be tried, by what level of court, and, when conviction and sentencing resulted, should determine what part of the sentence to approve.⁷⁴

That paper, entitled "Command Authority in Selected Aspects of the Court-Martial Process," was later submitted by the Army War College to the Department of Defense for its consideration.

In early 1971, Colonel Fulton learned that following his graduation at the Army War College, he would return to Charlottesville, at the request of the Commandant of the JAG School, Colonel John Jay Douglass, to be the Deputy Commandant.

G. Return to the JAG School

When Colonel Fulton reported to the JAG School in June 1971, he learned that his new position included duties both as the Deputy Commandant and as the Director of the Academic Department, as these positions had been merged. While at the War College, Colonel Fulton had been confronted with his classmates' displeasure "with the recent changes in the military justice system."⁷⁵ He observed that they had become "suspicious, perhaps, of military lawyers and their role in the system, finding the results less predictable and more frequently unsatisfactory from a commander's point of view."⁷⁶ General Prugh, then The Judge Advocate General, was aware of this "Crisis in Credibility" and "had to do something about it. Colonel Douglass and the School had the assets to do it."⁷⁷ In

74. *Id.*

75. *Id.* at 112.

76. *Id.*

an effort that violated the ordinarily sacrosanct starting date for the advanced course, General Prugh directed that Colonels Douglass and Fulton alter the course of instruction by “put[ting] teams of faculty and Advanced Course students to work writing three Department of the Army pamphlets . . . designed to assist in the orientation, understanding, and administration of military justice.”⁷⁸

They simultaneously launched the Senior Officers’ Legal Orientation (SOLO) Course, a program of instruction designed to prepare incoming commanders for legal aspects of command. Their greatest coup toward this end occurred when Colonel Douglass

worked what I regarded as a miracle. One day, we climbed into a helicopter[,] . . . flew up to the Army War College, and talked the Commandant into letting us teach that course on his platform to his students! I know of no service school that, other than an occasional selectively invited guest speaker, cares to have anyone else come and teach their students. Being able to intrude upon the Army War College curriculum was nothing short of miraculous.⁷⁹

For the next two years, Colonel Fulton sent instructors to the Army War College to give the SOLO course, while also conducting the SOLO course. The GOLO (general officer legal orientation) course followed in later years.

In another of his self-initiated projects, Colonel Fulton “rework[ed] the entire Advanced Course curriculum,”⁸⁰ resulting most notably in the availability of in-house electives to the Advanced Course students. Before Colonel Fulton’s arrival, Advanced Course students were permitted to take electives at the University of Virginia to fulfill the Advanced Course curriculum requirements, but the students were required to pay for these electives themselves, or use some of their GI Bill educational entitlement. Colonel Fulton’s “proposed curriculum re-instituted in-house electives,”⁸¹

77. *Id.*

78. *Id.* These pamphlets were entitled *Deskbook for Special Court-Martial Convening Authorities*, *Legal Guide for Commanders*, and *Lessons in Military Law*. *Id.*

79. *Id.* at 113.

80. *Id.* at 110.

81. *Id.* at 111.

a change that was immediately implemented and remains integral to the present graduate course curriculum.

In February 1974, Major General Prugh, then The Judge Advocate General of the Army, selected Colonel Fulton to be the ninth Commandant of The Judge Advocate General's School.⁸² At this time, the School had recently obtained property on the North Grounds of the University of Virginia and was in the process of "completing, furnishing, and moving to the new building that [Colonel Douglass]'s planning had caused to be approved and constructed."⁸³ Colonel Fulton found that his oversight of the new building "occupied so much of my time that I had very little influence on the faculty and the teaching side of the house."⁸⁴ The School moved to its current location in 1975.

Colonel Fulton later described himself as "the Commandant who lost both the welfare fund and the leased housing."⁸⁵ Before his return in 1971, the JAG School ran a bookstore, the profits from which funded the Commandant's Welfare Fund, which was often used for the entertainment of visitors. After "the Army decided to eliminate the book departments . . . [.] we provided for a branch of the Fort Lee [Post Exchange],"⁸⁶ but, of course, its profits no longer supported a welfare fund. Similarly, the School had, for some time, leased the

"Georgetown Apartments"—those buildings located on the left as one comes up the hill from Emmet Street towards the UVA School of Law and our JAG School. However, just as we were moving the School to a much more convenient location in terms of that housing, we learned that criteria for leased housing changed and [we] could no longer lease it.⁸⁷

Colonel Fulton's actual contributions, however, were recognized by Major General Lawrence H. Williams, then The Assistant Judge Advocate General, who noted in 1976 that "[t]he JAG School has been described by civilian lawyers and educators as the finest center for continuing legal edu-

82. Colonel Fulton was the ninth Commandant of the JAG School in Charlottesville. He was actually the eleventh Commandant when including the JAG Schools in Washington, D.C., Ann Arbor, and Fort Myer. *Id.* at 114; *see also supra* note 44.

83. Oral History, *supra* note 1, at 114.

84. *Id.*

85. *Id.* at 127.

86. *Id.* at 126.

87. *Id.* at 127.

cation in the United States. [Colonel Fulton] is largely responsible for that praise.”⁸⁸ This observation was primarily the result of Colonel Fulton’s work in response to the newly introduced mandatory continuing education movement among states and the American Bar Association (ABA), which “requir[ed] a specified amount of continuing legal education annually as a condition of maintaining one’s license to practice law.”⁸⁹

Colonel Fulton’s home state of Iowa was among those considering imposing continuing legal education (CLE) requirements, and Colonel Fulton grew concerned that judge advocates would be unable to maintain their state bar membership if the state refused to recognize courses taught at the JAG School as meeting CLE requirements. After attending several meetings sponsored by the ABA to study this idea, Colonel Fulton reported on the matter to the 1975 JAG Conference and through an article in the November 1975 edition of the *Army Lawyer*; “[m]y objective, of course, was to assure that the JAG School’s courses would be credited in satisfaction of any requirements that were imposed even though our courses were not conducted in or by the state of one’s licensure.”⁹⁰ Colonel Fulton had joined the ABA’s Section of Legal Education and Admissions to the Bar upon first returning to the School and remained a member for several years after leaving the School “because I wanted to be a voting member in case any issue arose as to the School’s accreditation.”⁹¹ In light of the JAG School’s growing curriculum of short courses and continuing accreditation status with the ABA,⁹² his efforts were clearly successful.

Colonel Fulton would never accept praise for these achievements without acknowledging the exceptional faculty that supported him during his Commandant years. Led by his successor in Heidelberg, Colonel Darrell Peck, the faculty included five members who later became general officers—MG Hugh R. Overholt, MG Kenneth D. Gray, BG Dulaney L. O’Roark, Jr., BG Scott Magers, and BG John S. Cooke; two others who

88. U.S. Dep’t of Army, Form 67-7, Officer Evaluation Report (1 Jan. 1973) Fulton, William S., Jr., 750701 thru 760630 (comments of rater).

89. Oral History, *supra* note 1, at 130.

90. *Id.*

91. *Id.* at 117.

92. In addition to recognizing the JAG School as a source of CLE, the ABA has, since December 1987, recognized the JAG School’s graduate course as meeting the requirements necessary to confer the Master of Laws (LL.M.) degree. Codified at 10 U.S.C. § 4315 (2000), the Commandant of the JAG School may, upon the recommendation of the faculty, confer the Master of Laws degree to graduates who have fulfilled the requirements of that degree. Feeney & Murphy, *supra* note 47, at 31-32.

later became School Commandants (as did BG O’Roark, briefly); and another who was later the Academic Director (as was BG Cooke). Colonel Fulton later observed that “[no] wonder Darrell Peck didn’t want me messing around with his Academic Department!”⁹³

Bill Fulton’s almost accidental entry into the JAG Corps resulted in many of the changes that make the JAG Corps what it is today. But for his unfettered dedication to Army service that compelled him to accept a battlefield commission, continue on to Fort Riley as an infantry officer, and eventually transfer to the JAG Corps, it is certainly open to debate whether The Judge Advocate General’s School would enjoy the prestige and ABA accreditation it enjoys today, whether overseas military insurance practices would protect soldiers as they do today, and whether the SOLO, GOLO, and graduate courses would be the successes that they are today. His untiring performance of whatever duty was before him, combined with his unyielding regard for others, inspired his colleagues and subordinates alike to emulate his passion for service, and in doing so, demonstrated the power of personal example. While a patriot’s success is often defined by the feats he accomplishes, his greatest legacy is often that which cannot be defined—in Bill Fulton’s case, it is the future of the JAG Corps.

IV. 1976—1997: Dedication to the Corps: A Patriot’s Legacy

*The only irreplaceable man I know.*⁹⁴

93. Oral History, *supra* note 1, at 128. In making this observation, COL Fulton also noted that

several [others] have become distinguished legal educators and well-known authors as well (Jack Costello, Fran Gilligan, Paul Gianelli, Fred Green, Nancy Hunter, Ed Imwinkelreid, Fred Lederer, Don Zillman). Some, after retirement, also became outstanding as government civilians (Jack Lane, Jim McCune, Darell Peck, and our Marine Corps faculty member, Hays Parks, who is now [a recognized] Law of War expert in the OTJAG International Law Division).

Id.

94. U.S. Dep’t of Army, Form 7222, Senior System Civilian Evaluation Report (May 1993), Fulton, William S., Jr., 940701 through 950331 (comments of the rater and senior rater, Brigadier General Thomas R. Cuthbert) (on file with Colonel Fulton).

A. Appellate Judge, The Army Court of Military Review

In July 1976, the Fultons returned to the Washington, D.C. area, where Colonel Fulton joined the Army Court of Military Review.⁹⁵ He would eventually spend more time there than many judge advocates spend on active duty—a total of twenty-one years—seven as an active duty appellate judge, and fourteen as the civilian Clerk of Court.

Having been away from military justice since his SJA time in Frankfurt, Colonel Fulton's first concern was his own re-education in criminal law, spending his first months on the Court reading everything he could find concerning military justice—from appellate cases to ABA materials. Once on the bench, Colonel Fulton was involved in a variety of cases ranging from “the constitutionality of regulations restricting social contacts between a permanent cadre and their trainees”⁹⁶ to the constitutionality of the military death penalty sentencing procedures.⁹⁷ During these years, the Army court was struggling to maintain its reputation as a “true appellate body in an improved system of military justice,” as the Court of Military Appeals⁹⁸ sought to ensure that the military justice system was a system of justice, and not merely a commanders' disciplinary tool.

Chief Judge Fletcher, of the Court of Military Appeals (CMA), was especially concerned with the CMA's oversight of the military justice system and the protection of the rights of soldiers under the UCMJ. Many of the decisions of the CMA were viewed as controversial and were often contrary to the prior decisions of the Army court.⁹⁹ Colonel Fulton later

95. As part of the Military Justice Act of 1968, the Army Court of Military Review replaced the numerous boards of review that served as court-martial reviewing authorities since their creation in 1920. In 1994, the Court was renamed the Army Court of Criminal Appeals. U.S. Court of Appeals for the Armed Forces, *Establishment & History of the Court* [hereinafter CAAF Web Site], at <http://www.armfor.uscourts.gov> (last visited Mar. 25, 2003).

96. Oral History, *supra* note 1, at 134 (referring to *United States v. Hoard*, 13 M.J. 563 (A.C.M.R. 1981)).

97. *Id.* at 137 (referring to *United States v. Matthews*, 13 M.J. 501 (A.C.M.R. 1982), *rev'd*, 16 M.J. 354 (C.M.A. 1983)).

98. The Court of Military Appeals was created in 1950 with the enactment of the Uniform Code of Military Justice. Established under Article I of the Constitution, the Court is comprised of five civilian members who are appointed by the President, confirmed by the Senate, and serve a term of fifteen years. During Chief Judge Fletcher's time on the Court, it consisted of only three members, as it did until 1990 when Congress increased its membership to five. In 1994, the Court was renamed the United States Court of Appeals for the Armed Forces. CAAF Web Site, *supra* note 95.

noted that “[t]he Fletcher court used to complain that some of our opinions were more like briefs than judicial opinions. Perhaps so, but Chief Judge Fletcher and his court needed briefs.”¹⁰⁰ During the early years of Colonel Fulton’s time on the Army court, it was very busy considering issues of first impression, some of which the Court feared would not survive the CMA’s review. As a result, the judges often spent a great deal of time explaining their decisions and rationales, sometimes making their “opinions” read like “briefs,” in an effort to educate the CMA about the military justice system and its practical application in the field Army.

While on the Court, Colonel Fulton was detailed to the West Point Study Group, a compilation of three committees formed at the direction of the Army Chief of Staff in January 1977 in the aftermath of the West Point cheating scandal in 1976. As the “Law/Legal Advisor” to the Academic Committee, Colonel Fulton’s role was to “study the law curriculum and make recommendations regarding the legal instruction given to cadets.”¹⁰¹ Colonel Fulton later observed that “what was really needed was to instill in the West Point staff and faculty an appreciation for the responsibility of lawyers in the Army.”¹⁰² In the disciplinary proceedings that followed the scandal, judge advocates—including some from the law faculty—became involved as defense counsel. “The specter of faculty members, or perhaps anyone, defending cadets accused of cheating apparently disturbed some of the other faculty.”¹⁰³ Included in Colonel Fulton’s report was his observation that “the then recent decision to establish a separate staff judge

99. From 1975 to 1978, in what some call the “COMA revolution,” the Court of Military Appeals

issued a number of controversial and sometimes criticized decisions that limited the jurisdiction of courts-martial, limited the powers of commanders, expanded individual rights, extended the court’s own authority, and broadened the authority and responsibility of the military judge. Some of the more problematic of the court’s initiatives were later reversed, either by Congress or by the court itself.

Cooke, *supra* note 68, at 4. A brief biography of Chief Judge Fletcher appears in Park, *supra* note 44, at 66.

100. Oral History, *supra* note 1, at 139.

101. *Id.* at 141.

102. *Id.*

103. *Id.*

advocate office at West Point should eliminate that problem in the unlikely event (we hope) of a recurrence.”¹⁰⁴

Having been commissioned in August 1951, Colonel Fulton’s retirement was to become mandatory on 30 September 1981. To remain on the Court, he “asked to be recalled to continue serving on the court, and, upon retirement, was recalled to serve another three years, until September 1984.”¹⁰⁵

That he earned the absolute confidence and respect of his superiors is evident in the evaluations Colonel Fulton received while serving on the Court. Described by one general officer as “one of the finest officers I have known,”¹⁰⁶ and by another as “one of the most able lawyers and most learned scholars in the JAGC,”¹⁰⁷ perhaps his most laudatory comments as an appellate judge came from Major General Hugh R. Overholt, The Assistant Judge Advocate General at the time of Colonel Fulton’s retirement from active duty in 1983, who said of Colonel Fulton: “A scholar, deeply dedicated soldier and judge advocate, Colonel Bill Fulton has been the quintessence of an appellate military judge By any objective or subjective standard, Colonel Fulton has been as outstanding a soldier and jurist as the Army has been privileged to have.”¹⁰⁸

B. Clerk of Court, Army Court of Criminal Appeals

Colonel Fulton’s recall was to end in September 1984, and so he “had begun to ponder what I might do when I . . . reverted to retired status.”¹⁰⁹ He had attended a workshop on appellate court administration in July 1982 and became interested in judicial administration. When the Clerk of Court position opened in 1983, Colonel Fulton saw a unique opportunity to remain involved in the administration of the Army court after leaving

104. *Id.*

105. *Id.* at 132.

106. U.S. Dep’t of Army, Form 67-7, Officer Evaluation Report (1 Jan. 1973), Fulton, William Sherwin, Jr., 770701 thru 780630 (comments of Major General Lawrence H. Williams, rater) (on file with Colonel Fulton).

107. U.S. Dep’t of Army, Form 67-7, Officer Evaluation Report (1 Jan. 1973), Fulton, William S., Jr., 780630 thru 790629 (comments of Major General Wilton B. Persons, Jr., senior rater) (on file with Colonel Fulton).

108. U.S. Dep’t of Army, Form 67-8, Officer Evaluation Report (1 Sept. 1979), Fulton, William S., Jr., 820801 thru 830321 (rater comments).

109. Oral History, *supra* note 1, at 133.

active duty. He applied for and received the position, and reported to work as the Clerk, U.S. Army Judiciary, on 3 April 1983, while on terminal leave status.¹¹⁰

“Never content with a business as usual approach,”¹¹¹ Colonel Fulton approached his new job with the same drive, initiative, and personal commitment that he brought to every duty assignment while on active duty, and his contributions far exceeded his job description. As Clerk of Court, Colonel Fulton wore two hats—one, as judicial advisor to the Chief Judge; and another, as clerk of court. In the latter capacity, he was responsible for the screening and processing of records of trial in preparation for appellate review, subsequent processing after appellate review, and final disposition and retirement of the record. In the former capacity, he provided advice to the Chief Judge¹¹² and took actions in the name of The Judge Advocate General, such as

directing a staff judge advocate of a general court-martial jurisdiction to take corrective action when a record of trial had been forwarded to the court incomplete or in improper condition, or directing the conduct of post-trial proceedings, such as a rehearing directed by our Court, or [further proceedings authorized by] the U.S. Court of Appeals for the Armed Forces.¹¹³

110. At that time, the Clerk of Court was a GM-12 position, and the now-repealed Dual Compensation Act dramatically reduced Colonel Fulton’s retired pay as a result of his federal civilian service. As a result, Colonel Fulton’s acceptance of this position was at extreme financial sacrifice. The position was eventually upgraded to GM-14, and the Dual Compensation Act was repealed in 2000, three years after Colonel Fulton’s retirement from federal service. Addendum, *supra* note 1, at 32. In a later interview, Colonel Fulton remarked that he accepted the position “because no one else would hire me.” Fulton Interviews, *supra* note 1.

111. U.S. Dep’t of Army, Form 4940-1-R, Merit Pay System Performance Appraisal (1 Oct. 1980), Fulton, William S., Jr. (comments of Brigadier General Donald Wayne Hansen, rating supervisor).

112. The Chief Judge, a general officer in the JAG Corps, wore three hats. As the Chief Judge of the Army Court of Military Review (now called the Army Court of Criminal Appeals, *see supra* note 95), he supervised all of the appellate judges and sat on cases, as he desired. As the Chief, U.S. Judiciary, he oversaw the Trial Judiciary, the Examination and New Trials Division, and the Office of the Clerk of Court. As the Commander of the U.S. Army Legal Services Agency (USALSA), he managed the administrative and logistical support to the many litigation and service offices such as the Government and Defense Appellate Divisions, the Litigation Division, and later the Trial Defense Service. Colonel Fulton’s role as “judicial advisor” to the Chief Judge concerned not the cases before the Army court, but primarily the myriad of administrative and supervisory duties of the Chief Judge. Addendum, *supra* note 1, at 2.

One of Colonel Fulton's first significant duties in his capacity as "judicial advisor" was to advise Major General Overholt, then The Judge Advocate General of the Army, of the import of the Model Rules of Professional Conduct, which the ABA House of Delegates had adopted in 1983. Having served as Chairman of the Judge Advocate General's Professional Responsibility Advisory Committee from 1979 to 1989, and having remained a member of the board for many years thereafter, Colonel Fulton was acquainted with many of the individuals involved in the drafting of the Model Rules, including Mr. Robert Kutak, who eventually became the Chair of the Commission on Evaluation of Professional Standards known as the "Kutak Commission." In large part due to the learned advice that Colonel Fulton shared through his involvement in the ABA, "[i]n the end, the Kutak Commission modified the commentary to some rules to resolve our concerns and we felt certain that we had correctly interpreted the remaining rules to permit our existing practices."¹¹⁴

In his role as court administrator, Colonel Fulton greatly expanded the scope of his office's oversight, first by maintaining regular contact with the Corps. He published a short history of the Court in the December 1985 and October 1991 editions of the *Army Lawyer*; and under the heading "Clerk of Court Notes," he began using the *Army Lawyer* to send guidance to the field concerning commonly occurring problems and errors (one article being entitled, "Boxes Without Topses," referring to court-martial records received improperly wrapped).¹¹⁵ He published guidance "on such matters as the procedures and timing for requesting witnesses from CONUS to appear at trial overseas, waiting appellate review or withdrawing an appeal, and filing petitions for extraordinary relief under the All Writs Act,"¹¹⁶ and he occasionally participated in the Annual JAG Conference. Perhaps his most widely disseminated product was "The Clerk of Court's Handbook for Post-Trial Administrative Processing of General Courts-Martial and BCD Special Courts-Martial."¹¹⁷ Completed in late 1996, this comprehensive handbook set forth guidance concerning every step of the appellate process from authentication of the record of trial to final action, and it covered every possible occurrence in between and after, including death of the accused, waiver of appellate review, petition for new trial, certificates of correction, service of appellate decisions on the accused, and

113. Addendum, *supra* note 1, at 1.

114. *Id.* at 29.

115. *Id.* at 26.

116. *Id.* at 27.

117. *Id.* at 34.

issuing supplementary promulgating orders. “It was [his] final educational effort before retirement,”¹¹⁸ and it remains in use today.

At the same time that he was disseminating advice and guidance to the field, Colonel Fulton was intimately involved in the formulation of the Court’s procedural rules. He updated the Court’s Internal Operating Procedures, represented the Court on the joint services committee that formulated the 1992 edition of “Courts of Military Review Rules of Practice and Procedure,” and again represented the Court in the formulation of the Joint Rules of Practice and Procedure of the Courts of Criminal Appeals that took effect in 1996.¹¹⁹ He was simultaneously involved in the Court of Military Appeals’ Rules Advisory Committee, having been appointed to the committee in late 1987 and serving successive three-year terms until September 2001.

Also as part of his administrative duties, Colonel Fulton was actively involved in building the Court’s automated database, a system known as the Army Court-Martial Management Information System (ACMIS). Together with his deputy, Colonel Fulton “worked far into many evenings identifying fields of information that should be used to record the performance of our military justice system.”¹²⁰ Through his meticulous design of the entry fields, Colonel Fulton’s development of ACMIS allowed the Court to later respond to outside inquiries regarding the numbers and types of courts-martial during combat deployments, information regarding courts-martial for sexual offenses in the aftermath of the sexual misconduct cases at Aberdeen Proving Ground, and “voluminous detailed information in response to Congressional inquiries probing the frequency of sex offenses against female soldiers.”¹²¹

Concerned with the dearth of continuing education for appellate military judges, Colonel Fulton published information papers for sitting appellate judges, including one entitled “Suggested Readings for New Appellate Judges: A Commentary and Selected Bibliography,” and another entitled “Introduction to the Record of Trial: An Orientation for New Appellate Judges.”¹²² After attending a National Conference on Judicial Education in January 1987, he proposed an orientation course for new appellate judges and “recommended that each judge attend at least

118. *Id.*

119. *Id.* at 19.

120. *Id.* at 14.

121. *Id.* at 15.

122. *Id.* at 17.

one of the ABA Appellate Judges Conference Seminars,”¹²³ in addition to attending the “All Services Appellate Military Judges Conferences,” an annual two-day seminar. While his recommendations were not then implemented, his efforts at improving judicial education were publicly recognized when, after his retirement from the Court in 1997, “the other services had voted unanimously (with the Army abstaining) to rename their annual educational conference the ‘William S. Fulton, Jr., Appellate Military Judges Conference.’”¹²⁴

C. Active Participant in Professional Organizations

One cannot discuss Colonel Fulton’s contributions to the JAG Corps without noting his consistently active involvement in professional organizations, ranging from the Judge Advocates Association to the National Conference of Appellate Court Clerks, a group in which he remains active even today. While initially viewing these organizations as a means of feeding his “inferiority complex”¹²⁵ by obtaining professional materials on a range of legal topics, Colonel Fulton later found them to be a means of furthering the goals of the JAG Corps and enriching his already broad range of experience. As then-Brigadier General Kenneth D. Gray noted in one of Colonel Fulton’s civilian evaluations,

[h]is many contacts outside this agency benefit [the United States Army Legal Services Agency] and the U.S. Army Court of Military Review in many ways. In this regard, he has contributed significantly to the enhancement and prestige of that court, and continues to be a worthy spokesperson and ambassador for the Chief Judge and Commander.¹²⁶

Colonel Fulton first became involved with the American Bar Association in 1957, having been selected to attend the annual meeting of the Junior Bar Conference (now the Young Lawyers Division) as a representative of the JAG Corps. Throughout his career, he was a member of various other sections, including the Section of Criminal Law, the Family Law Section, the International Law Section, the Government Contracts Section,

123. *Id.* at 25.

124. *Id.* at 38.

125. Oral History, *supra* note 1, at 117.

126. U.S. Dep’t of Army, Form 5398-R, Civilian Performance Rating (May 1986), Fulton, William S., Jr., from 1 July 1991 to 30 June 1992 (comments of supervisor) (on file with Colonel Fulton).

and the Appellate Judges Conference of the Judicial Administration Division. Colonel Fulton contributed significantly to the Judge Advocates Association and the Federal Bar Association, as well. In 1977, he became the first active duty officer to hold the position of President of the Judge Advocates Association, which he had joined in 1953.

D. Honorary Colonel of the Corps

In 1990, Major General William K. Suter, then Acting The Judge Advocate General, invited Colonel Fulton to lunch at the Pentagon. Having worked for General Suter five years earlier when General Suter was the Chief Judge, Colonel Fulton assumed that lunch was merely a get-together. Instead, Colonel Fulton learned that he had been nominated to become the next Honorary Colonel of the JAG Corps Regiment, succeeding the first Honorary Colonel, Major General Kenneth J. Hodson.¹²⁷

Unbeknownst to Colonel Fulton at that time, General Suter was largely responsible for Colonel Fulton's nomination. Describing him as "a man of principle and wisdom, low-key and never taking credit for his work, Bill Fulton always took care of his subordinates and his superiors; he did everything, and everyone respected him."¹²⁸ For his "great contributions all along the way, real and lasting contributions," General Suter saw Colonel Fulton as the obvious choice.¹²⁹

127. The JAG Corps became part of the U.S. Army Regimental System in July 1986. The Regiment has three honorary positions: the Honorary Colonel of the Corps, the Honorary Warrant Officer of the Corps, and the Honorary Sergeant Major of the Corps. They perform ceremonial duties, such as attending Corps functions and speaking about and to the Corps. Major General Kenneth J. Hodson was the first Honorary Colonel of the Corps, having served as The Judge Advocate General from 1967 until 1971. The Hodson Criminal Law Chair and the annual Hodson Criminal Law Lecture at the JAG School are named for him. Feeney & Murphy, *supra* note 47, at 8-9. U.S. DEP'T OF ARMY, REG. 600-82, THE U.S. ARMY REGIMENTAL SYSTEM (5 June 1990).

128. Fulton Interviews, *supra* note 1.

129. *Id.*

Overwhelmed and completely surprised by this request, Colonel Fulton accepted the nomination, and in November 1990, became the second Honorary Colonel of the Corps, a position he held until 1994.¹³⁰

V. Conclusion

*Few officers have the energy, interest, initiative, and imagination possessed by Colonel Fulton but only rarely does one officer use these characteristics so effectively. He has inspired his staff to new heights, not by driving but by leadership of the highest order. He has courage to face the hardest questions and press on. Colonel Fulton exemplifies total devotion to the job and the Army*¹³¹

William Sherwin Fulton, Junior, retired in May 1997, after fifty-four years of service to the United States. From his voluntary enlistment during World War II, through his request for recall to active duty in 1981, to his civilian employment with the Army Court of Criminal Appeals until 1997, Bill Fulton has always been about duty first. Whether pursuing affordable insurance for soldiers overseas to drafting internal rules for the appellate courts, be it at home in peacetime or during wartime abroad, he was wherever there was a job to be done. Interrupting his college education to enlist during World War II, willingly postponing a legal career to fight in the Korean War, foregoing his desire to command to better serve his nation as a judge advocate, and ultimately making the Army his life-long career by accepting a permanent commission and remaining in active federal service long past his retirement eligibility, Bill Fulton's life is the epitome of selfless service.

The JAG Corps is a better institution because of Bill Fulton. In addition to the many improvements to the Corps attributable to him, perhaps his greatest contribution was to personify that which cannot be defined in words, a strength of will and integrity that some might call heroism; a diligence and compassion that others might call mentorship. Regardless of the choice of words, what is clear is the lasting effect that one man's ser-

130. He was succeeded by his former supervisor and The Judge Advocate General, Major General Lawrence H. Williams; and then by Colonel (Retired) William P. Greene, Jr. Addendum, *supra* note 1, at 33.

131. U.S. Dep't of Army, Form 67-6, Officer Efficiency Report (1 Jan. 1986), Fulton, William S., Jr., 15 Jun 71 thru 14 Jun 72 (comments of Colonel John Jay Douglass, rater) (on file with Colonel Fulton).

vice had on his Corps, an effect that is still felt today among the many soldiers, officers, and civilians of The Judge Advocate General's Corps who were so profoundly touched by a patriot's heart.

*He stood, a soldier, to the last right end,
A perfect patriot and a noble friend,
But most a virtuous son.
All offices were done
By him, so ample, full, and round
In weight in measure, number, sound,
As, though his age imperfect might appear,
His life was of humanity the sphere.*¹³²

132. Ben Jonson (1572–1637) (British dramatist, poet), To the Immortal Memory and Friendship of That Noble Pair, Sir Lucius Cary and Sir Henry Morison (l. 45–52), <http://www.bartleby.com/66/77/31577.html>.

**THE FOURTEENTH MAJOR FRANK B. CREEKMORE
LECTURE¹**

BRIGADIER GENERAL (RET.) RICHARD J. BEDNAR²

5 December 2002

Thank you for that warm and generous introduction. I can hardly wait to hear what I have to say. I am glad for a couple of things this morning. Number one, I did not fall and drive cinders into my face as I did one time when I was scheduled to speak at the JAG School. That was the running accident I had that was mentioned a moment ago. Second of all, I was sit-

1. This is an edited transcript of a lecture delivered by Brigadier General (Retired) Richard J. Bednar to members of the staff and faculty, their distinguished guests, and members of the contract law community attending the Government Contract and Fiscal Law Seminar at The Judge Advocate General's School, Charlottesville, Virginia, on 5 December 2002. Not reproduced here are the charts Mr. Bednar displayed in support of his lecture. The Major Frank B. Creekmore Lecture was established on 11 January 1989. The Lecture is designed to assist The Judge Advocate General's School in meeting the educational challenges presented in the field of government contract law.

Frank Creekmore graduated from Sue Bennett College, London, Kentucky, and from Berea College, Berea, Kentucky. He attended the University of Tennessee School of Law, graduating in 1933, where he received the Order of the Coif. After graduation, Mr. Creekmore entered the private practice of law in Knoxville, Tennessee. In 1942, he entered the Army Air Corps and was assigned to McChord Field in Tacoma, Washington. From there, he participated in the Aleutian Islands campaign and served as the Commanding Officer of the 369th Air Base Defense Group.

Captain Creekmore attended The Judge Advocate General's School at the University of Michigan in the winter of 1944. Upon graduation, he was assigned to Robins Army Air Depot in Wellston, Georgia, as contract termination officer for the southeastern United States. During this assignment, he was instrumental in the prosecution and conviction of the Lockheed Corporation and its president for a \$10 million fraud related to World War II P-38 Fighter contracts. At the war's end, Captain Creekmore was promoted to the rank of major in recognition of his efforts.

After the war, Major Creekmore returned to Knoxville and the private practice of law. He entered the Air Force Reserve in 1947, returning to active duty in 1952 to successfully defend his original termination decision. Major Creekmore remained active as a reservist and retired with the rank of Lieutenant Colonel in 1969. He died in April 1970.

ting up here on this stage, with one leg over the other, and I said, "Thank God my socks match today," which is not always true, is it?

When I agreed to be your Creekmore lecturer, I had heard about this event. I was very much taken with the fact that a number of very distinguished persons have preceded me, almost all of whom I know personally, which says only that I have been around in this business for a very long time. But then I read the fine print, and I saw that long ago Major Creekmore actually pursued a fraud case against one of our clients. I wondered whether I had to get a conflict clearance in order to come here and make this presentation. But those were days long ago. Lockheed is now part of Lockheed Martin, of course, and a leading aerospace and defense contrac-

2. Brigadier General (Ret.) Bednar is Senior Counsel to the Washington, D.C. office of the law firm of Crowell & Moring LLP, where he specializes in the government contract law areas of contract claims, internal investigations, ethics and compliance issues, and suspension and debarment.

Before his retirement in 1984, BG (Ret.) Bednar served in a variety of Army JAG assignments, including the Administrative Law Division, Office of The Judge Advocate General; the Litigation Division; Contract Appeals Division; Procurement Agency, Vietnam; Judge Advocate, U.S. Forces, Korea; Judge Advocate, U.S. Army, Europe; and Assistant Judge Advocate General for Civil Law.

Brigadier General (Ret.) Bednar is a graduate of the Creighton University School of Law, and holds a Master of Law degree from the National Law Center, George Washington University.

Brigadier General (Ret.) Bednar is active in the Public Contract Law Section (former Council member), American Bar Association, and in the programs of the National Defense Industrial Association. He is a Fellow of the National Contract Management Association. In 1989, as a consultant to the Administrative Conference of the United States, he prepared and published a study titled *Government Contracting Officers Should Make Greater Use of ADR Techniques in Resolving Contract Disputes*. He is a co-author of the book *Construction Contracting*, published in 1991 by George Washington University, and a co-author and executive editor of the ABA publication, *The Practitioner's Guide to Suspension and Debarment*, published in July 2002.

In January 1999, he was appointed the national Coordinator of the Defense Industry Initiative on Business Ethics and Conduct (DII), and is active in defense industry ethics and compliance matters.

In 2001, BG (Ret.) Bednar was appointed as a member of the United States Sentencing Commission, Ad Hoc Advisory Committee on Corporate Sentencing Guidelines.

tor insofar as procurement dollars are concerned, and certainly a leader of the DII.

What I have tried to do and what I intend to do with you for the next hour and a half or so is to build on the theme of Creekmore's legacy, and that is a judge advocate who took on government contract fraud, and also a theme that is in keeping with the general subject of this seminar, namely, the Contract and Fiscal Law Seminar. So I have gone back in history for twenty years, and in doing that I do not mean to suggest for a moment that we had no contract fraud in the Defense Department prior to twenty years ago. I am not suggesting that at all, but we needed a beginning point. I could have gone back to the Revolution because I am sure the farmers were ripping off the Patriots as they marched into battle even then because the history of government contracting is a history of abuse and reform in a very real sense. I went back twenty years, first of all, because that spans a very interesting time frame, and also it gives us a reasonable period of time within our history to consider.

Another reason for going back twenty years is that the early 1980s were really the best of times in a very real sense. Procurement dollars were literally pouring into the Pentagon at a rate faster than they could be wisely spent. This was the Reagan era. President Reagan's vision was to build up our national defense apparatus so that we would eventually end the Cold War in one way or another. I do not think Reagan ever had in mind exactly the way the Cold War did end; namely, by the implosion of the Soviet Union in circumstances where we literally outspent them.

I do not think that President Reagan ever had that vision, but I do think that by building up the defense of this country the way he did in the early 1980s, it contributed strongly to the demise of the Soviet Union and the end of that era. It was a boom period in defense spending; literally a billion dollars a day were being poured into not only procurement, but were also being spent by the Defense Department. We had the vision of a 600-ship Navy, and a lot of aircraft were under development and were going into production. So those were the good times.

In addition to that, the early 1980s were, in a very real sense, the worst of times because the defense industry was mired in corruption, both inside and outside the Pentagon. The typical form of wrongdoing in the early 1980s was that unscrupulous procurement executives, all of whom were civilian and none of whom were Army, if that should make any difference to our consideration, would steal and convert to their own use precious

procurement information and sell it to corrupt “consultants” outside the Pentagon who, in turn, would resell that precious procurement information to defense contractors. Some of these defense contractors bought it unwittingly, not knowing that the information they were buying from the consultant was acquired in the manner I just described. But, I think a number of them also knew that what they were buying had to have been stolen from within the procurement planning apparatus within the Pentagon. It was terrible corruption. Not only that, but it was also an era when bribes and gratuities were frequently being paid in order to steer the award of important defense contracts to the payer of the bribes and the gratuities.

Again, the corruption was not limited to defense contractors alone. The corruption extended, unfortunately, to within the walls of the Pentagon, as well. You will remember some of these instances, I am sure. Some of you are old enough to remember the era of the four-hundred dollar hammer, the seventy-four hundred dollar coffee maker, and some of those other abuses. I can remember the four- or five-hundred dollar toilet seat. Those were some of the abuses that were going on. Incidentally, we looked into the reason why the coffee maker for the C-5A aircraft cost so much, and the real reason is that it was designed to withstand 17 Gs. When you design anything to withstand 17 Gs, that is going to cost a lot of money. Now the wings of the airplane would fall off at 17 Gs, but the coffee maker would survive, so the aircraft accident investigators would be assured of hot coffee when they arrived on the scene. That is the inside story about that. So, again, that was a time of abuse.

Another reason for these expensive spare and replacement parts, quite frankly, is that too often the people inside the Pentagon were lazy. They would order these things from the aerospace contractor. For example, if you order a box of screws from the XYZ Corporation, and they pass it through all of their engineering and evaluation and acquisition process and add all that overhead to it, you are going to come up with a pretty expensive end item. That is part of the explanation why the spare parts in particular cost so much money.

Operation Ill Wind was the largest procurement fraud investigation in the history of our nation, bar none. “Operation Ill Wind” was the term used because that investigation was initiated to pull us out of the mire. The operation was led by a colleague named Henry Hudson, who at the time was the U.S. Attorney for the Eastern District of Virginia. Cases brought involving defense procurement fraud quite commonly are brought in the

District Court for the Eastern District of Virginia because of its proximity to the Pentagon.

Here are some statistics illustrating the magnitude of the investigation. Operation Ill Wind involved a thousand investigators and prosecutors. Many of the investigators, by the way, were Defense Criminal Investigative Service (DCIS) and Army CID personnel. I do not know if we had any judge advocates involved in that or not, quite frankly. Over 800 subpoenas were issued by the grand juries (plural) that Henry Hudson worked with, and the investigation included two million documents. Ninety companies and individuals were ultimately convicted, and a good number of those were debarred from government contracting. This whole process took a long number of years. They were still gaining convictions when I went to Crowell & Moring in 1987. Operation Ill Wind was still bearing the fruit of its efforts.

With respect to the wire taps, they got authority to wire tap a number of people inside the Pentagon and some of these consultants. The first couple of weeks after I went to Crowell & Moring in 1987, I had occasion to listen to some of those wire taps because the firm was representing some of these individuals who ultimately were prosecuted, and some of them were convicted. The funniest one I remember is a discussion between a guy on the outside and this procurement executive inside the Pentagon. The conversation goes something like this: "Did you deposit the money yet?" "Yeah, it's been deposited." "Where is it?" "Well, just like we arranged. It's deposited in your Swiss banking account." "My Swiss banking account, huh? Is that right?" "Yeah." At the other end, "Well, tell me how do I get the money out?" So as sophisticated as some of these crooks were, they didn't know the answer to that question; and by the way, the guy on the phone didn't know either. So that was always an entertaining thing to consider.

The major forms of wrongdoing that were unearthed during this era—we are still in the early 1980s—were these crimes: bribery and illegal gratuities; misuse of procurement information; mail and wire fraud; a lot of conversion of government documents, including classified documents, which was the subject of a companion investigation because there were so many classified documents that were stolen and sold under this process that I earlier described to you; and, of course, false claims and false state-

ments. The Office of the U.S. Attorney did a wonderful job and eventually cleaned that mess up.

I think, and you will agree with me after we go through the review that I am about to make, that in the last twenty years we have seen more success in combating procurement fraud, and we have had fewer scandals and problems. I really believe that. I really believe that we have risen from the mire of twenty years ago. It has been a slow process. It has taken a lot of resources. It has taken a lot of new statutes and regulations, but the defense industry has pulled out of that mire. At the same time, I personally fear that we are on the edge of the mire again, and I think there is a real danger that we are about to slide into that slop in short order. Why do I say that? Well, first of all, almost all of our investigative resources at the federal level are now being devoted not to procurement fraud, but to chasing the terrorists—to the anti-terrorist campaign. That is particularly so in the Federal Bureau of Investigation (FBI). The FBI has almost no resources dedicated to Army procurement fraud or to Defense procurement fraud anymore. They are all after terrorists.

Second of all, we are getting away from the discipline of full and open contracting. Look at where the defense dollars are going today. They are not going through the competitive contracting process that we were familiar with for so many years. The game now is that when an agency gets a contract awarded successfully, it keeps loading additional tasks, works, and transfers of funds onto that contract. The use of “other” authority, instead of using the procurement statutes and the Federal Acquisition Regulation (FAR), is growing by leaps and bounds. More procurement dollars every year are awarded on the basis of pre-existing contract vehicles or other authority than there are through the traditional competitive contracting practice.

We have seen some abuse already in the use of government credit cards, and we will see more of that. I think that the investigation into that area has yet to be unfolded thoroughly, and we will find even more abuse than we have been reading about recently.

Another thing we have done: we have raised the authority to use the simplified acquisition procedure for commercial items to five million dollars. Come on. That is just asking for abuse. We are contracting out more and more all the time, which means that we are removing the responsibility

and the accountability to outside of the government organizational apparatus and into the commercial sector.

The notion of partnering is another area that I think is rife with risk for improper conduct. Anytime you have contractor and Department of Defense (DOD) personnel working shoulder to shoulder, side by side, the same desk, there is bound to be some crossover of precious information that should not crossover. There is bound to be some abuse of conflict of interest protections—invitation for a renewal of a revolving door, and what have you. That is just not our experience. Our experience is a formal, arms-length relationship between the contracting partners works best. Let them be partners, let them work shoulder to shoulder to pursue the objective of the contract. I am not quarreling with that. But we should return, I think, to a more arms-length contract relationship.

Finally, for those of you who have read the Homeland Security Act,³ you know that there are a zillion loop holes in that statute as well. There probably are a number of government contractors in the Washington area who are just licking their chops to get in to that; it is going to open up a lot of abuse that we have not experienced before.

So that is why I think we may be on the edge of the mire again. We need to be vigilant; we need to work together; we need to be sensitive; and we need to be circumspect and make sure it does not happen.

Back to 1982. One of the highlights of 1982: Admiral Rickover retires. This guy had sixty-three years of active duty. I will leave it up to you fiscal law guys to figure out what his retired pay must have been, but if it was two and a half percent per year, that is a pretty good plus-up for retiring. The guy was on active duty until he was eighty-two. That is a terrific, long period of time.

Admiral Rickover was a very controversial guy. On the one hand, he was a hero. He was the father of the nuclear Navy. On the other hand, he was sharply criticized for accepting gratuities and being too cozy with his favorite contractors. In fact, he was once quoted as saying that high-priced law firms can probably avoid almost any contract, probably even the Ten

3. Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135.

Commandments. His retirement marked the end of an era; there is no question about that.

At one time it was my pleasure to serve as the judge advocate in Korea with General Jack Vessey, who later became the Chairman of the Joint Chiefs of Staff, twice as a matter of fact. I remember being out with General Vessey one time when he was giving the troops of the 2d Infantry Division a lecture on ethics and morality, which he did from time to time. He was a very spiritually devout person, and I remember his punch line talking to these troops. Vessey said, "And just because you're 5000 miles away from home does not mean that there is a king's X on the Ten Commandments." That seemed to resonate with the troops. I think they understood that.

Senators Levin and Cohen were really pushing in 1982 for a greater use of debarment. I happened to have been the debarring official in 1980 and 1981, I think. Then there was a break, and then I went back to do it again; but I was one of the debarring officials called on the carpet by Levin and Cohen in their hearings. They had a whole litany of convictions, sort of like the POGO list that most of you are familiar with, a list of defense contractors which had been convicted of contract fraud and would still get contracts. In any event, they really pushed us hard, all of us—Army, Navy, Air Force, Defense Logistics Agency—to pull up our socks and use the protective measure of suspension and debarment to an extent that was unprecedented.

Before 1981-1982, when Levin and Cohen had these hearings, we did not use suspension and debarment very often. As the Assistant Judge Advocate General for Civil Law, I was the debarring official. I am trying to remember how many debarment cases would be presented to me in a given year. I think it was somewhere in the neighborhood of fifteen or twenty, no more than that. It was a remedy that was always there in the regulations, but never used. For some reason the field and Army policy-makers never brought it up. It was not peculiar to the Army, either. It was a condition that existed also in the other services. It took these two courageous lawmakers, Cohen and Levin, to dig in and find out that this remedy was not being used. They put some heat on us to actually begin using the remedy to a greater extent than we ever had before.

Also in 1982, the Office of Federal Procurement Policy issued a letter that for the first time discouraged pinpointing a suspension or debarment to a particular facility or particular operating unit, but rather to take out the

whole company. It is a recognition that you have to look at the culture of the company; you have to look at the company's corporate attitude, if you will, to see how relevant that is to the problem that brought the company in harm's way with suspension or debarment. That policy letter also for the first time established some evidentiary standards: a preponderance standard for debarment and an adequate evidence standard for suspension. Those standards remain viable today, but we did not really have it voiced and articulated until this policy letter of 1982, twenty years ago. The letter also made it clear that if anyone pled *nolo contendere*, that that was equivalent to a plea of guilty and would provide an adequate predicate for suspension or debarment.

About the same time, the Department of Justice (DOJ) and DOD began to get together and figure out jointness in investigating and going after procurement fraud. The first two guys who linked arms in that endeavor were Dick Sauber and Mike Eberhardt. Dick Sauber came from the Criminal Division of the Department of Justice, and is now in private practice with the D.C. law firm of Fried, Frank. Mike Eberhardt was from the DOD and had been an Assistant Inspector General of the Defense Department. Mike served for a period of time in this capacity with Sauber and successors from the Criminal Division, and he is now also practicing with a D.C. law firm.

Also in 1982, for you fiscal law guys, you may remember that for the first time we said, "Hey, why should we make legal costs or the cost of defense against fraud allowable costs?" The regulations were therefore changed so that if you defended yourself, the cost of doing that would be totally unallowable if you lost. Even if you won, you only got to recover eighty percent. I believe that is still in FAR part 31; that is still one of the principles on the allowability of costs.

The DOD also finally got around in 1982 to formalizing its DOD hotline, which had been established in 1979. This is a hotline to receive reports from anywhere within the Defense Department or otherwise on suspected fraud, waste, or abuse. It was a huge initial success, and it still is. It is still widely used, probably to a little lesser extent than before because: (a) all the agencies now have hotlines and not just DOD; and (b) a number of corporations have hotlines so that some of those reports go into the company's system rather than directly to the DOD.

1982 was also the year that the DCIS was established to concentrate on white-collar crime, with special agent training to take on contract fraud

matters. We did not have any training in contract fraud twenty years ago. It just was not there. There may have been an occasional short course at the JAG School from time to time, if you were lucky enough to have funding to go, and if they had offered it at a time when you could be there, but there was no formal training. The investigators had no formal training either, but it all got started twenty years ago in 1982.

There was a time in the JAG Corps, frankly, when unless you were trying courts-martial, unless you were in military justice, you were second rate. I spent much of my time trying cases before the Armed Services Board of Contract Appeals and in related endeavors, so we were really not the front-runners, if you will. The front-runners were in military justice. Military justice knew about fraud, but not in the context of procurement fraud. So this was a big change that we in JAG would finally get some formal training in contract fraud.

1982 also marked the enactment of the Victims and Witnesses Protection Act,⁴ which in a small way contributed to the war on defense procurement fraud because it provided for restitution to agency victims. In most situations now when the defense contractor settles a civil false claims case with the U.S. Attorney or with the DOJ, they will insist on restitution. The predicate for that began twenty years ago.

In 1983—we have moved ahead a whole year now—the bill was introduced to authorize agencies to charge administrative penalties. This eventually led to the Program Fraud Civil Remedies Act (PFCRA),⁵ which has never been used very much. The procedure is very awkward, and there are very few situations when the decision-makers think it is appropriate. The idea and the concept is a good one, however, and I think that with some more streamlined procedures, it has a place. The whole concept was that we had to have a mechanism for dealing with “smaller” frauds: cases that the typical U.S. Attorney would turn down because they have limited resources and are not going to pursue it unless it is worth millions of dollars. So the whole concept of the Program Fraud Civil Remedies Act was to deal with those smaller ones and to give the agencies the authority to

4. 18 U.S.C. § 1512 (1982).

5. 31 U.S.C. §§ 3801-3810 (1982 & Supp. IV 1986).

have a little due process and have the authority to enact some actual administrative penalties, but it is not used much.

Executive Order 12,448⁶ issued in 1983 authorized regulations to rescind contracts. Then finally, a very seminal event in the Army, at least, happened in July 1983, when The Army Judge Advocate General for the first time established a Contract Fraud Branch. At that time, it was located in the Litigation Division and led by Dick Finnegan. Dick is now a lawyer with the Defense Logistics Agency and a very good person. He still involves himself in defense contract fraud issues. It was also led by Kevin Flanagan, a lawyer with the DOD IG's office. Those guys really got, in a branch setting, the Army procurement contract fraud going. Later, of course, it became a Procurement Fraud Division. I understand by rumor that it may be squeezed down to a branch again because of the impetus to move people to the war fighters and to size down the "overhead" and the number of lawyers devoted to these activities. What is now the Procurement Fraud Division, and a very successful one I will say, may indeed shrink down to branch size in the near future.

Now back in 1982, before this began, I was the Judge Advocate of Europe. While in that position, I helped start what I called the Contract Fraud Coordinating Committee because we had no mechanism for integrating our attack on government contract fraud in Europe until that time; it was an ad hoc thing. We would get together once every couple of weeks with the Judge Advocate; the chief of contract law; the head of the Army's CID for Europe; the head of the Provost Marshall for U.S. Army, Europe; the auditors; and the head of contracts. We had about eight people, and we would get together and review incident reports that would come in. Most of these involved construction contracts in Europe where the contractor was somehow "shorting" on its deliveries, either in quality or quantity, and so we took a coordinated approach.

Some of those companies for the first time we debarred. We had authority in Europe at that time to debar them—we did not have to come back to Washington—and some of those we reported to the German authorities for prosecution. So for the first time we took a whack at it in a

6. Exec. Order No. 12,448, Exercise of Authority Under Section 218 of Title 18, United States Code, 48 Fed. Reg. 51,281 (Nov. 8, 1983).

way that was later to grow into what was the Procurement Fraud Division. Those were pioneer days.

Now a great blow for combating fraud occurred when I retired in 1984, and they finally got somebody in the job who knew what he was doing. The competency and the attention to defense contract fraud certainly grew by leaps and bounds at that time. 1984 saw a lot of headlines. A big fuss over Rickover occurred when Electric Boat was prosecuted for providing gratuities to Admiral Rickover and to Mrs. Rickover. Some of the charges were pretty outrageous. This was at a time when Rickover was feeding contract work to Electric Boat, so it was a terribly scandalous situation. The word “fuss” is certainly an understatement of the attention that it got at that time.

We also had the Defense Procurement Reform Act of 1984,⁷ which says, “Up at the front end when you’re designing systems—defense systems, electronic systems—do it in a way that promotes competition and not in a way that it’s going to go to one source.” Those are marvelous ideas—hard to implement, in fact—but they were marvelous ideas, aimed again to try to promote competition.

Then finally, remember all the spare parts scandals. We had this Small Business and Federal Procurement Competition Enhancement Act of 1984,⁸ which says, “Hey, if you’re a prime contractor, you can’t limit your sub to sell to you only. You must let the sub go direct to sell to anybody else or direct to the agency.” These direct sales to the Defense Department were a big step forward in reducing the cost of spare parts and replacement components. All this sounds so logical today, doesn’t it? So simple and so logical, and yet it grew over the last twenty years. It did not happen overnight.

In 1985, the DOD published a list of thirty-six defense contractors who were under investigation; most of those were for mischarging. That is a lot, though, to be under investigation at one time. Then we had a kind of a misplaced policy, in my judgment. Will Taft was the Deputy Secretary of Defense, and he put out a letter that said any contractor who is convicted of a felony connected with a contract will be debarred, no discretion, for at

7. Pub. L. No. 98-525, 98 Stat. 2588 (codified as amended at scattered sections of 10 U.S.C. (1982 & Supp. III 1985)).

8. Pub. L. No. 98-577, 98 Stat. 3066 (codified as amended at 10 U.S.C. §§ 2302, 2303a, 2304, 2310, 2311; 15 U.S.C. §§ 637, 644; 41 U.S.C. §§ 251 note, 253, 253b-253g, 259, 403, 414a, 416, 418a-418b, 419).

least one year. Well, that did not sit very well with other contract agencies or the contractors, as you can imagine. It seemed a bit out of balance with reality because quite often a contractor was as much a victim as the Defense Department. That is to say, the contractor tried to do everything right—the right policies, controls, procedures, and training. Yet some scoundrel, some rotten apple in the barrel, would commit a fraud. Of course, that makes the company criminally liable; that is U.S. Law.

Within a few months, that policy proved unworkable. Instead the FAR published a list of mitigating factors which the debarring official could—not must—could consider in determining whether to debar, and if so, what the duration should be. We pretty much have that rule today. There is no automatic one-year debarment. Unless it is in the area of violation of the Clean Air Act or Clean Water Act, the duration is a discretionary one, and we are still there.

As a matter of fact, we have the same rule with the non-procurement debarment. Non-procurement debarment, which is really a big area because it has to do with grantees and a lot of money, particularly from HUD, the Environmental Protection Agency (EPA), and Health and Human Services (HHS), is distributed not by contract, but by grant. So there is this whole separate set of regulations called a common rule that govern non-procurement suspension and debarment. The regulations as non-procurement document not only list mitigating factors, but also a list of aggravating factors. I think this is a plus, and maybe we will see that repeated over into the FAR someday.

The year 1986 also saw fifty-nine of the top one hundred contractors under investigation for fraud. Isn't that pathetic? Fifty-nine out of a hundred. At the same time, President Reagan had appointed David Packard from Hewlett-Packard, who was then the Deputy Secretary of Defense, to head up a blue-ribbon panel on management of the Defense Department. Concurrent with Packard and in coordination with his work, thirty-two CEOs of leading defense contractors decided that they needed to do something industry-wide.

So for the first time in history, these defense leaders got together and decided to form an association which became known as the Defense Industry Initiative on Business Ethics and Conduct. The whole concept was, "Look, we as an industry really have been in a mire. We have lost the confidence of the Congress. We have lost the trust of the American people. The defense industry is being prosecuted for absolutely shameful conduct,

and no amount of laws and regulations is going to change that unless we have an attitude change, a culture change within the industry itself. The real answer is to aggregate ourselves, to pull up our socks and decide that we as an industry are going to embrace and practice ethical business conduct as a discipline so as to restore that trust and confidence.”

That was the birth, if you will, of the DII, the Defense Industry Initiative on Business Ethics and Conduct. Thirty-two at the beginning, and the DII is now at fifty. By the way, I do not know how many of you read *Defense Week*. But if you look on page sixteen of this week’s *Defense Week*, dated Monday, 2 December 2003, it has a chart illustrating twenty years of defense industry consolidation. If you go down the left side of the chart, you see that there were seventy-three major defense companies involved in this process of consolidation over twenty years ago. We are now down to Lockheed Martin, Boeing, Raytheon, Northrop Grumman, and General Dynamics, the big five. Not the final four like we have in the accounting industry. We had the big five in the accounting industry, and now after Arthur Andersen, we have the final four.

Think about that great consolidation, in twenty years. That is a tremendous statistic, evidencing a substantial consolidation of the industry. Seventy-three now melted into five; that is not to say that there are only five defense contractors, but these five defense contractors represent what was seventy-three separate companies a mere twenty years ago.

Looking at the principles that DII adopted in 1986 reflect what defense contractors expect of themselves. It is an expectation of what a defense contractor should do. If you look in DFARS 203.7000, you will see expressed the similar expectation that a defense contractor will have standards of conduct. It all came from the DII. The DII was there first. Later on, the U.S. Sentencing Commission also picked up on the DII’s concept of insistence on ethical conduct.

It seems so simple. The defense contractor is expected to establish a code of ethical conduct that represents the most precious values of the company, what the company believes in, what the company is all about. The Code is applied to everybody, including employees. It is now being applied to major subcontractors as well. You also have ethical conduct training, an internal means for reporting misconduct, and a procedure for self-disclosure to the government. Now, this is not the same thing as the DOD Voluntary Disclosure Program. It means a self-disclosure to the government, and that can take many forms: a disclosure to the contracting

officer, or if appropriate, to the DOD IG; sharing best practices; and then public accountability. I will talk about the DII a little bit more at the end of this presentation.

To go on, then, in 1986 we had a stiffening of the 1962 statute, the Truth in Negotiations Act.⁹ The Truth in Negotiations Act that passed in 1962 was simply a disclosure statute. It was never envisioned to be the predicate for fraud prosecution, but it grew into that later on. The whole idea was, “Look, if we are a defense buyer and you are a defense seller, let’s display what your costs are so that we have a more level playing field in negotiating estimated costs or negotiating price, if we are talking about a price.” That was stiffened, then, in 1986, and gradually became a strong predicate for prosecuting companies who in submitting their cost or pricing data knowingly provided false information, a very strong and fertile area for prosecution.

The DOD Voluntary Disclosure Program was established in 1986, which in its heyday was a very successful program. The Voluntary Disclosure Program is faltering today. It is not used to the extent it was before. I personally blame not the lack of interest of the DOD, nor the lack of interest of the contractors. I blame the plaintiff’s bar because, unfortunately, if a company makes a voluntary disclosure, that information likely is not likely confidential; it becomes part of the public record. Not only does the company which has made a voluntary disclosure have to own up to the Defense Department and DOJ in making them whole regarding the consequences of the fraud revealed in the disclosure, but it also provides a road map for third party lawsuits by plaintiff’s counsel. There is no sure protection of any of the information that is disclosed.

The U.S. Sentencing Commission is pursuing a notion—I am not sure how far it will get—but is pursuing a notion of some sort of self-evaluative privilege such that if a company receives a report of fraud, conducts an internal investigation, and takes that internal investigation to the Defense Department, for example, under the Voluntary Disclosure Program, as a self-disclosure, this self-evaluative privilege would protect that information from use other than the official use by the government. I do not know

9. 10 U.S.C. § 2306a (1982 & Supp. IV 1986).

whether it will get there, but at least it would protect companies from all these abusive lawsuits from the plaintiff's bar.

We also had major revisions to the Civil False Claims Act in 1986.¹⁰ Of course, this is a Lincoln-era law. It was substantially stiffened in 1986 as a result of many people, including John Phillips, who is now a *qui tam* lawyer par excellence. John is a good friend of the JAG School. He has spoken here many times. In fact, John was a former Creekmore lecturer. John spent the better part of about ten years before 1986 lobbying Congress, in particular Senator Grassley, to get these amendments through so that the proof required was made easier and the *qui tam* plaintiff would enjoy a greater percentage of recovery. John Phillips wanted a more formal mechanism for those lawsuits to be put under seal and evaluated and reviewed by the Department of Justice. Justice then would make a determination whether to go forward or let the complainant go forward on its own. It was a major event, and it is a very big business today for people who are in that area. There are a number of law firms in the country that do that.

The Program Fraud Civil Remedies Act became law in 1986, as did the Anti-Kickback Act.¹¹ Now here is an interesting thing. We have always had specific and explicit protections from giving bribes and gratuities from the prime to the government. That has been with us for a long period of time. What the Anti-Kickback Act has done is take it down another level so that it is illegal to provide anything of value to a prime or to a higher-level subcontractor in exchange for some favorable consideration. That favorable consideration usually is one of two things: (1) either the award of the work; that is, you get the subcontract or an order; or (2) and probably more dangerous, a relaxation of the inspection and vendor quality assurance that comes in. The latter results in substantially less protection for the government when a kickback has been paid.

The law presumes that the value of the kickback is built into the price to the government, so the government is able to go after the miscreants under that statute. The law also places a very heavy obligation on prime contractors and first-tier subcontractors to have a formal program to prevent kickbacks. All the major ones do have a very formal program, which includes training, periodic reviews of contract files, and surprise inspections. Some of them even rotate their buyers from time to time so that they

10. 31 U.S.C. §§ 3729-3733.

11. 41 U.S.C. §§ 51-58 (1982 & Supp. IV 1986).

do not get too cozy with a particular vendor. It has been a major statute in fighting defense contract fraud, and one that I think has put us in good stead.

A number of companies, very good companies, have been prosecuted under the Anti-Kickback Statute because they were unaware that their buyers were actually accepting kickbacks. A couple of very major New England companies recently were in that situation; they were surprised; they had absolutely no idea. Whether they should have known is another issue. Whether they had reason to know is another issue, but they did not know that these practices were going on. Sometimes the kickback is a very subtle thing like, "Hey, how about giving my kid a job when he's home from college next summer." That has happened in exchange for some implicit or explicit favorable consideration. We had a case once where the value given was constructing a porch and putting a roof on a vacation home of one of the buyers. Those things were discovered, and they were prosecuted. Between 1985 and 1987, thirty-five contractors—that is only a two-year period—were convicted of defense procurement fraud.

I do not know how many of you have seen the DOD IG contract fraud handbooks. They are useful. The first one was put out in March 1987 to alert auditors on how to detect fraud in defective-pricing cases. I have also seen other publications on labor mischarging, on material substitution, and other species of defense fraud. Very valuable guidebooks not only to auditors, but also to investigators.

In November 1987, the Sentencing Commission Guidelines for Individuals finally went into effect. This removed substantial discretion from the trial judge and jury. To a large extent, it made the determination of a sentence of an individual based on a computation of pluses and minuses.

The 1988 Procurement Integrity Act,¹² which dealt principally with revolving door issues and protecting valuable procurement information, was directly traceable to the abuses revealed by Operation Ill Wind. The "revolving door" was a very common situation, as was stealing and using relevant procurement information. A few years ago, there was a big competition between XYZ Ironworks and ABC Corp.. It was a Navy procurement. One day when the Navy delegation left the building of the XYZ Ironworks, it left behind the pricing information of ABC Corp. on the conference room table. Some say the Navy left the information deli-

12. *Id.* § 423 (1988).

berately because they really wanted XYZ Ironworks to win the contract; some say inadvertently—they were just sloppy and left it there. In any event, this precious, valuable competition information was left.

When it was found by the XYZ Ironworks employee, the first thing he did was to take it to the CFO, Chief Financial Officer, who made a copy of it and then passed it on to the CEO. The CEO took it and read it, kept it for a couple of days, and then consulted with his general counsel. The lawyer said, “You have to give it back. You have to give it back, and you have to tell the Navy exactly what happened here and disqualify yourselves from the competition.” Well, at first they did not want to do that. The CFO did not want to do that; the CEO did not want to do that. The Navy did find out about it. The Navy was, of course, more than mildly upset. The Navy then disqualified Ironworks from the competition. They also suggested that both the CEO and the CFO be fired, and they were. And guess what happened? As I recall, the general counsel became the CEO. Yes!

Finding procurement information happens every once in a while, and almost all of the defense industry contractors now have a process for implementation when visiting government folks inadvertently leave precious procurement information behind. All the big aerospace and defense companies now have a procedure such that when information is found, it is delivered to a person called the take-out officer. The take-out officer in coordination with the general counsel informs the agency, conducts an investigation to see who has knowledge of that information in the acquisition process and disqualifies them from any participation in the competitive process. So not only do we have the Procurement Integrity Act, but we also have a stiffening of internal controls to deal with this.

The revolving door notion, however, has been ignored lately. Almost all of our major defense acquisition executives come from industry, and they are going to go back to industry. There are not any real safeguards. We have to depend on the integrity of the individual. There is this free personal exchange back and forth. Government engineers who really understand the engineering of our major weapons systems leave and go to industry, taking all of that knowledge with them. I am not saying there is anything wrong with that, but I do think it presents some new revolving door issues that we simply have not paid enough attention to lately.

The major fraud act of 1988: the Drug-Free Workplace Act.¹³ This is almost a joke, isn’t it? It had aspects of keeping the workforce pure, of

rational mind, and efficient; but it really has not done much at all. A number of companies do random testing, and they all have programs, educational programs and so on, but I do not think it has done a whole lot.

In 1989, the DOD IG obtained more funding and staffing. *Qui tam* began to catch on. It was big-time business then, and it is even bigger now. The President also signed the Whistle-Blower Protection Act¹⁴ in 1989 to give some courage to the whistle-blower. It does take courage to blow the whistle on your company. The *Wall Street Journal* last week had an article about a guy who was a whistle-blower in his company. He then voluntarily left the company. It was more than a year ago, and he still can't even get a job interview in the industry. He is an anathema because of what he did; he is regarded not as a hero and a whistle-blower, but a snitch and somebody not to be trusted. So we have a long way to go in that area, too, to encourage whistle-blowers. Sarbanes-Oxley¹⁵ has taken a step in that direction, but we have a long way to go.

The Alternate Dispute Resolution (ADR) Act of 1990¹⁶—did you know that ADR is used in fraud cases? It is. There are circumstances in which contractors have settled factual issues through an ADR process even though it happens to be a fraud case. Far and away the biggest problem during 1990 was in cost mischarging—forty-six percent of cases—and product substitution—twenty-six percent.

In 1991, the *Wall Street Journal* published a story that many states were providing incentives to companies that adopted compliance programs. How about that? Finally, we were getting a little more emphasis on the carrot as opposed to the stick. From 1982 to 1991, it has been the stick, the stick, the stick. Now we were getting a little emphasis on the carrot—in charging decisions made by the U.S. Attorney's office and in sentencing decisions—to give some incentive to companies to try to do the right thing.

We also enacted 10 U.S.C. § 2408, which is a very effective statute. It means if you are convicted of fraud in connection with a defense contract, you cannot really hold a job, any responsible job, that is, working on defense contracts for at least five years following that conviction. That

13. *Id.* §§ 701-707.

14. Pub. L. No. 101-12, 103 Stat. 16 (1989) (codified in scattered sections of 5 U.S.C.).

15. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745.

16. 5 U.S.C. §§ 571-583.

statute is very rigorously enforced to my knowledge, not by the Army, but by the U.S. Attorneys for the region in which the company is located.

November 1991 saw another opportunity to offer more of the carrot when the corporate sentencing guidelines went into effect. Also, the Environmental Protection Agency (EPA) published guidelines stating the compliance elements to be considered in debarment. The EPA has taken a very strong view, at least since 1991, when it comes to escaping a suspension or debarment by the EPA. You have to show more than just correction of the conditions that led to the Clean Air Act problem or the Clean Water Act problem. You have to prove that you have the right corporate attitude—they use that term, the “right corporate attitude”—and demonstrate that attitude to the EPA debarring official, or you are not going to avoid a suspension or debarment.

The sentencing guidelines established in November 1991—for a corporation or an organization to reduce a corporate fine—parallel what the DII did in 1986, with one major difference. The sentencing guidelines speak to *compliance*. The DII guidelines, however, speak to *ethics*. It is the DII on Business Ethics and Conduct, not business compliance and conduct. The mindset of the DII companies is that compliance is the absolute minimum. It is presumed that you are going to comply with the law and the regulations. Over and above that is this commitment to ethics such that you do the right thing when there is no rule.

In 1992, the Ethics Officers Association was established. This association is across the board, not DOD only. It is across all industries, civilian and military related. Today it has about 800 individuals, with its center of gravity at Bentley College in Boston, Massachusetts. It meets two or three times a year with formal programs that address ethics issues. These meetings are a wonderful learning opportunity to see what is going on in the commercial world in the way of embracing and practicing ethical conduct. Believe me, the practice of good self-governance is catching on.

In May 1994, the DOD concluded an administrative compliance agreement with Lucas Aerospace. To my knowledge, that was the first real formal agreement that permitted a company to avoid suspension and to avoid debarment. We have had agreements before that, but they were not expressed in detail and did not include the discipline and the safeguards and controls as did the one in Lucas. This was a Navy agreement. Lucas was alleged to have ripped off the Navy on some components to some model aircraft parts, and they avoided debarment by entering into this

administrative compliance agreement. Many such compliance agreements have followed. The Army sometimes is willing to do that, as is the Navy and the Air Force. David Drabkin, the GSA debarring official, a registrant, is not here at this moment, so I will testify that he will not do it. I have never known Mr. Drabkin to enter into a compliance agreement as the GSA debarring official. Maybe someday he will; who knows?

To go on, then, we had this *Caremark* decision in 1996.¹⁷ I am sure all of you are very much aware of that. This was the decision of the Delaware court that specifically requires directors to take an active role in establishing and overseeing a compliance program within the company at peril to personal liability, a landmark case in this area. If you are not familiar with that case, pull it out and take a look at it because it has made a terrific difference in publicly traded corporations. They take the exposure to personal liability very seriously, as do their insurance companies, so it has made a big difference.

Then we had the series of cases in 1998 in which the Supreme Court held that in certain circumstances, if the company had a good compliance program, it might shield the company from liability for an employee's sexual harassment. Again, if you can show that you are trying to do the right thing, that you have the right policies, training, rules, supervision, and due diligence, and it still happens, then at least the company might dodge the bullet.

In June 1999, Eric Holder, who was then the Deputy Attorney General of the United States and a former U.S. Attorney for the District of Columbia, put together a beautiful letter and memorandum which is a guideline for federal prosecutors in determining whether to charge corporations.¹⁸ It is a landmark piece of work. It, again, gives recognition to companies that try to practice self-governance and try to do the right thing.

More recently, we have had Sarbanes-Oxley.¹⁹ I am not going to spend a lot of time on that because it is not specifically a defense contract fraud statute. It applies to all companies regulated by the Securities and Exchange Commission; all issuers, if you will, all publicly traded U.S.

17. *In re Caremark Int'l*, 698 A.2d 959 (Del. Ch. 1996).

18. Memorandum from Eric J. Holder, Deputy Attorney General, to Heads of Department Components All United States Attorneys, subject: Bringing Criminal Charges Against Corporations (June 16, 1999) (with attachment entitled *Federal Prosecution of Corporations*), available at <http://www.usdoj.gov/04foia/readingrooms/6161999.htm>.

19. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745.

companies, so it would include most defense companies, and many, many others as well. Some of the anti-fraud features in Sarbanes-Oxley, which are being implemented as we speak, involve protection of whistle-blowers, conflicts of interest, stiffer corporate governance, and a code of ethics. Certifications are back. We tried to get away from that in DOD, but they are back under Sarbanes-Oxley.

So now CEOs and CFOs have to do what? Certify. Covered companies have to file these financial reports quarterly and annually. Previously, this certification merely said that it “applied to a good accounting standard,” or something like that. Now they have to say more than that, that it “fairly represents the financial condition of the company.” That is a big one to put your name on, fairly represents the financial condition of the company. The first wave of those certificates went in earlier this year, and I think we will see that result in more attention to good corporate governance.

In response to the document shredding incident last year of Arthur Andersen, Sarbanes-Oxley also expands the criminal provisions that govern obstruction of justice. That is what Andersen was convicted of. It was not convicted of anything else but obstruction, and the form of obstruction was the shredding of documents done in Enron’s office in Houston.

Just a little bit more about the DII. If you are not familiar with the DII, I encourage you to become familiar with it.²⁰ One of the important things that the DII does: it holds a “best practices” meeting every May with a substantial number of representatives of the Defense Department, the debarring officials, the IGs, the DCIS, and the procurement policy people. We meet for a day and a half in Washington, D.C., to share best practices on good corporate governance and going after government contract fraud. It is a very rich experience for both government and industry representatives. We willingly share best practices with each other and openly disclose what is going on. There are no secrets from the Defense Department customer about what we are doing by way of corporate self-governance. We may have a lot of other business secrets, but we share in this effort of good corporate governance. I am a strong proponent of the DII.

DII’s organization is informal. The steering committee, which is like the board of directors, consists of thirteen top corporate executives. Our

20. For more information on the DII, see its Web site, <http://dii.org>. The DII principles that guide its signatory companies are displayed on the Web site.

chairman is Vance Coffman, the chairman and CEO of Lockheed Martin Corporation. Some of the other representatives come from household names in the defense industry, like Honeywell, Boeing, Raytheon, Textron, UTC, Harris, Northrop Grumman, Rockwell Collins, and so on. We last met with the DII steering committee in November in Phoenix, Arizona, in connection with the annual Aeronautic Industry Association meeting. Because of the crowded agenda, they set aside the time for the DII meeting to begin at 6:30 in the morning. I will tell you—this is the gospel truth—every single one of those CEOs showed up, thus reflecting their commitment to what the DII is all about, and to give us their guidance, their leadership, and our charter for work for the next year. One of the things they want the DII to do, and they are dead serious about it, is to try to export what the DII's doing down to the next tier, to major subcontractors. To encourage major subcontractors to embrace and practice good corporate self-governance just as the DII has been doing. That was a very telling meeting.

In conclusion, I do think that the defense industry has come a long way since twenty years ago. I hope you agree. It was the terrible fraud and abuse situation that twenty years ago engendered what was “in the best of times” and the “worst of times.” The defense industry has come a long way in pulling ourselves out of that. I think I have illustrated to you that one of the key developments in the defense industry is the emphasis now on ethics and self-governance to encourage corporations to do more on their own, to practice self-governance on their own, and to reduce the requirement for oversight by auditors and inspectors and prosecutors.

I also think that this litany of laws that I have gone through with you, alone, is not going to solve procurement fraud. Quite frankly, I believe that these laws have abated contract fraud in the defense industry to a substantial degree. Have we stamped it out? Absolutely not. We still have more to do, but I do think that we have done about as much as we can do with the statutes, the regulation, and the punishment. What we need to do now is to emphasize the “carrot” to stimulate industry to do more on its own through a culture of ethics. My belief is that ethics trumps the effectiveness of penal laws and enforcement.

Well, it has been a real joy. I appreciate the warm welcome I received. I enjoyed the reception last night. I am deeply honored to be your Creekmore lecturer, and I hope I have added a dimension to your understanding of where we are and how we got here over the last twenty years. Thank you.

FIFTEENTH WALDEMAR A. SOLF LECTURE IN INTERNATIONAL LAW¹

SUPERIOR ORDERS AND COMMAND RESPONSIBILITY

PROFESSOR LESLIE. C. GREEN²

First, let me say what an honor it is to have been invited to deliver the 2002 Waldemar H. Solf Memorial Lecture.

I first met Wally at the diplomatic conference responsible for drafting the two Additional Protocols to the Geneva Conventions of 1949. Our first encounter had its moments of humor. The Canadian delegation was at lunch when a representative of a third world country complained to David Miller, the head of delegation, that he really must control the language of his legal adviser. He maintained that it was most improper at a diplomatic conference to say of the comments of another delegate that he had never heard such arrant nonsense in his life. David explained that I had been accredited to him by the Government of Canada as the delegation's legal adviser and that he could not easily get rid of me. However, he suggested to me that I could achieve the same effect by indulging in English understatement. The following day while we were at lunch, Wally came over and explained to David that they were having some problems in his com-

1. This is an edited transcript of a lecture delivered 6 March 2002, to members of the staff and faculty, distinguished guests, and officers attending the 50th Judge Advocate Officer Graduate Course at The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia. The Waldemar A. Solf Lecture in International Law was established at The Judge Advocate General's School on 8 October 1982. The chair was named after Colonel Solf who served in increasingly important positions during his career as a judge advocate. After his retirement, he lectured at American University for two years, then served as Chief of the International Affairs Division, Office of The Judge Advocate General. In that position, he represented the United States at numerous international conferences, including those that prepared the 1977 Protocols Additional to the 1949 Geneva Conventions. After his successful effort in completing the Protocol negotiations, he returned to Washington and was appointed the Special Assistant to The Judge Advocate General for Law of War Matters. He served in that position until his second retirement in August 1979.

2. C.M., LL.B., LL.D., F.R.S.C. University Professor Emeritus and Honorary Professor of Law, University of Alberta; Charles H. Stockton Professor of International Law, U.S. Naval War College, 1996-1998.

mittee and it would be helpful if he could send his "hatchet man" across to help out. This I tried to do in the most diplomatic language I could muster.

For the rest of the conference, Wally and I often found ourselves working together, although we were not always *ad idem*. We tended to agree on the issue of command responsibility, but were not able to see eye to eye on the related problem of superior orders, even though these may be considered as the two sides of a single coin. An order depends upon a superior having authority to issue such command, and it requires an inferior to whom it is directed and who is obligated to obey. Because of this inter-connection, I thought it might be useful to devote this memorial lecture to the interplay of superior orders and command responsibility.

There seems to be a tendency in military and even academic circles to assume that the concepts of superior orders and command responsibility only became important, from the point of view of the law of armed conflict, as a result of the war crimes trials consequent upon the two world wars. This, however, is far from being the case. Both saw their births at least 550 years ago.

In 1439, in his Ordinances for the Armies, Charles VII of Orleans proclaimed:

The King orders each captain or lieutenant be held responsible for the abuses, ills, and offences committed by members of his company, and that as soon as he receives any complaint concerning any such misdeed or abuse, he bring the offender to justice so that the said offender be punished in a manner commensurate with his offence, according to these Ordinances. If he fails to do so or covers up the misdeed or delays taking action, or if, because of his negligence or otherwise, the offender escapes and thus evades punishment, *the captain shall be deemed responsible for the offence, as if he has committed it himself and shall be punished in the same way as the offender would have been.*³

A mere forty-five years later, an international tribunal comprising representatives of some of the Hanseatic cities and of the city of Berne was established to try Peter of Hagenbach⁴ for a series of offenses which would

3. THEODOR MERON, *HENRY'S WARS AND SHAKESPEARE'S LAWS* 149 n.40, art. 19 (Eng. tr. 1993) (emphasis added); LOUIS GUILLAUME DE VILEVAULT & LOUIS BRÉQUIGNY, *ORDONNANCES DES ROIS DE FRANCE DE LA TROISIÈME RACE* xiii, at 306 (1782).

today be described as “crimes against humanity.”⁵ An interesting feature of this incident is that it arose out of conduct taken to maintain illegally the authority of Charles, Duke of Burgundy.⁶ Breisach was in an area occupied by forces under command of Hagenbach, appointed by Burgundy as Governor or *Landvogt*.

The charges against Hagenbach included murder, rape, perjury, and other *malefacta*, including orders to mercenaries he had brought to Breisach to kill the men in the houses where they were quartered so that the women and children would be completely at their mercy. By way of defense, *Hagenbach* pleaded he was complying with superior orders:

Sir Peter von Hagenbach does not recognise any other judge and master but the Duke of Burgundy from whom he had received his commission and his orders. He had no right to question the orders, which he was charged to carry out, and it was his duty to obey. Is it not known that soldiers owe absolute obedience to their superiors? Does anyone believe that the Duke's *Landvogt* could have remonstrated with his master or have refused to carry out the Duke's orders? Had not the Duke by his presence subsequently confirmed and ratified all that had been done in his name?⁷

The tribunal was not impressed by this plea and sentenced Hagenbach to death, since he had “trampled under foot the laws of God and of man,”⁸ though in compliance with the orders of his superior.

Regardless of the application of these principles in the law of armed conflict, we do not find much reference to them in judicial practice until the end of the nineteenth century. However, both, and particularly rejection of the defense of superior orders,⁹ were well known in municipal law.

4. GEORG SCHWARZENBERGER, 2 INTERNATIONAL LAW, THE LAW OF ARMED CONFLICT ch. 39 (1968).

5. This term was first used in a diplomatic note by Britain, France, and Russia in 1915 condemning the Armenian atrocities committed by the Ottoman Empire, describing them as “a crime against civilization and humanity.” See Egon Schwelb, *Crimes Against Humanity*, 23 BRIT. Y.B. INT’L L. 178, 181 (1946); M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY 168-69 (1992); Vahakn N. Dadrian, *Genocide as a Problem of National and International Law: The World War Armenian Case and Its Contemporary Legal Implications*, 14 YALE J. INT’L L. 221 (1989).

6. Known variously as Charles the Bold or Charles the Terrible.

7. SCHWARZENBERGER, *supra* note 4, at 465.

8. *Id.* at 466.

It is perhaps worth drawing attention to, for example, the attitude adopted towards the regicides charged with the execution of Charles I.

Axtell was guard commander at the King's execution and

justified that all he did was as a soldier, by the command of his superiour officer, whom he must obey or die. It was resolved that was no excuse, for his superiour was a traitor, and all that joyned him in that act were traitors, and did by that approve the treason; and where the command is traitorous, there the obedience to that command is also traitorous.¹⁰

The court took the line that even a common soldier must have known that it was an act of treason to participate in any way in the execution of one's king.

Even clearer in application of the principle of knowledge is *Cooke's Case*.¹¹ Cooke was Chief Justice of Ireland who had presented the indictment against the King and demanded judgment against him. The court rejected his plea that

[t]hey were not my words, but their words that commanded me, . . . [for] you know by a printed authority, that where a settled court, a true court is, if that court meddle with that which is not in their cognizance, it is purely void; the minister that obeys them is punishable; if it is treasonable matter, it is treason; if murder, it is murder. . . . [If the Common Pleas sentence a man to death when it should be the King's Bench,] it is murder in the Executioner. . . . You speak of a court: 1 It was not a court: 2 No courts whatsoever could have any power over a king in a coercive way, as to his person. . . . [T]he acting by colour of that pretended authority was so far from any extenuation, that it was aggravation of the thing.¹²

Unlike Axtell, a common soldier who could only know the law on the assumption that all citizens must be aware that to kill a king is treason, the

9. See, e.g., LESLIE C. GREEN, *ESSAYS ON THE MODERN LAW OF WAR* ch. vii (2d ed. 1998).

10. Axtell's Case, 84 Eng. Rep. 1060 (1661).

11. 5 St. Tr. 1077, 1113, 1115 (1660).

12. *Id.*

Chief Justice was considered one who by his training had to be aware of the law.

As recently as 1945, that is to say some 300 years later, the principle in *Axtell* was cited as a binding precedent in a court-martial in India.¹³ The Advocate General referred to this case in his opening address for the prosecution¹⁴ against three of the most senior officers of the Indian National Army (INA), a force raised from among (British) Indian Army personnel who had been captured or surrendered to the Japanese “to fight for the independence of India.”¹⁵ He continued:

An act of treason cannot give any sort of right nor can it exempt a person from criminal responsibility for the subsequent acts. Even if an act is done under a command, where the act is traitorous, obedience to that command is also traitorous. It is submitted that the accused cannot in law seek to justify what they did as having been done under the authority of the I.N.A. Act. No authority purporting to be given under that Act can be recognized by this court or indeed by any court of this country. The assumption of any such authority was illegal from the beginning. Any tribunal or authority purporting to be established under that Act would be a repudiation of the allegiance which is inherent in a court of this country. Those who instituted or took part in the proceedings [—by, for example, confirming a death sentence—] would themselves be liable to be punished for offences against the State. All orders under the I.N.A. Act or by any tribunal or authority purporting to be established by it are without sanction. They cannot protect a person who made such orders or acted upon them.¹⁶

Despite a most vigorous defense,¹⁷ based on the contention that the INA was a regular “army” established by the “Provisional Government of Free India,” which was recognized by the Axis Powers and their satellites, the Court appears to have accepted the Advocate General’s arguments and sentenced the three officers to death. However, for political reasons, the

13. See RATANLAL & THAKORE, *LAW OF CRIMES* 274 (1936).

14. *HINDUSTAN TIMES*, 6 NOV. 1945.

15. For an account of the origins and history of the INA, together with the *Provisional Government of Free India*, see Green, *supra* note 9, ch. xi.

16. Transcript (on file with author).

17. See ANITA DESAI, *I.N.A. DEFENCE* 101, 108-09 (1946). For a similar, but equally unsuccessful, defense, see *Pius Nwaoga v. State*, 52 I.L.R. 494 (1972) (Nig.).

Governor-General as Commander-in-Chief, India, reduced the sentence in each case to cashiering, and they were freed.

Before proceeding further, reference might usefully be made to some of the leading English and American writings which are usually regarded as being among the principal commentaries of the law of the United Kingdom and the United States. According to Halsbury:

The mere fact that a person does a criminal act in *obedience to the order of a duly constituted superior does not excuse the person who does the act from criminal liability*, but the fact that a person does an act in obedience to a superior whom he is bound to obey, *may exclude the inference of malice or wrongful intention* which might otherwise follow from the act Soldiers and airmen are amenable to the criminal law to the same extent as other subjects *Obedience to superior orders is not in itself a defence to a criminal charge.*¹⁸

In his *History of the Criminal Law*,¹⁹ Stephen would apparently excuse the soldier if he might reasonably suppose that the superior issuing the order had “good reason” for so doing. Thus, it would be

monstrous to suppose that superior orders would justify a soldier in the massacre of unoffending civilians in time of peace, or in the exercise of inhuman cruelties, such as the slaughter of women and children, during a rebellion. [A] soldier should be protected by orders for which *he might reasonably believe his officer to have good grounds.*²⁰

This statement would impose upon the soldier receiving the order the well-nigh impossible task of reading his superior’s mind. Dicey does not go nearly so far, introducing a more practical and personal obligation:

A soldier is bound to obey any lawful order which he receives from his military superior. But a soldier cannot any more than a civilian avoid responsibility by pleading that he broke the law in bona fide obedience to the orders He may . . . be liable to

18. HALSBURY’S LAWS OF ENGLAND vol. 10, §§ 541, 1169 (Simmonds 3d ed. 1952) (emphasis added).

19. 2 SIR JAMES F. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND (1883) (emphasis added).

20. *Id.* at 204-06 (emphasis added).

be shot by a Court-martial if he disobeys an order, and to be hanged by a judge and jury if he obeys it While, however, a soldier runs no substantial risk of punishment for obedience to orders which a man of common sense may honestly believe to involve no breach of law, he cannot avoid liability on the ground of obedience to superior orders for any act which a man of ordinary sense must have known to be a crime.²¹

As for the United States, the legal position resembles that in the United Kingdom. According to the *Corpus Juris Secundum*:

As a general rule, a person who, while acting under the authority or direction of a superior, performs a criminal act is responsible therefore The rules of law as to the liability of a soldier for the execution of the orders of his superiors are the same in criminal as in civil cases; thus he is *not criminally liable for the execution of a lawful order, or one which is fair and lawful on its face; but an order illegal on its face is no justification* for the commission of a crime.²²

In his *Criminal Law and Procedure*,²³ Wharton is equally dogmatic:

[W]here a person relies on a command of legal authority as a defense, it is essential that the command be a lawful one An order which is illegal in itself, and not justified by the rules and usages of war or which is, in substance, *clearly illegal, so that a man of ordinary sense and understanding would know* as soon as he heard the order read or given *that it was illegal*, will provide no protection for a homicide When an act committed by a soldier is a crime, even when done pursuant to military orders the fact that he was ordered to commit the crime by his military superior is not a defense.²⁴

21. A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 298-99, 302 (8th ed. 1915).

22. 22 C.J.S. *Criminal Law* § 39 (1936) (emphasis added).

23. 1 WHARTON'S CRIMINAL LAW AND PROCEDURE (1957).

24. *Id.* at 257-58 (emphasis added). See *Melinki v. Chief Military Prosecutor, translated in* 2 PALESTINE Y.B. INT'L L. 69 (1956) (discussed *infra* text accompanying note 141).

Somewhat closer to Stephen's view are those of Hare:

The question is . . . had the accused *reasonable cause for believing in the necessity* of the act which is impugned, and in determining this point a soldier . . . may obviously take the orders of the person in command into view as proceeding from one who is better able to judge and well-informed; and, if the circumstances are such that the command may be justifiable, he should not be held guilty for declining to decide that it is wrong with the responsibility incident to disobedience, *unless the case is so plain as not to admit of a reasonable doubt*. A soldier consequently runs little risk in obeying any order *which a man of common sense so placed would regard as warranted by the circumstances*.²⁵

The references to the "reasonable man" in these quotations leads one to inquire whether the measuring rod should be the "man of ordinary common sense," frequently described as "the man on the downtown omnibus," or rather that of "the ordinary soldier in similar circumstances"? Assuming the latter to be the more reasonable approach, he should be tried by a military court made up solely of military officers, preferably chosen from those with some experience of active service conditions, though they may need some person possessed of legal knowledge to sit with them.

Examples of military personnel pleading superior orders by way of defense in an ordinary criminal proceeding may be taken from both English and United States jurisprudence. In 1866, Willes J. heard two cases in which the defense was raised. *Keighley v. Bell*²⁶ arose from an order to arrest issued by a military officer. In the course of his judgment, he stated:

I should probably hold the orders [to arrest another member of the military] are an absolute justification in time of actual war . . . unless the orders were such as could not legally be given . . . [A]n officer or soldier, acting under the orders of a superior—*not being manifestly illegal*—would be justified of his orders.²⁷

25. HARE, CONSTITUTIONAL LAW 920 (1889) (emphasis added). See, e.g., Commonwealth *ex rel.* Wadsworth v. Shortall, 55 A. 952, 956 (1903).

26. 176 Eng. Rep. 781 (1866).

27. *Id.* at 793 (emphasis added).

Later the same year, he dealt with this problem again:

If the military should injure [civilians] in their person or their property, not even the command of a superior officer will justify a soldier in what he does, unless the command should turn out to be legal, and to be within the limits of the protection given by the Mutiny Act and the Articles of War. It is only by reason of the 88th section [of the Act], that a soldier acting *bona fide*, and in discharge of what he supposes to be his duty could ever set up against a citizen not a soldier, the justification of superior command.²⁸

An American case relating to an offense by military personnel against civilians was *Mitchell v. Harmony*,²⁹ in which Chief Justice Taney held:

[T]he order given was to do an illegal act; to commit a trespass upon the property of another; and can afford no justification to the person by whom it was executed. . . . And upon principle, . . . *it can never be maintained that a military officer can justify himself for doing an unlawful act, by producing the order of his superior. The order may palliate, but it cannot justify.*³⁰

In a later case,³¹ it was held by Justice Carroll that an order which might appear perfectly reasonable from the military point of view, could nevertheless be illegal as an invasion of private rights:

It may and doubtless is true that, looking at the matter from a military standpoint, the order to act as Franks did was *not such an unreasonable command as that a soldier of common sense would feel authorized to refuse to obey*. But . . . conduct like this is such an intolerable invasion of private rights, . . . that we cannot consent that all military orders, however reasonable they may appear, will afford protection in the civil or criminal courts of the State.³²

28. *Dawkes v. Lord Rokeby*, 176 Eng. Rep. 800 (1866).

29. 54 U.S. (13 How.) 115 (1851).

30. *Id.* at 137 (emphasis added).

31. *Franks v. Smith*, 134 S.W. 484 (Ky. 1911).

32. *Id.* at 490-91 (emphasis added). *See also* *Riggs v. State*, 3 Cold. 85 (Tenn. 1866); *United States v. Clark*, 31 F. 710, 717 (C.C.E.D. Mich. 1887).

On the other hand, American courts have dealt with the dilemma, which confronts a soldier when faced with an illegal order. The law has been clearly stated in *McCall v. McDowell*:³³

Except in a plain case of excess of authority, where at first blush it is *apparent and palpable to the commonest understanding* that the order is illegal, I cannot but think that the law should excuse the military subordinate when acting in obedience to the orders of the commander. Otherwise he is placed in the dangerous dilemma of being liable in damages to third persons for obedience to an order, or to the loss of his commission and disgrace for disobedience thereto. . . .

....

. . . True, cases can be imagined where the order is *so palpably atrocious as well as illegal, that one can instinctively feel that it ought not to be obeyed*, by whomever given. . . .

Between an order plainly legal and one palpably otherwise—particularly in time of war—there is a wide middle ground, where the ultimate legality and propriety of orders depends or may depend upon circumstances and conditions of which it cannot be expected that the inferior is informed or advised. In such cases, justice to the subordinate demands . . . that the order of the superior should protect the inferior; *leaving the responsibility to rest where it properly belongs—upon the officer who gave the command*.³⁴

This is a clear judicial recognition of the principle of command responsibility I will later discuss.

Emphasizing the importance of “surrounding circumstances” in relation to a specific order, reference might be made to *United States v. Carr*,³⁵ which arose from the suppression of a mutiny:

A soldier is bound to obey only the lawful orders of his superiors. If he receives an order to do an unlawful act, he is bound neither by his duty nor his oath to do it. . . . [A]n order from an officer to shoot another for disrespectful words merely would, if

33. 15 F. Cas. 1235 (C.C.D. Cal. 1887) (No. 8673).

34. *Id.* at 1240-41 (emphasis added).

35. 25 F. Cas. 306 (C.C.S.D. Ga. 1872) (No. 14,732).

obeyed, be murder, both in the officer and soldier. . . . Place yourselves in the position of the prisoner at the time of the homicide. Inquire whether at the moment he fired . . . , *with his surroundings at that time, he had reasonable ground to believe, and did believe*, that the killing or serious wounding . . . was necessary If he had reasonable ground so to believe, . . . then the killing was not unlawful. But if . . . the mutinous conduct . . . had ceased, and it so appeared to the prisoner, or if he could reasonably have suppressed the disorder without resort to such violent means as the [killing] of the deceased, and it would *so have appeared to a reasonable man under the circumstances*, then the killing was unlawful. But . . . the law will not require an officer charged with the order and discipline of a camp or fort to weigh with scrupulous nicety the amount of force necessary to suppress disorders. The exercise of a *reasonable* discretion is all that is [necessary].³⁶

One final United States decision, and that of fairly recent years, might be cited to illustrate what is palpably not a legal order. In *State v. Roy*,³⁷ the appellant had been convicted of assault with intent to commit rape, and appealed on the ground that he was a private soldier obeying the orders of his sergeant. Justice Denny felt that

[t]he contention has no merit. The duty of a subordinate to obey a superior officer, while one is subject to military law, has reference only to lawful commands of such superior officer, in matters relating to military duty. And there is certainly nothing on this record to indicate that either of these defendants were engaged in any activity relating to military duties on the night in question.³⁸

It is time now to turn attention to the development of the doctrine of superior orders in time of war. Perhaps we may start with the *Wirz (Andersonville)* trial.³⁹ Wirz was charged, as commander of a Confederate prisoner of war camp during the American Civil War, with a series of atrocities committed against federal prisoners. Since this was a military trial, there

36. *Id.* at 308 (emphasis added).

37. 64 S.E.2d 840 (N.C. 1951).

38. *Id.* at 841 (citation omitted).

39. H.R. EXEC. DOC. No. 23, 40th Cong., 2d Sess. (1868).

was no judgment, but as the court found him guilty of the charges we may assume that the judges accepted the view of the Judge Advocate:

With what detestation must civilized nations regard that government whose conduct has been such as characterized this pretended confederacy. *An ordinary comprehension of natural right, the faintest desire to act on principles of common justice*, would have dictated some humane action, would have extorted from some official recognition of international rules of conduct. . . . [I]t was not . . . ignorance of the law; it was intrinsic wickedness of a few desperate leaders, seconded by mercenary and heartless monsters of whom the prisoner before us is a fair type. . . .

It is urged that during all this time, [the accused] was acting under General Winder's orders. . . . *A superior officer cannot order a subordinate to do an illegal act, and if a subordinate obeys such an order and disastrous consequences result, both the superior and the subordinate must answer for it. General Winder could no more command the prisoner to violate the laws of war than could the prisoner do so without orders. The conclusion is plain, that where such orders exist both are guilty.* . . .

Strongly as it may strike you that strict justice would require the punishment of the arch-conspirator himself[,] . . . you cannot stop the course of justice or refuse to brand Wirz's guilt as the law and evidence direct. . . . Nothing can ever separate them. . . . [The accused] executed the bloody work with industry which was almost superhuman and with a merriment which would have shamed a demon. . . . There could be no collision where the subordinate was only anxious to surpass an incomparable superior. . . .

If the accused still answers that, admitting the facts charged, he did these things in the exercise of authority lawfully conferred upon him, and that what he did was necessary to the discipline and safety of the prisoners, I answer him in the language of Lord Mansfield[:] "[T]he principal inquiry to be made is, by a Court of Justice, how the heart stood? And if there appears to be nothing wrong there, great *latitude* will be allowed for misapprehension or mistake. But . . . if the heart is wrong, if cruelty, malice, and oppression, appear to have occasioned or aggravated the . . .

injury complained of, they shall not cover themselves with the thin veil of legal forms, nor escape, under the cover of a justification, the most technically regular.”⁴⁰

This language is on all fours with that used later by the Israeli Court hearing the charges arising from the *Kafr Qassem* massacre.

[T]he distinguishing mark of a “manifestly illegal order” should fly like a black flag above the order given, as a warning saying “Prohibited.” Not formal unlawfulness, hidden or half-hidden, nor unlawfulness discernible only by the eyes of legal experts, is important here, but *a flagrant and manifest breach of the law, definite and necessary unlawfulness appearing on the face of the order itself, the clearly criminal character of the acts ordered to be done, unlawfulness piercing the eye and revolting the heart, be the eye not blind nor the heart stony and corrupt*—that is the measure of “manifest unlawfulness” required to release a soldier from the duty of obedience upon him and make him criminally responsible for his acts.⁴¹

Perhaps the common law case that is most frequently referred to on the issue of superior orders arose out of action taken against Boer detainees during the South African War. In delivering judgment in *Reg. v. Smith*,⁴² Solomon J. declared, in terms that have become virtually authoritative world-wide:

[I]t is monstrous to suppose that a soldier would be protected where the order is *grossly illegal*. [But that he] is responsible if he obeys an order not strictly legal . . . is an extreme proposition which the Court cannot accept. . . . [E]specially in time of war[,] immediate obedience . . . is required. . . . I think it is a safe rule to lay down that if a soldier *honestly believes* he is doing his duty in obeying . . . and the orders are *not so manifestly illegal* that he . . . ought to have known they were unlawful, [he] will be protected by the orders.⁴³

40. *Id.* at 764, 773-74, 802 (quoting *Wall v. M’Namara*, 99 Eng. Rep. 1239 (1779)) (emphasis added).

41. *Melinki v. Chief Military Prosecutor*, translated in 2 PALESTINE Y.B. INT’L L. 69 (1956) (discussed *infra* note 141) (emphasis added).

42. 17 S.C. 561(1900) (Cape of Good Hope).

The issue of superior orders as a defense became of major significance after World War I in relation to the trials for war crimes held in accordance with Article 228 of the Treaty of Versailles.⁴⁴ By this, the German authorities were obliged to hand over for trial and punishment by military tribunals established by the Allied and Associated Powers those accused of having committed acts "in violation of the laws and customs of war."⁴⁵ In fact, Germany refused to hand over any of these persons, but did bring a small number for trial by the German *Reichsgericht* sitting at Leipzig. By the German Military Penal Code, section 47, a subordinate is bound to obey the orders of his superior, but he is punishable as an accomplice if he knew that the act ordered was criminal by either civil or military law.

Two cases decided by this tribunal are of significance in relation to the defense of superior orders. Both arose out of the sinking of hospital ships by U-boats. In the case of the *Dover Castle*,⁴⁶ the commander pleaded that he had acted on Admiralty orders issued in the belief that hospital ships, contrary to the law of war, were being used for military purposes. He was acquitted, since

it is a military principle that the subordinate is bound to obey the rules of his superiors. . . . When the execution of a service order involves an offence against the criminal law, the superior giving the order is alone responsible. . . . The Admiralty Staff was the highest service authority over the accused. He was in duty bound to obey their orders in service matters. So far as he did this, he was free from criminal responsibility.⁴⁷

43. *Id.* at 567-68 (emphasis added). See also *R. v. Werner* 1947 (2) SALR 828; *Nwaoga v. State*, NIG. LAW REP., pt. 1, vol. 1, at 149 (Mar. 3 1972), reprinted in 52 I.L.R. 494 (1972).

44. See 2 FRED L. ISRAEL, MAJOR PEACE TREATIES OF MODERN HISTORY 1648-1947, at 1255 (1967).

45. *Id.*

46. Judgment in Case of Commander Karl Neumann (Hospital Ship *Dover Castle*) (S. Ct. Leipzig 1921), reprinted in 16 AM. J. INT'L L. 704-06 (1922).

47. *Id.* at 707-08.

In the circumstances of the case, the tribunal considered that the accused was entitled to believe that the order to sink hospital ships was not illegal, but amounted to a reprisal.

Shortly after this decision was rendered, the *Reichsgericht* indicated that the defense was not as extensive as appeared. The *Llandovery Castle*⁴⁸ involved a group accused of opening fire on hospital ship survivors. They pleaded that they had acted on the orders of the U-boat commander, who was not himself on trial. In the course of its judgment, the court stated:

[N]o importance is to be attached to the statements put forward by the defence, that the enemies of Germany were making improper use of hospital ships for military purposes, and that they had repeatedly fired on German lifeboats and shipwrecked people. . . . Whether this belief was founded on fact or not, is of less importance as affecting the case before the court, than the established fact that the *Llandovery Castle* at the time was not carrying any cargo or troops prohibited [under the Hague Convention on Naval Warfare].⁴⁹ The killing of survivors was homicide under the German Penal Code, and was also] an offence against the law of nations. . . .

Any violation of the law of nations in warfare is . . . a punishable offence, so far as, in general, a penalty is attached to the deed. The killing of enemies in war is in accordance with the will of the State that makes war (whose laws as to the legality or illegality on the question of killing are decisive), only in so far as such killing is in accordance with the conditions and limitations imposed by the law of nations. *The fact that his deed is a violation of International Law must be well known to the doer.* . . . The rule of International Law, which is here involved, is *simple and universally known*. No possible doubt can exist with regard to the question of its applicability. . . . [The] order does not free a man from guilt. . . .

48. Judgment in Case of Lieutenants Dithmar and Holdt (Hospital Ship *Llandovery Castle*), 2 Ann. Dig. 436 (S. Ct. Leipzig 1921), reprinted in *THE PELEUS TRIAL* (John Cameron 1948).

49. Hague Convention on Naval Warfare, reprinted in *THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS, AND OTHER DOCUMENTS* 313 (Dietrich Schindler & Jiří Toman eds., 1988) [hereinafter *THE LAWS OF ARMED CONFLICTS*].

[A]ccording to para. 47 of the Military Penal Code[,] . . . the subordinate obeying [an] order [involving a violation of the law] is liable to punishment, if it was *known to him* that the order of the superior involved the infringement of civil or military law. . . . It is certainly to be urged in favour of the military subordinates that they are under no obligation to question the order of their superior officer, and they can count upon its legality.⁵⁰ But no such confidence can be held to exist, if such an order is *universally known to everybody, including also the accused, to be without any doubt whatsoever against the law*. As naval officers by profession [the accused] were all *well aware . . . that one is not legally authorized to kill defenceless people*. They should, therefore, have refused to obey. As they did not do so, they must be punished. . . .

[To] have refused to obey the order . . . would have required a specially high degree of resolution. A refusal to obey the commander of a submarine would have been something so unusual that it is humanly possible to understand that the accused could not bring themselves to disobey. That certainly does not make them innocent They had acquired the habit of obedience to military authority and could not rid themselves of it. This justifies the recognition of *mitigating circumstances* in determining the punishment. . . . The killing of defenceless shipwrecked people is an act in the *highest degree contrary to ethical principles*. . . .⁵¹

It is almost inevitable that one accused of war crimes will plead that he was obeying superior orders, often claimed to have been given by an unnamed or unknown superior. In some cases, however, it has been held that the order alleged to have been given was not actually given. In the *Crusius* case,⁵² the accused claimed that he was complying with an oral order to shoot all prisoners of war. The Leipzig court found that the alleged

50. But see U.S. Dep't of Army, "Lesson Plan" on Teaching The Geneva Conventions of 1949 and Hague Convention No. IV of 1907, ASubjScd 27-1 (8 Oct. 1970) [hereinafter Lesson Plan].

51. *Llandovery Castle*, reprinted in THE PELEUS TRIAL, *supra* note 48, at 179-82 (emphasis added).

52. 2 Ann. Dig. 438 (S. Ct. Leipzig 1921).

remark related only to wounded enemy soldiers suddenly resuming hostilities:

Such an order, if it were issued, would not have been contrary to international principles, for the protection afforded by the regulations for land warfare, does not extend to such wounded who take up arms again and renew the fight. Such men have by so doing forfeited the claim for mercy granted to them by the laws of warfare. On the other hand, an order of the nature maintained by the accused would have had *absolutely no justification*.⁵³

These German judicial decisions to the effect that superior orders provided no defense, although it could be considered by way of mitigation, were not in universal accord with the views held in some of Germany's former enemies. The first edition of *Oppenheim's International Law*,⁵⁴ at that time considered as *the* textbook on the subject, stated dogmatically: "[I]n case members of forces commit violations ordered by their commanders, the members cannot be punished, for the commanders alone are responsible, and the latter may, therefore, be punished as war criminals on their capture by the enemy."⁵⁵

A similar statement appears in the 1914 edition of the British *Manual of Military Law*,⁵⁶ perhaps not surprising since Oppenheim was joint author of the section devoted to the "Law and Usages of Warfare on Land." The United States *Rules of Land Warfare* were based on the British *Manual*, and a similar provision is to be found even in their 1940 edition.⁵⁷

The first edition of *Oppenheim* to appear after World War I, and therefore, after the decisions of the *Landsgericht* had been published,⁵⁸ reprinted the statement unchanged, but with the following note added:

53. C. MULLINS, THE LEIPZIG TRIALS 155 (1921) (emphasis added).

54. 2 LASSA OPPENHEIM, INTERNATIONAL LAW (1906).

55. *Id.* § 253.

56. See BRITISH MANUAL OF MILITARY LAW para. 443 (1914). The 1929 edition is to the same effect.

57. UNITED STATES, RULES OF LAND WARFARE art. 345 (1940 ed.), 366 (1914 ed.).

58. His Majesty's Stationery Office had published their texts in 1921.

“the contrary is sometimes asserted . . . [but] the law cannot require an individual to be punished for an act which he was compelled to commit.”⁵⁹

This statement is considered by McNair in the fourth edition to be “consistent with customary law.”⁶⁰ The last edition to appear before the outbreak of World War II (and the first to be edited by Lauterpacht) is the first to mention the *Llandovery Castle*. There is a simple reference to the decision in a footnote as being among those wherein “the contrary is sometimes asserted.”⁶¹

A fundamental change appears in the 1940 and 1944 editions, both of which were edited by Lauterpacht. The entire paragraph has been rewritten:

The fact that a rule of warfare has been violated in pursuance of an order of the belligerent Government or of an individual belligerent commander does not deprive the act in question of its character as a war crime; neither does it, in principle, confer upon the perpetrator immunity from punishment by the injured belligerent. . . . Undoubtedly a Court confronted with the plea of superior orders adduced in justification of a war crime is bound to take into consideration the fact that obedience to military orders *not obviously unlawful*, is the duty of every member of the armed forces and that the latter cannot, in conditions of war discipline, be expected to weigh scrupulously the legal merits of the order received. . . . However, . . . the question is governed by the major principle that members of the armed forces are *bound to obey lawful orders only*[,] and that they cannot escape liability if, in obedience to a command, they commit acts which both *violate unchallenged rules of warfare and outrage the general sentiments of humanity*.⁶²

This statement of the law is supported by a reference to the *Llandovery Castle* decision,⁶³ and Lauterpacht appears to justify his departure from previous editions, including his own, by stating that “a different view has occasionally been adopted by military manuals and by writers, but it is difficult to regard it as expressing a sound legal principle.”⁶⁴ In explaining

59. OPPENHEIM, *supra* note 54, § 253, at 342 n.3 (Roxburgh 1921).

60. *Id.* § 253, at 410 n.2 (1926).

61. *Id.* § 253, at 454 n.1 (Hersch Lauterpacht ed., 1935).

62. *Id.* § 253, at 452-53 (Hersch Lauterpacht ed., 1944) (emphasis added).

63. *See id.* § 253, at 455 n.1.

the reference to “writers,” he comments: “See, e.g., [section] 253 of the previous editions of this volume. However, the great majority of writers are in favour of the view advanced in the text.”⁶⁵ He nowhere states that he edited two previous editions.

The British *Manual* was amended in 1944,⁶⁶ and Lauterpacht’s new wording was adopted *expressis verbis*. Seven months later a similar amendment was made to the United States *Field Service Manual*: “individuals and organizations who violate the *accepted laws and customs of war* may be punished therefore . . . [, but superior orders] may be taken into consideration in determining culpability, either by way of defense or in mitigation of punishment.”⁶⁷

French authorities, too, considered a restatement of the law necessary. During World War I, writers differed as to the availability of the defense to Germans accused of war crimes, with the majority rejecting it.⁶⁸ In accordance with Article 327 of the *Code Pénal* that “no crime or delict is committed when the homicide . . . was ordered by law or by legal authority,”⁶⁹ “In every case where the plea of superior command was invoked they made short shrift of it and if the evidence established the guilt of the accused he was condemned, even when he produced conclusive proof that he acted under orders.”⁷⁰ The Ordinance concerning the Prosecution of War Criminals, however, removes this defense regarding “[l]aws, decrees[,] or regulations issued by the enemy authorities, orders or permits issued by these authorities . . . which are or have been subordinated to them[,] . . . but can only, in suitable cases, be pleaded as an extenuating or exculpating circumstance.”⁷¹

Other Allied countries tended to introduce similar legislation, frequently after their liberation, to make it clear that in trials before their military courts no accused would be able to avoid responsibility by pleading that he was acting under orders, especially as it was so easy for an accused to cite as the responsible superior some officer who was either dead or

64. *Id.* at 453.

65. *Id.* at 452 n.2.

66. *Id.* amend. 34 (1944), reprinted in *THE PELEUS TRIAL*, *supra* note 48, at 150.

67. U.S. FIELD SERVICE MANUAL 152 (C1, 15 Nov. 1944) (emphasis added).

68. 2 JAMES W. GARNER, INTERNATIONAL LAW AND THE WORLD WAR 487 (1920).

69. CODE PÉNAL, art. 327.

70. GARNER, *supra* note 68, at 487.

71. 3 UNITED NATIONS WAR CRIMES COMMISSION, LAW REPORTS OF TRIALS OF WAR CRIMINALS 93, 96 (1948).

untraceable.⁷² Judicial decisions since 1945 have contributed to the development of the defense. The trend began with the decision in *The Peleus* concerning the firing by U-boat crew members upon survivors of a torpedoed merchant ship, resulting in their deaths. In the course of his summation, which led to the verdict of guilt, the Judge Advocate said:

[T]he duty to obey is limited to the observance of orders which are lawful. There can be no duty to obey that which is not a lawful order. . . . The fact that a rule of warfare has been violated in pursuance of an order of a belligerent government, or of an individual belligerent commander, does not deprive the act in question of its character as a war crime, neither does it confer upon the perpetrator immunity from punishment by the injured belligerent. Undoubtedly a Court confronted with a plea of superior orders adduced in justification of a war crime is bound to take into consideration the fact that obedience of military orders *not obviously unlawful* is a duty of every member of the Armed Forces, and that the latter cannot in conditions of war discipline be expected to weigh scrupulously the legal merits of the order received. The question, however, is governed by the major consideration that members of the Armed Forces are bound to obey *lawful orders only*, and that they cannot therefore escape liability if in obedience to a command they commit acts which both *violate unchallenged rules of warfare and outrage the general sentiment of humanity*.

It is quite obvious that no sailor or soldier can carry with him a library of International Law, or have immediate access to a professor in that subject who can tell him whether or not a particular command is a lawful one. . . . [I]s it not fairly obvious to you that if in fact the carrying out of [the] command involved the killing of those helpless survivors, it was not a lawful command, and that it must have been *obvious to the most rudimentary intelligence that it was not a lawful command*, and that those who did the shooting are not to be excused for doing it upon the grounds of superior orders?⁷³

72. See, e.g., MORRIS GREENSPAN, *THE MODERN LAW OF WARFARE* 491 (1959) (providing the Soviet opinion).

Regardless of the comments herein quoted as to the defense of superior orders, there can be no question that the action of the submarine's medical officer in participating in the shooting was a war crime *ipso facto*.

The *Buck* case concerned the shooting of prisoners of war, and the tribunal adopted similar language as to the obvious knowledge of the accused soldiers:

The Court has to consider whether men who are serving either as soldiers or in proximity to soldiers know as a matter of the *general facts of military life* whether a prisoner of war has certain rights . . . [including], when captured [the right to] security for his person. . . . The position under international law is that it is contrary to rules of international law to murder a prisoner.⁷⁴

Since the London Charter establishing the Nuremberg Tribunal expressly excluded obedience to orders as a defense, the Judgment was able to deal with this issue fairly briefly:

[I]ndividuals have international duties which transcend the national obligations imposed by the individual State. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorising action moves outside its competence under international law That a soldier was ordered to kill or torture in violation of the international law of war has never been recognised as a defence to such acts of brutality, though . . . the order may be used in mitigation of the punishment. The true test, which is found in varying degrees in the criminal law of most nations is not the existence of the order, but whether moral choice was in fact possible.⁷⁵ . . . Superior orders . . . cannot be considered in mitiga-

73. THE PELEUS TRIAL, *supra* note 48, at 128-29 (emphasis added). For an abbreviated report of the case, see *In re Eck*, 13 Ann. Dig. 248 (1946). See also Masuda, 1 UNITED NATIONS WAR CRIMES COMMISSION, LAW REPORTS OF TRIALS OF WAR CRIMINALS 71, 74 (1945); *In re Holzer*, 5 UNITED NATIONS WAR CRIMES COMMISSION, LAW REPORTS OF TRIALS OF WAR CRIMINALS 15 (1946). Note that by Protocol I, 1977, Article 82, a legal adviser should be available to the commander. In accordance with the U.S. Army Lesson Plan, such an officer should also be available for consultation by the man in the field. Lesson Plan, *supra* note 50.

74. 13 Ann. Dig. 293-94 (British Military Court, Wuppertal 1946) (emphasis added). The first thing the author was told after joining the British Army in World War II was that it was absolutely illegal to kill or injure a prisoner of war.

tion where crimes as shocking and extensive as have been committed conscientiously, ruthlessly and without military excuse or justification. . . .

Participation in such crimes as these has never been required of any soldier and he cannot now shield himself behind a mythical requirement of soldierly obedience at all costs as his excuse for commission of these crimes. . . . [M]any of these men have made a mockery of the soldier's oath of obedience to military orders. When it suits their defence they say they had to obey; when confronted with Hitler's brutal crimes, which are shown to have been within their general knowledge, they say they disobeyed. The truth is they actively participated in all these crimes, or sat silent and acquiescent, witnessing the commission of crimes on a scale larger and more shocking than the world has ever had the misfortune to know.⁷⁶

Similar statements are to be found in the judgments of the United States military commissions that sat at Nuremberg and heard a series of war crimes cases against senior German personnel.⁷⁷ Of these, perhaps the most comprehensive dealing with the defense of superior orders was the *Einsatzgruppen* trial.⁷⁸

The obedience of a soldier is not the obedience of an automaton. A soldier is a reasoning agent. He does not respond, and is not expected to respond, like a piece of machinery. It is a fallacy of widespread consumption that a soldier is required to do everything his superior officer orders him to do. . . . [A]n order to require obedience must refer to military duty And what the superior officer may not militarily demand of his subordinate, [for example, shoot a superior], the subordinate is not required to do. Even if the order refers to a military subject[,] it must be one which the superior is authorized under the circumstances to give. The subordinate is bound to obey only the lawful orders of his superior[,] and if he accepts a criminal order and executes it with a malice of his own, he may not plead Superior Orders in mitiga-

75. See, e.g., LESLIE C. GREEN, SUPERIOR ORDERS IN NATIONAL AND INTERNATIONAL LAW pt. 1 (1976) (The Position in National Law).

76. 41 AM. J. INT'L L. 172, 221, 271-72, 283, 316 (1947) (emphasis added).

77. See, e.g., *In re Milch*, 2 UNITED NATIONS WAR CRIMES COMMISSION, LAW REPORTS OF TRIALS OF WAR CRIMINALS 353 (1947).

78. *In re Ohlendorf*, 15 ANN. DIG. 656 (1948).

tion of his offense. If the nature of the order is manifestly beyond the scope of the superior authority, the subordinate may not plead ignorance of the criminality of the order. If one claims duress in the execution of an illegal order it must be shown that the harm caused by obeying the illegal order is not disproportionately greater than the harm that would result from not obeying the illegal order. . . . It would not be an adequate excuse . . . if a subordinate, under orders, killed a person known to be innocent, because by not obeying he himself would risk a few days of confinement. Nor if one acts under duress, may he, without culpability, commit the illegal act once the duress ceases.⁷⁹

The tribunal cited German military codes going back to that of Prussia, 1845, which provided for punishment if the subordinate knew the order “related to an act which is *obviously aimed at a crime*,”⁸⁰ and continued, with much reference to the defense of duress involved in the receipt of an order:

Yet, one of the most generally quoted statements on this subject is that a German soldier must obey orders even though the heavens fall. The statement has become legendary. The facts prove that it is a myth. . . . To plead Superior Orders[,] one must show an excusable ignorance of their illegality. What S.S. man could say that he was ignorant of the attitude of Hitler towards Jewry? . . . But it is stated that in military law even if the subordinate realizes that the act he is called upon to perform is a crime, he may not refuse its execution without incurring serious consequences, and that this, therefore, constitutes duress. . . . [T]here is no law which requires that an innocent man must forfeit his life or suffer serious harm in order to avoid committing a crime which he condemns. The threat, however, must be imminent, real[,] and inevitable. . . .

The test to be applied is whether the subordinate acted under coercion or whether he himself approved of the principle involved in the order. If the second proposition is true, the plea of Superior Orders fails. The doer may not plead innocence to a criminal act ordered by his superior if he is in accord with the principle and intent of the superior. Where the will of the doer

79. *Id.* at 665-68.

80. *Id.* at 666 (emphasis added).

merges with the will of the superior in the execution of the illegal act, the doer may not plead duress under Superior Orders. If the mental and moral capacities of the superior and the subordinate are pooled in the planning and execution of an illegal act, the subordinate may not subsequently protest that he was forced into the performance of an illegal undertaking. Superior means superior in capacity and power to force a certain act. It does not mean superiority only in rank. . . . If the cognizance of the doer has been such, prior to the receipt of the illegal order that the order is obviously but one further logical step in the development of a program which he knew to be illegal in its very inception he may not excuse himself from responsibility for an illegal act which could have been foreseen by the application of the simple law of cause and effect. . . .

One who embarks on a criminal enterprise of obvious magnitude is expected to anticipate what the enterprise will logically lead to. In order successfully to plead the defense of Superior Orders the opposition of the doer must be constant. It is not enough that he mentally rebel at the time the order is received. If at any time after receiving the order he acquiesces in its illegal character, the defense of Superior Orders is closed to him.⁸¹

In *Audieur-General pres la Cour Militaire v. Miller*,⁸² a Belgian court made it clear that Belgian courts were adopting a similar view and that an order "should be disobeyed in view of its *manifest violation of a superior principle of humanity [and its] flagrantly illegal character . . . universally recognized as being contrary to law*."⁸³

Subsequent to World War II, German legislation was changed⁸⁴ expressly recognizing a soldier's right to disobey an order he believed to be criminal, but no guilt attaches if the order is obeyed and the soldier does not know, and it is not *apparent* to him that a crime or misdemeanor is thereby committed. Although there were some cases in which German courts have applied this principle,⁸⁵ there are others which cause one to

81. *Id.* at 667. See, for example, Lenz in *The Peleus*, 2 Ann. Dig. 436 (S. Ct. Leipzig 1921), reprinted in *THE PELEUS TRIAL*, *supra* note 48.

82. 16 Ann. Dig. 400 (1949).

83. *Id.* at 402 (emphasis added).

84. *THE TIMES* (London), Feb. 8, 1957.

85. See, e.g., *id.*; *THE TIMES* (London), Dec. 12, 1962; *THE TIMES* (London), Apr. 1, 1963.

wonder. In one instance a murder charge was reduced to manslaughter, for the accused were “little fishes sitting in the dock, while the sharks swim around free.”⁸⁶ However, it is difficult to appreciate how such a decision could have been reached since the accused were nurses participating in the Nazi euthanasia program and must have appreciated the illegality of injecting fatal doses, even on the instructions of doctors.

In the Israeli proceedings against *Eichmann*,⁸⁷ the accused acknowledged: “I see in this murder, in the extermination of Jews, one of the gravest crimes in the history of humanity. . . . I already realised at the time that this solution by the use of force was something unlawful, something terrible.”⁸⁸ Nevertheless, he pleaded superior orders. The Supreme Court, however, held them to be “*manifestly unlawful . . . contrary to the basic ideas of law and justice . . . [and Eichmann] performed the order of extermination at all times *con amore*, with full zeal and devotion to the task.*”⁸⁹

In the district court, Judge Halevy expressed himself in terms which were later used by the Yugoslav War Crimes Tribunal:

[T]he distinguishing mark of a “*manifestly unlawful order*” *should fly like a black flag above the order given, as a warning saying “Prohibited.”* Not formal unlawfulness, hidden or half-hidden, nor unlawfulness discernible only by the eyes of legal experts, is important here, but a *flagrant and manifest breach of the law, definite and necessary unlawfulness appearing on the face of the order itself, the clearly criminal character of the acts ordered to be done, unlawfulness piercing the eye and revolting the heart, be the eye not blind nor the heart stony and corrupt—that is the measure of “manifest unlawfulness”* required to release a soldier from the duty of obedience upon him and make him criminally responsible for his acts.⁹⁰

In light of the experience gained from the post-War decisions and to reduce the resort to the defense as well as to prevent arguments concerning *ex post facto* legislation, new editions of both the British and American

86. THE TIMES (London), Mar. 13, 1965.

87. *Israel v. Eichmann*, 36 I.L.R. 5 (D.C. 1961), 36 I.L.R. 277 (S. Ct. 1962) 257-58, 314-15, 318.

88. *Id.* at 258 (D.C.).

89. *Id.* at 315 (S. Ct.) (emphasis added).

90. *Id.* at 256 (D.C.) (emphasis added) (citing *Kafr Qassem* (Melinki) judgment, *supra* note 41, at 108).

manuals were issued. The 1951 edition of the *British Manual of Military Law* provides that if an order is “manifestly illegal, [a person] is under a legal duty to refuse to carry out the order and if he does carry it out he will be criminally responsible for what he does in doing so.”⁹¹

It goes on to say that even if the order relates to an act that is illegal, but not manifestly so, a subordinate will not be excused, although it may give rise to a defense on other grounds, such as reducing a charge to one of culpable negligence. The part of the *Manual* devoted to “The Law of War on Land” is very specific: “[O]bedience to the order of a government or superior, whether military or civil, or to a national law or regulation affords no defence to a charge of committing a war crime, but may be considered in mitigation of punishment.”⁹² No criminal liability will, however, lie in the face of physical compulsion against his will, or if his own life is in danger, unless the act involves the taking of innocent life. Otherwise threats are no defense, but may again mitigate punishment, as would compulsion arising from hunger or immediate danger to life or property.

The United States Field Manual, *The Law of Land Warfare*,⁹³ while making no reference to manifest unlawfulness, does say that armies are obliged to obey only “lawful orders,” and states that if an order results in a violation of the law of war, the order does not “constitute a defense in the trial of an accused individual, unless he did not know and *could not reasonably have been expected to know* that the act ordered was unlawful,”⁹⁴ but even then the order may result in the punishment being mitigated.

The American view of the law was examined in a series of cases arising from the operations in Korea and in Vietnam. Before looking at these, it might be beneficial to note what is stated in Winthrop’s *Military Law and Precedents*,⁹⁵ as well as the *Manual for Courts-Martial* of 1951.⁹⁶ According to Winthrop,

to justify an inferior in disobeying an order as illegal, the case must be an extreme one and the illegality not doubtful. The order must be clearly repugnant to some specific statute, to the law of

91. BRITISH MANUAL OF MILITARY LAW, *supra* note 56, pt. I, ch. V, § 23.

92. *Id.* pt. III, §§ 627-630 (1958).

93. U.S. DEP’T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE (1956) [hereinafter FM 27-10].

94. *Id.* at 509 (emphasis added).

95. WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS (2d ed. 1920).

96. MANUAL FOR COURTS-MARTIAL, UNITED STATES (1951) [hereinafter 1951 MCM].

military service, or to the general law of the land, the unlawfulness of the command must thus be a fact, and, in view of the authority of military orders emanating from official superiors, the onus of establishing this fact will in all cases—*except where the order is palpably illegal upon its face*—devolve upon the defense and clear and convincing evidence will be required to rebut the presumption.⁹⁷

The *Manual for Courts-Martial*, clearly reflecting Winthrop, states:

[T]o justify from a military point of view a military inferior in disobeying the order of a superior, the order must be one requiring something to be done which is *palpably a breach of law and a crime or injury to a third person*, or is of a serious character (not involving unimportant consequences only) and if done would not be susceptible of being righted. An order requiring the performance of a military duty or act cannot be disobeyed with impunity unless it has one of these characteristics. . . .⁹⁸

The *Manual* further states, however, that “an order requiring the performance of a military duty or act is presumed to be lawful and is disobeyed at the peril of the subordinate.”⁹⁹

Many of the United States cases have been concerned with the killing of prisoners of war. On this matter, the *Manual* provides:

[A] homicide committed in the proper performance of a legal duty is justifiable. Thus[,] . . . killing to prevent the escape of a prisoner if no other apparent means are adequate, killing an enemy in battle and killing to prevent the commission of an offense attempted by force or surprise . . . are causes of justifiable homicide. The general rule is that the acts of a subordinate, done in good faith in compliance with his supposed duty or orders, are justifiable. This justification does not exist, however, when those acts are manifestly beyond the scope of his authority, or the *order is such that a man of ordinary sense and understanding would know it to be illegal*, or the subordinate willfully or through negligence does acts endangering the lives of innocent

97. WINTHROP, *supra* note 95, at 575 (emphasis added).

98. 1951 MCM, *supra* note 96, at 416 (emphasis added).

99. *Id.* at 196B. See *United States v. Trani*, 3 C.M.R. 27 (C.M.A 1952).

persons in the discharge of his duty to prevent escape or effect an arrest.¹⁰⁰

A case that most clearly indicates the significance of these rules is *United States v. Kinder*,¹⁰¹ resulting from the killing of a Korean civilian who was in custody and not resisting, violent, or attempting to escape. The killing was ordered to scare other locals from entering the area in which the arrest took place and to boost troop morale. The officer responsible for the order returned a false report,¹⁰² as did Kinder on the officer's instructions. Kinder was sentenced to life imprisonment, reduced by the confirming officer to two years, a sentence which was approved by the Board of Review. Kinder testified that his officer had stated

that any orders that he gave were definitely not to be questioned in any way[,] . . . [and] he fully understood he was to obey the orders of [LT S] no matter what they were. He knew it would have been wrong to shoot the Korean without an order. He thought [LT S] had the authority to order the Korean shot. At the time he did not know the difference between a legal and an illegal order and [believed] that any order [LT S] gave him was legal. . . . He did not know what [LT S] would have done to him if he had not obeyed[,] but he does not believe he would have had him shot . . . for an offense without getting a trial.¹⁰³

The Board of Review found that

neither the laws of our nation, federal or military, . . . nor the laws and usages of war as recognized by our nation and its allies, justified the issuance of an order . . . to kill the victim under the circumstances shown. . . .

. . . [T]he superior officer issuing the order was fully aware of its illegality and . . . [he] maliciously and corruptly issued the unlawful order

. . . .

. . . [No justification will lie if the homicide is the result of an order] manifestly beyond the scope of the superior officer's

100. 1951 MCM, *supra* note 96, § 197 (emphasis added).

101. 14 C.M.R. 742 (A.F.B.R. 1954).

102. *See* *United States v. Schreiber*, 18 C.M.R. 226 (C.M.A. 1955).

103. *Kinder*, 14 C.M.R. at 763 (citation omitted).

authority and . . . *so obviously and palpably unlawful as to admit of no reasonable doubt on the part of a man of ordinary sense and understanding*. . . .

. . . [T]he conclusion is inescapable that the accused was aware of the criminal nature of the order, not only from the palpably illegal nature of the order itself, but from the surreptitious circumstances under which it was necessary to execute it[, and the fact that he received and complied with a further order to return a false report of the act]. . . .

Of controlling significance . . . is the *manifest and unmistakable illegality* of the order Human life being regarded as sacred, moral, religious and civil law proscriptions against its taking existing throughout our society, we view the order as commanding an act *so obviously beyond the scope of authority of the superior officer and so palpably illegal on its face as to admit of no doubt as to its unlawfulness to a man of ordinary sense and understanding*. The distance from the battle line and other circumstances . . . cannot be reasonably considered as furnishing any basis to *a man of ordinary sense and understanding* to assume that laws and usages of war . . . would justify the killing [N]o rational being of the accused's age [twenty], formal education [grade eleven], and military experience [two years] could have . . . considered the order lawful. Where one obeys an order to kill . . . for the apparent reason of making [the] death an example to others, the evidence must be strong, indeed, to raise a doubt that the slayer was not aware of the illegality of the order. . . . The inference of fact is compelling . . . that the accused complied with the palpably unlawful order fully aware of its unlawful character.¹⁰⁴

The Board then rejected the defense argument that all orders must be obeyed by citing the ruling in the *Einsatzgruppen* trial.

Even if, as a matter of training, members of the military are instructed that all orders, regardless of their character, are to be obeyed, this will not provide a defense. In *United States v. Keenan*,¹⁰⁵ a Marine was accused of unpremeditated murder in compliance with orders which were “in line

104. *Id.* at 770, 773-75 (emphasis added) (citation omitted).

105. 39 C.M.R. 108 (C.M.A. 1969).

with training received from the Marine Corps.”¹⁰⁶ However, the Board of Review confirmed the law officer’s summation that “Marine Corps training” would not constitute a defense:

[T]he acts of a Marine done in good faith and without malice, in compliance with the orders of a superior . . . [, are] justifiable, unless such acts are manifestly beyond the scope of his authority and *such that a man of ordinary sense and understanding would know them to be illegal*. Therefore, if you find beyond a reasonable doubt that the accused under the circumstances of his age and military experience could not have honestly believed that the order issued . . . “to be legal under the laws of war,” then the killing of the alleged victim was without justification. A Marine is a reasoning agent, who is under a duty to exercise judgment in obeying orders to the extent that when such orders are manifestly *beyond the scope of the authority* of the one issuing the order, and were *palpably illegal upon their face*, then the act of obedience to such orders will not justify acts pursuant to such illegal orders.¹⁰⁷

A decision by the Court of Appeal in Ghana goes even further in rejecting a defense based on compliance with national legislation or policy. The accused, Professor Schumann, had participated in the euthanasia program at Auschwitz and had fled to Ghana, from which Germany sought his extradition. He pleaded that the policy of extermination in which he participated was by order of his government and constituted a political offense, thus exempting him from extradition. In rejecting this defense, Lassey J.A. commented:

[I]n the present case . . . the evidence . . . shows that the mass killings complained of are the ordinary crimes against the person known to the Federal Republic of West Germany, but there is no doubt also that those killings were done in circumstances which were not entirely without some political significance. The . . . offences . . . were committed on the orders of the ruling political party in Germany at the time[,] and they were committed in fulfilment of the political programme of ambitions of the ruling party . . . prior to and during . . . the Second World War. . . . In those circumstances it is necessary to widen the

106. *Id.* at 117.

107. *Id.* (emphasis added).

scope of meaning of these magic words, “of a political character,” if only for reasons of humanity? . . .

[I]n order to determine the political character of the particular offence so as to make it not extraditable[,] there must necessarily be present at the time of the commission of the particular crime some element of organized or violent opposition or resistance to the execution of the planned policy of the ruling political party and the offence must be committed in the conflict which might result between the opposing parties. In this context[,] any such offence committed by the agent of the ruling political party seeking to carry out their principal’s orders or by agents of those who dislike or resist the carrying into effect of the particular political policy may be brought under the category of an offence “of a political character” and therefore excusable in extradition proceedings.

This . . . should be one of the tests in determining whether in the particular circumstances an offence committed against the municipal laws of a State by a national who has sought asylum or refuge in another State is of a political nature or not. Merely *carrying out wicked orders of plans of a governing political party by State agents* against the persons or properties of individuals or groups of individuals who manifestly do not demonstrate any organized violent resistance to the execution of those plans would not stamp the offence committed in such a situation with political character so as to afford the perpetrators an excuse from due prosecution. It is absolutely absurd to me . . . that what is clearly murder in one territory *in response to the superior orders of a ruling political party* against helpless victims in a lunatic asylum should not lie and the offender [should not be] extradited because it was done in obedience to superior orders of a governing political party . . . ¹⁰⁸

In light of the judgments herein quoted, it is evident that a distinction must be drawn between the “ordinary reasonable man” and the “ordinary reasonable soldier in battle.” Attention in military cases should be drawn to the personal condition of the accused, including his age, education, and military experience, as well as the surrounding circumstances in which he

108. *Ex parte Schumann*, 39 I.L.R. 433, 451-52 (Ghana Ct. of App. 1966) (emphasis added).

found himself. Some attention should be given to the length of time he had been in action, the nature of the hostilities, the type of enemy confronting him, and the methods of warfare conducted against him, all of which are likely to affect his judgment. However, care must be taken not to allow resentment, hatred, anger, revenge, or sorrow to overcome even a soldier's reasonable understanding of right and wrong. Thus, it should be clear to any soldier "of ordinary sense and understanding" that an order to enter a village in a "cleared area" and to exterminate all living beings regardless of age or sex, as was alleged to have occurred in Vietnam, would be "palpably unlawful." At the same time, care must be taken to ensure that prior publicity does not create a sentiment in the public that might have an adverse effect on the independence of the tribunal, whose members must, at all times, put any prejudices out of their minds.

From the point of view of a subordinate, any order given him implicitly carries with it some measure of duress in the form of the threat of punishment in the event of non-compliance. It is, therefore, necessary in all cases where the plea of superior orders is raised to consider whether the order has in fact been accompanied by any type of threats. This has become important in some of the decisions rendered by the tribunal established to try offenses committed in the former Yugoslavia.

It is perhaps enough to mention the *Erdemović* case,¹⁰⁹ in which the accused pleaded guilty to charges that he had participated in the unlawful shooting of a number of Muslims following the Bosnian take-over of Srebrenica, which had been established as a safe area by the Security Council. These offenses, unlike those discussed earlier, were committed during a non-international armed conflict and were, therefore, governed by common Article 3 of the 1949 Geneva Conventions, as well as Protocol II, 1977, annexed thereto. Erdemović explained that he had been ordered to take part in this massacre, but had in fact tried to save some of the victims:

[A]t first I resisted[,] and [another member of his squad] told me if I was sorry for those people that I should line up with them; and I know that this was not just a mere threat but that it could happen, because in our unit the situation had become such that the commander of the group has the right to execute on the spot

109. *Prosecutor v. Erdemović*, Nos. IT-96-22-T (Nov. 29, 1996) (Trial), IT-96-22-A (Oct. 7, 1997) (Appeal), available at <http://www.un.org/icty/judgement.htm>. See, e.g., Leslie C. Green, *Drazun Erdemović: The International Tribunal for the Former Yugoslavia in Action*, 10 LEIDEN J. INT'L L. 361 (1997).

any individual if he threatens the security of the group or in any other way he opposes the Commander of the group appointed by the Commander¹¹⁰

Interestingly enough, Erdemović did not plead duress or superior orders, but instead pleaded guilty. However, the prosecutor suggested to the Tribunal that in considering the significance of his having acted under orders, it should pay attention to

his low rank . . . [, which] suggests a greater pressure on him than on one holding a higher rank . . . [and that] the coercive elements described by [him], while not amounting to a defense, should be given consideration as a factor in mitigation of the sentence.¹¹¹

In the course of its judgment, the Tribunal reviewed post-World War II cases¹¹² and stated:

Although the accused did not challenge the manifestly illegal order he was allegedly given, the Trial Chamber would point out that according to the case-law referred to, in such an instance, the duty was to disobey rather [than] to obey. This duty to disobey could only recede in the face of the most extreme duress. . . .

. . . [W]hen assess[ing] the objective and subjective elements characterising duress or the state of necessity, it is incumbent . . . to examine whether the accused in his situation did not have the duty to disobey, whether he had the moral choice to do so or to try to do so. Using this rigorous and restrictive approach, the Trial Chamber relies not only on general principles of law as expressed in numerous national laws and case-law, but would also like to make clear through its unfettered discretion that the scope of its jurisdiction requires it to judge the most serious violations of international humanitarian law.

110. Prosecutor v. Erdemović, No. IT-96-22-*Tbis*, at 10, 11 (Mar. 5, 1998) (quoting Erdemović's testimony before the Trial Chamber on 5 July 1996).

111. *Erdemović*, IT-96-22-A.

112. In addition to the cases discussed above, see MARC J. OSIEL, *OBEYING ORDERS* (1998); NICO KEIJZER, *MILITARY OBEDIENCE* (1978); LESLIE C. GREEN, *SUPERIOR ORDERS IN NATIONAL AND INTERNATIONAL LAW* (1976); YORAM DINSTEIN, *THE DEFENCE OF OBEDIENCE TO SUPERIOR ORDERS IN INTERNATIONAL LAW* (1965).

With regard to crimes against humanity[, to which Erdemović had pleaded guilty], . . . the life of the accused and that of the victim are not fully equivalent. As opposed to ordinary law, the violation here is no longer directed at the physical welfare of the victim alone but at humanity as a whole. . . .

. . . .
. . . [T]here is a general principle of law common to all nations whereby the severest penalties apply for crimes against humanity in national legal systems. [The Chamber] thus concludes that there exists in international law a standard according to which a crime against humanity is one of extreme gravity demanding the most severe penalties, when no mitigating circumstances are present. . . .

. . . .
. . . [As to the issue of mitigation,] any reduction of the penalty stemming from the application of mitigating circumstances in no way diminishes the gravity of the crime. . . .

. . . .
. . . [T]ribunals have tended to show more leniency . . . where the accused . . . held a low rank in the military or civilian hierarchy. . . . [H]owever, . . . a subordinate defending himself on the grounds of superior orders may be subject to a lower sentence only in cases where the order of the superior effectively balances the degree of his guilt. If the order had no influence on the unlawful behaviour because the accused was already prepared to carry it out, no such mitigating circumstances can be said to exist. . . .

. . . .
It is therefore no longer a matter of questioning the principle of criminal responsibility, but rather one of evaluating the degree of the latter since, if the subordinate did indeed commit the offence against his will because he feared that disobedience would entail serious consequences, in particular for himself or his family, the Trial Chamber might then consider that his degree of responsibility is lessened and mitigate the sentence accordingly. In case of doubt whether the accused did actually act under the yoke of duress, the tribunals [examined] preferred to consider it a mitigating factor.¹¹³

113. *Erdemović*, No. IT-96-22-T, paras. 18-19, 31, 46, 53 (Nov. 29, 1996) (Sentencing Judgment) (citations omitted).

In assessing punishment, the Tribunal considered that

most important [are] the concepts of deterrence and retribution . . . [and] that in the context of gross violations of human rights which are committed in peace time, but are similar in their gravity to the crimes within the International Tribunal's jurisdiction, reprobation (or stigmatisation) is one of the appropriate purposes of punishment. One of the purposes of punishment for a crime against humanity lies precisely in stigmatising criminal conduct which has infringed a value fundamental not merely to a given society, but to humanity as a whole. . . .

. . . .
 . . . Without denying any rehabilitative and amendatory function to the punishment, especially given the age of the accused [twenty-three], his physical or mental condition [a Croat, whose common law wife and mother of his child was a Bosnian Serb], the extent of his involvement in the concerted plan (or systematic pattern) [he saved the life of at least one witness and confessed] which led to the perpetration of a crime against humanity, the Trial Chamber considers . . . that the concern for the above mentioned function of punishment must be subordinate to that of an attempt to stigmatise the most serious violations of international humanitarian law, and in particular an attempt to preclude their recurrence.¹¹⁴

Having weighed all the factors submitted in mitigation, the accused was sentenced to ten years imprisonment. Erdemović's appeal was rejected, but a new trial was ordered on the ground that the Trial Chamber erred in not explaining to him the implications of a guilty plea. At the retrial his sentence was reduced.

It is significant that the Tribunal applied principles regarding superior orders that had evolved at least since 1945, regardless of the fact that neither of the 1977 Geneva Protocols makes any reference to this issue. In fact, a lengthy debate took place during the drafting Conference concerning a proposed Article 77 to Protocol I:

1. No person shall be punished for refusing to obey an order of his government or of a superior which, if carried out, would con-

114. *Id.* paras. 64, 66.

stitute a grave breach of the provisions of the Conventions or of the present Protocol.

2. The fact of having acted pursuant to an order of his government or of a superior does not absolve an accused person from penal responsibility if it be established that, in the circumstances at the time, he should have reasonably known that he was committing a grave breach of the Conventions or of the present Protocol and that he had the possibility of refusing to obey the order.¹¹⁵

This proposal reflected what had become a clearly accepted attitude, but failed to receive the necessary two-thirds majority in Plenary. In explaining its negative vote, the United States maintained that it did not consider the proposal to go far enough, since it was limited to "grave breaches."¹¹⁶ Others feared that such a proposal would endanger military discipline, while Canada indicated that it regarded the proposal as

broadly in accordance with existing international law, which continues to operate in so far as breaches of the Conventions and the Protocol are concerned. . . . We agree that under customary international law an accused is unable to plead as a defence that the criminal act with which he was charged was in compliance with superior orders that had been given to him. While denying this avenue of defence, the Canadian delegation is aware that compliance with an order which the accused knew or should have known was clearly unlawful may be taken into consideration by way of mitigation of punishment.¹¹⁷

In the light of what has been stated above, it is submitted that members of the armed forces should be informed by their national authorities that they are to behave in accordance with the following principles:

- (1) Lawful orders issued by superiors to subordinates under their command shall be obeyed by those subordinates;
- (2) There shall be a presumption that all orders issued by superiors to their subordinates are in fact legal;

115. HOWARD S. LEVIE, *PROTECTION OF WAR VICTIMS* 1 (Supp. 1985).

116. *Id.* at 44.

117. *Id.* at 40-41.

- (3) If an order obviously/palpably entails the commission of a criminal act it shall not be obeyed;
- (4) No subordinate shall be liable to trial or disciplinary proceedings for failing to obey such an order;
- (5) Should a subordinate obey such an order, the surrounding circumstances shall be taken into consideration in order to ascertain whether the order may be pleaded in mitigation of punishment. The tribunal shall also examine the personal characteristics, such as age, education and intelligence of the accused, in considering mitigation; and
- (6) In assessing whether the order in question obviously involves the commission of a criminal act, the tribunal shall examine whether the order was so obvious to other persons in similar circumstances as the accused, that is to say, not to the reasonable man, but to the reasonable soldier faced with the same factual situation as the accused.

As was stated at the beginning of this lecture, the principle of command responsibility¹¹⁸ has as ancient a history as superior orders, and similarly can be traced back to as early as the fifteenth century,¹¹⁹ and by Shakespeare's time was well established enough for him to acknowledge it in, for example, *The Rape of Lucrece*, *Anthony and Cleopatra*, and *Henry V*.¹²⁰

Almost five hundred years later, as recently as 1941, we find Field Marshal von Rundstedt issuing an order to his troops which is almost identical with that of Charles VII in 1439:

Ref.: Combating anti-Reich elements

The investigation and combating of anti-Reich tendencies and elements (Communists, Jews and the like), in so far as these are not incorporated into the enemy army, are the *sole* responsibility of the Sonderkommandos of the Security Police and the SD in the occupied areas. The Sonderkommandos have sole responsibility for taking the measures necessary to this end.

118. See W. Hays Parks, *Command Responsibility for War Crimes*, 62 MIL. L. REV. 1 (1973) (providing a general discussion of this topic, especially by the United States tribunals).

119. See *supra* note 3 and accompanying text.

120. See THEODOR MERON, *BLOODY CONSTRAINT: WAR AND CHIVALRY IN SHAKESPEARE* 156-66 (1998).

Unauthorized action on the part of individual Wehrmacht members or participation of Wehrmacht members in the excesses of the Ukrainian population against Jews is forbidden, as is watching or photographing the Sonderkommandos' measures. This prohibition is to be made known to members of all units. *The disciplinary superiors of all ranks are responsible for ensuring that this prohibition order is complied with. In the event of violation, the case in question will be examined to ascertain whether the superior has failed to fulfil his supervisory duty. If this is the case he is to be punished severely.*¹²¹

While there was no black letter law on the subject and no judicial decisions indicating its content, international practice confirmed the reality of command responsibility, even to the extent of seeking to make heads of state, who according to accepted international law enjoy impunity, liable for activities which were committed during conflict and regarded, at least by the victors, as criminal. Thus, after Napoleon escaped from Elba, to which he had withdrawn by agreement, and returned to France and raised the *Grande Armée*, the Congress of Vienna issued a declaration that by so doing, he had

destroyed the sole legal title upon which his existence depended[,] . . . placed himself outside the protection of the law, and manifested to the world that it can have neither peace nor truce with him . . . [, and had put himself outside] civil and social relations, and that, as Enemy and Perturbator of the World, he has incurred liability to public vengeance.¹²²

Although Blucher, basing himself on this declaration, would have had Napoleon shot as an "outlaw," after his capture Napoleon was exiled to St. Helena as a prisoner of the British.

That the Great Powers of the nineteenth century were, nevertheless, not prepared to make individual liability, whether by superior or subordinate, a legal obligation may be seen from Article 3 of Hague Convention IV, 1907: "A belligerent party which violates the provisions of the said Regulations [annexed to the Convention] shall, if the case demands, be lia-

121. Supreme Command, Army Group South, Ic/AO (Abw. III) (Sept. 24, 1941), translated in ERNST KLEE, WILLI DRESSEN & VOLKER RIESS, *THE GOOD OLD DAYS: THE HOLOCAUST AS SEEN BY ITS PERPETRATORS AND BYSTANDERS* 116 (1988) (emphasis added).

122. UNITED NATIONS WAR CRIMES COMMISSION, *HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION* 242 n.1(c) (1948).

ble to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.”¹²³

It did not take long, however, in view of events occurring during World War I, for attitudes to change. As previously discussed, the Treaty of Versailles postulated personal responsibility in the case of German personnel accused of war crimes. The victors did not, however, consider this to be adequate and were anxious to place responsibility for the conflict and all its consequences at the highest level. Accordingly, the Preliminary Peace Conference appointed a Commission to consider the responsibility of the authors of the war. In its report, the Commission expressed the view that the war had been conducted by the Central Powers by

barbarous methods in violation of the established laws and customs of war and the elementary laws of humanity In the hierarchy of persons in authority, there is no reason why rank, however exalted, should in any circumstances protect the holder of it from responsibility when that responsibility has been established before a properly constituted tribunal. All persons belonging to enemy countries, however high their position may have been, without distinction of rank, including Chiefs of Staff, who have been guilty of offences against the laws and customs of war or the laws of humanity, are liable to criminal prosecution. This even extends to the heads of States. . . . The ex-Kaiser and others in high authority were cognizant of and could at least have mitigated the barbarities committed during the course of the war. A word from them would have brought about a different method in the actions of their subordinates on land, at sea and in the air. . . . [T]o uphold the immunity of the Head of State would involve laying down the principle that the greatest outrages against the laws and customs of war and the laws of humanity, if proved against him, could in no circumstances be punished.¹²⁴

There was no suggestion in the report that Wilhelm II had personally directed or ordered any act against a single individual that was contrary to the laws and customs of war. Both the United States and Japan opposed

123. Hague Convention IV Respecting the Laws and Customs of War on Land, art. 3, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539 [hereinafter Hague Convention IV], *reprinted in* THE LAWS OF ARMED CONFLICTS, *supra* note 49, at 63.

124. 14 AM. J. INT'L L. 95, 117 (Mar. 19, 1919).

this proposal directed against a head of State, but the Treaty of Versailles provided:

The Allied and Associated Powers publicly arraign William II of Hohenzollern, formerly Emperor of Germany, for a supreme offence against international morality and the sanctity of treaties.

A tribunal will be constituted to try the accused, thereby assuring him the guarantees essential to the right of defence. It will be composed of five judges, one appointed by each of the following Powers: namely, the United States of America, Great Britain, France, Italy and Japan.

In its decision the tribunal will be guided by the highest motives of international policy, with a view to vindicating the solemn obligations of international understandings and the validity of international morality. It will be its duty to fix the punishment which it considers should be imposed.

The Allied and Associated Powers will address a request to the Government of the Netherlands [—wherein Wilhelm had sought asylum—] for the surrender to them of the Ex-Emperor in order that he may be put on trial.¹²⁵

Interestingly, the treaty does not talk of “crimes against international law,” but of “a supreme offence against international morality [—whatever that may mean—] and the sanctity of treaties,”¹²⁶ and it does not require that the trial be in accordance with law. In fact, when the German delegation opposed the inclusion of the article in the treaty, the Allies bluntly stated that the war was

the greatest crime against humanity and the freedom of peoples that any nation calling itself civilized has ever consciously committed . . . [;] a crime deliberately against the life and liberties of the people of Europe [However,] the public arraignment under Article 227 framed against the German ex-Emperor has not a juridical character as regards its substance, but only in its form. The ex-Emperor is arraigned as a matter of high international policy, as the minimum of what is demanded for a supreme

125. Treaty of Versailles, June 28, 1919, art. 227, 225 Consol. T.S. 189, 285.

126. *Id.*

offence against international morality, the sanctity of treaties[,] and essential rules of justice. The Allied and Associated Powers have decided that judicial forms, a judicial procedure[,] and a regularly constituted tribunal should be set up in order to assure the accused full rights and liberties in regard to his defence, and in order that the judgment should be of the utmost solemn character.¹²⁷

Since The Netherlands refused to surrender Wilhelm, no trial ever took place, and it is impossible to know what contribution to development of the law regarding command responsibility would have been made by a tribunal “guided by the highest motives of international policy” in order to vindicate the validity of “international morality.”

Similarly unsuccessful was the attempt by France, Great Britain, and Russia to try the political leaders of the Ottoman Empire for the Armenian atrocities, which were denounced as “crimes against humanity and civilization for which the members of the Turkish government will be held responsible together with its agents implicated in the massacres.”¹²⁸

A provision was included in the Treaty of Sèvres to enable trials to take place with respect to war crimes and the massacres,¹²⁹ but Turkey refused to sign the treaty, and no similar clause appears in the subsequent Treaty of Lausanne.¹³⁰

The issue of command responsibility came up for judicial examination after World War II. Perhaps one of the clearest cases ever in which a superior accepted direct responsibility was that of Eck, commander of the U-boat which sank *The Peleus*. The Judge Advocate pointed out that “Eck does not rely upon the defence of superior orders. He stands before you

127. HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION, *supra* note 122, at 240.

128. *See supra* note 5.

129. Treaty of Peace Between the Allied and Associated Powers and Turkey, arts. 226-30, signed at Sèvres, Aug. 10, 1920 (never adopted; superceded by Treaty of Lausanne (1923)), available at <http://www.lib.byu.edu/~rdh/wwi/versa/sevres1.html>.

130. Treaty of Peace with Turkey, signed at Lausanne, July 24, 1923, *reprinted in* 18 AM. J. INT’L L. 1 (Supp. 1924).

taking the sole responsibility of the command which he issued upon himself,"¹³¹ and he was sentenced to death.

A more senior officer who was sentenced to death as a result of passing on illegal orders, to which he added a supplement of his own, was General von Falkenhorst. He was charged with transmitting the Führerbefehl ordering the execution of captured commandos, to which he added: "Should it prove advisable to spare one or two men in the first instance for interrogation reasons, they are to be shot immediately after their interrogation."¹³²

The court accepted the Judge Advocate's summary of the prosecution view that

a soldier of experience, General von Falkenhorst, must be taken to know the elementary rules and usages of war, and that he must have realized that it was a breach of the laws and rules laid down for the benefit of a prisoner of war, to issue an order which said that people should be shot within twenty-four hours of being captured, without immediate provision at any rate of some reasonable method of trial to establish their guilt as having done something which was a war crime. . . . [The] Prosecution say he should not have issued these orders; he knew it was wrong; they are in fact a breach of the laws and usages of war; . . . [the Prosecution] say not only did he issue orders but he allowed them to be implemented in the sense that quite a number of British soldiers and sailors and Norwegians were being handed over to [the S.D.] which at the time he and everybody else in Germany must have realized was likely to cause great danger, to put it at the least, to anybody who was handed over. . . . They say there was no justification for it, and that the accused cannot come here and say, "What I did I was made to do by the F[ue]hrer."¹³³

The sentence on von Falkenhorst was, however, commuted to twenty years.

A careful analysis of the responsibility of a commander for passing an illegal order is in *The German High Command Trial*,¹³⁴ in which the

131. THE PELEUS TRIAL, *supra* note 48, at 128.

132. TRIAL OF NIKOLAUS VON FALKENHORST 9 (E.H. Stevens ed., 1949).

133. *Id.* at 238.

American tribunal appeared to take a more generous view of responsibility for transmitting illegal orders than had the British court martial in von Falkenhorst:

[I]t is urged that a commander becomes responsible for the transmittal in any manner whatsoever of a criminal order. Such a conclusion this Tribunal considers too far-reaching. The transmittal through the chain of command constitutes an implementation of an order. Such orders carry the authoritative weight of the superior who issues them and of the subordinate commanders who pass them on for compliance. The mere administrative function of transmitting an order directed by a superior authority to subordinate units, however, is not considered to amount to such implementation by the commander through whose headquarters such orders pass. Such transmittal is a routine function which in many instances would be handled by the staff of the commander without being called to his attention. The commander is not in a position to screen orders to be transmitted. His headquarters, as an implementing agency, has been bypassed by the superior command. Furthermore, a distinction must be drawn as to the nature of the criminal order itself. Orders are the basis upon which the army operates. . . .

Many of the defendants here were field commanders and were charged with heavy responsibilities in active combat and their legal facilities were limited. They were soldiers—not lawyers. Military commanders in the field with far-reaching military responsibilities cannot be charged under International Law. Such a commander cannot be expected to draw fine distinctions and conclusions as to legality in connection with orders issued by his superiors. He has the right to assume in the absence of specific knowledge to the contrary, that the legality of such orders has been properly determined before their issuance[, and today he might properly make this assumption in view of the presence of a legal adviser at the higher echelon]. He cannot be held criminally responsible for a mere error of judgment as to disputable legal questions.

134. 12 UNITED NATIONS WAR CRIMES COMMISSION, LAW REPORTS OF WAR CRIMINALS 1 (1948).

It is therefore considered to find a commander criminally responsible for the transmittal of such an order, he must have passed the order to the chain of command, and the order must be one that is criminal upon its face, or one which he is shown to have known was criminal. . . . The act or neglect must be voluntary and criminal. . . . From an international standpoint, criminality may arise by reason that the act is forbidden by international agreements or is inherently criminal and contrary to accepted principles of humanity as recognized and accepted by civilized nations.¹³⁵

The major difference between this statement and Falkenhorst is that in the latter the Führerbefehl was considered to be common knowledge and there was the additional criminal order of his own.

There is no need to discuss the *Nuremberg Judgement* in this connection since the statute establishing the Tribunal is specific on this matter. The last phrase of Article 6, which defines the offences over which the Tribunal has jurisdiction, simply states: "leaders, organizers, instigators[,] and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes [aggression, war crimes and crimes against humanity] are responsible for all acts performed in execution of such plan."¹³⁶ Article 7 is even more dogmatic: "The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment."¹³⁷

Those accused at Nuremberg who held political and military positions sufficiently high to indicate that they must have been parties to the planning of the war were found guilty under these provisions, while Dönitz, who had assumed headship of the State, was among those condemned, although no mention was made in the Judgment of his exalted position.

Perhaps the two most important cases on command responsibility to have come out of World War II were those of *Yamashita* and *Meyer*. Yamashita, General Officer Commanding Japanese forces in the Philippines, was charged before a United States Military Commission with fail-

135. *Id.* at 73-77. Note that the last phrase of the quotation appears to be a paraphrase of the Martens Clause.

136. Statute Establishing the United Nations War Crimes Commission, art. 6, reprinted in *THE LAWS OF ARMED CONFLICTS*, *supra* note 49, at 911, 916.

137. *Id.* art. 7.

ing to prevent, terminate, or punish those of his subordinates who were committing war crimes in a widespread fashion. The Commission found:

[T]he crimes committed were so extensive and widespread, both as to time and area, that they have been wilfully permitted by the accused, or secretly ordered by the accused. . . . As to the crimes themselves, complete ignorance that they had occurred was stoutly maintained by the accused, further, that all such acts, if committed, were directly contrary to the announced policies, wishes[,] and orders of the accused. The Japanese Commanders testified that they did not make personal inspections or independent checks during the Philippine campaign to determine for themselves the established procedures by which their subordinates accomplish their missions. Taken at full face value, the testimony indicates that Japanese senior commanders operate in a vacuum, almost in another world with respect to their troops, compared with standards American Generals take for granted. [—One may perhaps question whether every Army is expected to behave in the same way as that of the officers trying an accused?—]

. . . .

This accused is an officer of long years of experience, broad in its scope, who has had extensive command and staff duty in the Imperial Japanese Army in peace as well as war. . . . Clearly, assignment to command military troops is accompanied by broad authority and heavy responsibility. This has been true in all armies throughout recorded history. It is absurd, however, to consider a commander a murderer or rapist because one of his soldiers commits a murder or a rape. Nevertheless, where murder and rape and vicious, revengeful actions are widespread offences, and there is no effective attempt by a commanding officer to discover and control the criminal acts, such a commander may be held responsible, even criminally liable, for the acts of his troops, depending upon their nature and the circumstances surrounding them. Should a commander issue orders that lead directly to lawless acts, the criminal responsibility is definite and has always been so understood¹³⁸

138. 4 UNITED NATIONS WAR CRIMES COMMISSION, LAW REPORTS OF WAR CRIMINALS 1, 34-35 (1945).

After the dismissal of his appeal to the Supreme Court of the United States,¹³⁹ Yamashita was executed.

In some ways the Canadian case involving *Brigadeführer Kurt Meyer* is even clearer on the issue of command responsibility. Meyer was charged with having incited his men to deny quarter, and having ordered or been responsible for the shooting of a number of Canadian prisoners at his headquarters. He was found responsible for inciting and counselling, though not for directly ordering the execution. In the course of his summing-up, the Judge Advocate, as legal adviser to the tribunal, stated:

[A]n officer may be convicted of a war crime if he incites and counsels troops under his command to deny quarter, whether or not persons were killed as a result thereof. It seems to be common sense to say that not only those members of the enemy who unlawfully kill prisoners may be charged as war criminals, but also any superior military commander who incites and counsels his troops to commit such offences. . . . [The] broad question, "When may a military commander be held responsible for a war crime committed by men under his command in the sense that he may be punished as a war criminal?" is not easily answered [T]he facts proved by the prosecution must be such as to establish the responsibility of the accused

[A] military commander is [not] in every case liable to be punished as a war criminal for every war crime committed by his subordinates, but once certain facts have been proved . . . , there is an onus cast upon the accused to adduce evidence to negative or rebut the inference of responsibility which the Court is entitled to make The rank of the accused, the duties and responsibilities of the accused by virtue of the command he held, the training of the men under his command, their age and experience, anything relating to the question whether the accused either ordered, encouraged or verbally or tacitly acquiesced in the killing of prisoners, or wilfully failed in his duty as a military commander to prevent, or to take action as the circumstances required to endeavour to prevent, the killing of prisoners are matters affecting the question of the accused's responsibility. In the last analysis, it is for the Court, with its vast knowledge and experience of military matters [—this indicates that a war crimes

139. *In re Yamashita*, 327 U.S. 1 (1946).

tribunal should always include at least some military personnel —], to determine, in the light of the relevant factors . . . , the responsibility of an accused in any particular case. . . .

The giving of the order may be proved circumstantially. . . . [I]t is not necessary for [the court] to be convinced that a particular or formal order was given but you must be satisfied before you convict, that some words were uttered or some clear indication was given by the accused that prisoners were to be put to death¹⁴⁰

In the instant case, the fact that a non-commissioned officer was present at the time of the shooting raised a presumption that the latter was aware of the fact that the commander would not disapprove of what had occurred.

It is extremely unlikely that senior field officers issuing illegal orders will be present when such orders are carried out. In fact, responsibility may arise even in the absence of a junior officer. In the Israeli case arising from the *Kafr Qassem* massacre, involving peaceful Arab villagers returning home after a curfew of which they had no knowledge had been announced, Lieutenant D, one of the accused, pleaded that he was carrying out an order originally issued by Brigadier S and transmitted by Major M. The Military Court of Appeal stated:

D's responsibility for the acts of [his] men derives from his order to fire . . . which he issued to his unit This makes D liable for procuring an offence under the . . . Criminal Code Although D was not present [when the] squad committed the murders[,] . . . he was patrolling in the village, driving his car, and from time to time appeared near the area from which the firing took place, he was aware of what was taking place . . . [,] and did not take any measures to stop the killings. Under these circumstances, bearing in mind his authority [over the group], his omission to act to stop the killings is the same as being an accessory to the offence. . . . There is no doubt that the death of all the victims . . . was the probable result of M's order, even though as regards perhaps most of them there was no intention of murder .

140. Brigadeführer Kurt Meyer, unpublished transcript, at 839-45. An abbreviated, but not very helpful, report appears in 4 United Nations War Crimes Commission, LAW REPORTS OF WAR CRIMINALS 97 (1945).

. . . A reasonable soldier can distinguish a *manifestly illegal order on the face of it*, without requiring legal counsel and without perusing the law books. These provisions impose legal and moral responsibility on every soldier, irrespective of rank. . . .

[A] commander of any rank must consider the morality of the order he issues and also its legality The commander who issued the original order and not in obedience to any superior, has no claim to justification Commanders . . . [are obligated] to give thought in issuing their orders and the higher the rank the greater the thought required of them. Such thought is required so that the orders will not cause illegal and immoral acts, so that the soldiers will not be led to undermine army discipline [by disobedience] It is the duty of the commander to obey the law at all times The order to kill men, women and children [was] an order to murder, and no claim of justification will avail anyone who gives or executes such an order¹⁴¹

Somewhat similar to the reasoning of the Israeli court is that of the charge to the jury by the military judge, Colonel Kenneth Howard, in *United States v. Medina* arising from the My Lai massacre during the Vietnam conflict. Colonel Howard stated that

as a general principle of military law and custom[,] . . . after taking action or issuing an order, a commander must remain alert and make timely adjustments as required by a changing situation. Furthermore, a commander is also responsible if he has actual knowledge that troops or other persons subject to his control are in the process of committing or are about to commit a war crime and he wrongly fails to take the necessary and reasonable steps necessary to ensure compliance with the law of war These legal requirements placed upon a commander require actual knowledge plus a failure to act. Thus mere presence at the scene will not suffice. That is, the commander-subordinate relationship alone will not allow an inference of knowledge. While it is not necessary that a commander actually see an atrocity being committed, it is essential that he know that his subordinates are in the process of committing atrocities or are about to commit atrocities. . . . In order to find the accused guilty . . . ,

141. *Melinki v. Chief Military Prosecutor*, translated in 2 PALESTINE Y.B. INT'L L. 69 (1956) (emphasis added).

you must be satisfied . . . beyond reasonable doubt . . . [:] (2) That [the] deaths resulted from the omission of the accused in failing to exercise control over subordinates subject to his command after having gained knowledge that his subordinates were killing non-combatants . . . ; (3) That this omission constituted culpable negligence; [and] (4) That the killing . . . by subordinates of the accused, and under his command, was unlawful [The] killing of a human being is unlawful [when] done without justification.¹⁴²

In the light of this summation, the jury acquitted Medina.

Closely connected with *Medina* was the decision by Major General Koster, his commander, not to undertake a proper investigation of the My Lai incident. The decision not to prosecute Koster was reviewed by the Secretary of Defense, and he was subjected to a number of disciplinary punishments, including withdrawal of his Distinguished Service Medal. While the Secretary's comments do not amount to a judicial decision, they may be given the same weight since Koster's appeal against them was dismissed by the United States Court of Claims:

[A]lthough free of personal culpability with respect to the murders themselves, [Koster was] personally responsible for the inadequacy of subsequent investigations, despite whatever failures may have been ascribed to his subordinates.

A commander is not, of course, personally responsible for all criminal acts of his subordinates. In reviewing General Koster's case, I have also excluded as a basis for administrative action the isolated acts or omissions of subordinates. But a commander clearly must be held responsible for those matters which he knows to be of serious import, and with respect to which he assumes personal charge. Any other conclusion would render essentially meaningless and unenforceable the concepts of great command responsibility accompanying senior positions of authority.

....

There is no single area of administration in the Army in which strict concepts of command liability need more to be enforced

142. United States v. Medina, No. 427162 (Sept. 22, 1971) (acquittal) (original record of trial on file with the Clerk of the Court, U.S. Army Judiciary, Arlington, Virginia).

than with respect to vigorous investigations of alleged misconduct.¹⁴³

One of the most extensive studies of the principle of command responsibility is found in the *Report of the Commission of Inquiry*¹⁴⁴ appointed by Israel after the massacres in the Sabra and Shatila refugee camps in Lebanon—a massacre carried out by Lebanese personnel held to be under Israeli control. Evidence indicated that senior officers of the Israel Defense Force acknowledged their insensitivity as to what was happening in the camps and put this forward to account for their failure to act. The Commission absolved the State of Israel from any responsibility, but commented:

If it indeed becomes clear that those who decided on the entry of the [Lebanese] Phalangists into the camps should have foreseen—from the information at their disposal and from things which were common knowledge—that there was danger of a massacre, and no steps were taken which might have prevented the danger or at least greatly reduced the possibility that deeds of this type might be done, then those who made the decisions and those who implemented them are indirectly responsible for what ultimately occurred, even if they did not intend this to happen and merely disregarded an anticipated danger. A similar indirect responsibility also falls on those who knew of the decision [to allow the Phalangists into the camps]; it was their duty, by virtue of their position and their office, to warn of the danger, and they did not fulfill this duty. It is also not possible to absolve of such indirect responsibility those persons who, when they first received the first reports of what was happening in the camps, did not rush to prevent the continuance of the Phalangists' actions, and did not do everything within their power to stop them.¹⁴⁵

The Commission was aware that Israel had not accepted any treaty obligation concerning command responsibility, which appears in Protocol

143. *Koster v. United States*, 685 F.2d 407, 410, 414 (Ct. Cl. 1982) (quoting Secretary of the Army Resor's Memorandum).

144. REPORT OF THE COMMISSION OF INQUIRY INTO THE EVENTS AT THE REFUGEE CAMPS IN BEIRUT, 8 FEBRUARY 1983, 22 I.L.M. 473 (1983) [hereinafter KAHAN REPORT], available at <http://www.mfa.gov.il/mfa/go.asp?MFAH0ign0>.

145. *Id.* at 496.

I, 1977,¹⁴⁶ to which Israel is not a party, and also of the fact that there was no “war” and that Lebanon was not a “hostile” territory. Nevertheless,

[i]f the territory of West Beirut may be viewed at the time of the events as occupied territory—and we do not determine that such indeed is the case from a legal perspective—then it is the duty of the occupier, according to the rules of usual and customary international law, to do all it can to ensure the public’s well-being and security. . . . [A]s far as the obligations applying to every civilized nation and the ethical rules accepted by civilized peoples go, the problem of indirect responsibility cannot be disregarded.

...

. . . [T]he development of ethical norms in the world public requires that the responsibility be placed not just on the perpetrators, but also on those who could and should have prevented the commission of these deeds which must be condemned.¹⁴⁷

It was not only senior Israeli military officers whose responsibility came under scrutiny by the Kahan Commission. Then Minister of Defence Sharon had assumed the role of Supreme Commander of “Peace for Galilee War,” during which the massacre occurred, and his responsibility also became relevant. Thus, even though he had received no direct warning of what might occur,

it is impossible to justify the Minister of Defence’s disregard of the danger of a massacre. . . . There was the widespread knowledge regarding the Phalangists’ combat ethics, their feelings of hatred towards the Palestinians, and their leaders’ plans for the future of the Palestinians when said leaders would assume power. Besides this general knowledge, the Defence Minister also had special reports from his not inconsiderable meetings with the Phalangist heads. In the circumstances that prevailed after [the president-elect’s] assassination, no prophetic powers were required to know that concrete danger of acts of slaughter existed when the Phalangists were moved into the camps without the Israel Defence Force being with them . . . and without the IDF being able to maintain effective and ongoing supervision of

146. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, arts. 86-87, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I].

147. KAHAN REPORT, *supra* note 144, at 496.

their actions there. The sense of such a danger should have been in the conscience of every knowledgeable person who was close to this subject, and certainly the consciousness of the Minister of Defence, who took an active part in everything relating to the war. His involvement in the war was deep, and the connection with the Phalangists was under his constant care. If in fact the Defence Minister, when he decided that the Phalangists would enter the camp without the IDF taking part in the operation, did not think that that decision would bring about the very disaster that in fact occurred, the only possible explanation for this is that he disregarded any apprehension about what was to be expected.

. . .

It was the duty of the Defence Minister to take into account all the reasonable considerations for and against having the Phalangists enter the camps and to disregard entirely the serious considerations militating against such action, namely that the Phalangists were liable to commit atrocities and that it was necessary to forestall this possibility as a humanitarian obligation. . . [He] made a grave mistake when he ignored the danger of acts of revenge and bloodshed by the Phalangists against the population in the refugee camps. . . [R]egarding his responsibility, it is sufficient to assert that no order was issued to the IDF to adopt suitable measures. Similarly, in his meetings with the Phalangist commanders, [he] made no attempt to point out to them the gravity of the danger that their men would commit acts of slaughter. . . Had it become clear to [him] that no real supervision could be exercised over the Phalangist forces that entered the camps with the IDF's consent, his duty would have been to prevent their entry. . . Responsibility is to be imputed to the Minister of Defence for having disregarded the danger of acts of vengeance and bloodshed by the Phalangists against the population of the refugee camps, and having failed to take this danger into account when he decided to have the Phalangists enter the camps. In addition, responsibility is to be imputed to the Minister of Defence for not ordering appropriate measures for preventing or reducing the danger of massacre as a condition for the Phalangists' entry into the camps. The blunders constitute the non-fulfillment of a duty with which the Minister of Defence was charged.¹⁴⁸

148. *Id.* at 502-03.

Despite the fact that the Commission recommended that administrative action be taken against the senior Israeli officers involved, which was done, it tended to disregard its own comments concerning Sharon's responsibility, basing itself on the finding that he had been informed that the operation had terminated and the Phalangists ordered to withdraw. One can only conclude that the Minister of Defence got off lightly!

Kafr Qassem, Medina, and Koster, together with the Kahan Commission Report, all emphasise that the problem of command responsibility does not only arise when trying enemies for offenses against the law of armed conflict. The members of one's own forces are equally expected to appreciate the reality and significance of this concept, whether they are involved in a "recognized" war or not. This portion of the examination of the issue may be terminated by citing *Dishonoured Legacy*, the Report of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia. This Report examined both accountability and responsibility in assessing the liability of senior officers for what had happened and whether there had been a "cover-up."

[A]ccountability is the mechanism for ensuring conformity to standards of action. In the military, this means that those called upon to exercise substantial power and discretionary authority must be answerable (i.e., subject to scrutiny, interrogation and, ultimately, commendation or sanction) for all activities assigned or entrusted to them. In any properly functioning system or organization, there should be accountability for actions, whether those actions are executed properly and lead to a successful result or are carried out improperly and produce injurious consequences. Accountable leaders cannot shelter behind the actions of their subordinates. Accountable officials are always answerable to their superiors. . . .

In any organization[,] . . . those at the apex should be accountable for the actions and decisions of those in the chain of authority who are subordinate to them. In a properly linked chain of command, accountability does not become attenuated the further removed one is from the source of the activity. When the subordinate fails, that failure is shouldered by all who are responsible and exercise the requisite authority—subordinate, superior, and superior to the superior. The term responsibility is not synonymous with accountability. One who is authorized to act or exercise authority is "responsible." Responsible officials

are held to account. An individual who exercises powers while acting in discharge of official functions is responsible for the proper exercise of the powers or duties assigned. . . .

[R]esponsible officials include supervisors or delegates or agents who act on behalf of a superior officer. All are responsible for their actions and can be held to account for what goes wrong on their watch. One cannot delegate responsibility (and hence accountability) even if the authority to act has been delegated. It is the responsibility of those entrusted with authority, those who exercise authority, and those who delegate authority to act to others to know what is transpiring in the area of their assigned authority. Even if subordinates, whose duty it is to inform their superior of all relevant facts, circumstances, and developments, fail to fulfil their obligations, this cannot absolve the superior of responsibility for what has transpired. Ignorance of significant facts bearing on the discharge of an important responsibility does not often provide an adequate excuse for those who lead or are responsible when the time comes to account. In the military, unlimited liability and unrestricted access to the use of force impose a premium on those entrusted with the responsibility of leadership. These principles of accountability and their corollaries are the yardstick by which we have assessed the actions and decisions of senior leaders with respect to . . . the Somalia deployment.¹⁴⁹

The effect of the *Yamashita* and *Meyer* decisions may be seen in the *British Manual of Military Law*:

In some cases military commanders may be responsible for war crimes committed by subordinate members of the armed forces or other persons subject to their control. Thus, for example, when troops commit, or assist in the commission of, massacres against the civilian population of occupied territories, or against prisoners of war, the responsibility may rest not only with the actual perpetrators but also with the commander. Such responsibility arises directly when the acts in question have been committed in pursuance of an order of the commander concerned.

149. 1 REPORT OF THE COMMISSION OF INQUIRY INTO THE DEPLOYMENT OF CANADIAN FORCES TO SOMALIA 21-22 (1997). See also 2 REPORT OF THE COMMISSION OF INQUIRY INTO THE DEPLOYMENT OF CANADIAN FORCES TO SOMALIA ch. 16 (1997).

The commander is also responsible if he has actual knowledge or should have knowledge through reports received by him through other means, that troops or other persons subject to his control are about to commit or have committed a war crime and he fails to use the means at his disposal to ensure compliance with the law of war.¹⁵⁰

The United States manual, *The Law of Land Warfare*, is to similar effect:

In some cases, military commanders may be responsible for war crimes committed by subordinate members of the armed forces, or other persons subject to their control. Thus, for instance, when troops commit massacres and atrocities against the civilian population of occupied territory or against prisoners of war, the responsibility may rest not only with the actual perpetrators but also with the commander. Such a responsibility arises directly when the acts in question have been committed in pursuance of an order of the commander concerned. The commander is also responsible if he has actual knowledge, or should have knowledge, through reports received by him or through other means, that troops or other persons subject to his control are about to commit or have committed a war crime and he fails to take the necessary and reasonable steps to insure compliance with the law of war or to punish violators thereof.¹⁵¹

The London (Nuremberg) Charter establishing the International Tribunal for the Prosecution and Punishment of the Major War Criminals of the European Axis,¹⁵² while expressly excluding superior orders as a defense,¹⁵³ makes no express reference to command responsibility. However, it does provide that

leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes [—crimes against peace, war crimes, or crimes against humanity—] are responsible for all acts performed by any person in execution of such plan . . . [,

150. BRITISH MANUAL OF MILITARY LAW, *supra* note 56, pt. III, para. 631.

151. FM 27-10, *supra* note 93, para. 501.

152. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 1548, 82 U.N.T.S. 279, 288 (London Charter; sometimes referred to as the Nuremberg Charter).

153. *Id.* art. 8.

and] the official position of defendants, whether as Heads of State or responsible officials in Government departments, shall not be considered as freeing them from responsibility or mitigating punishment.¹⁵⁴

An interesting deviation from these assertions of the personal liability of a Head of State, also present in the Charter establishing the International Military Tribunal at Tokyo,¹⁵⁵ is to be found in the decision of the Tokyo District Court in *Shimoda v. Japan*,¹⁵⁶ considering the legality of the use of the atomic weapon against Japan. Having compared its use to that of poison and poisonous gases, the court found the use of the bomb to be illegal, and that

Japan has a claim for damages against the United States in international law.¹⁵⁷ In such a case, however, responsibility cannot be imputed to the person who gave the order for the act, as an individual. Thus, in international law damages cannot be claimed against President Truman of the United States of America who ordered the atomic bombing, as it is a principle of international law that States must be held directly responsible for the act of a person done in his capacity as a State organ, and that person is not held responsible as an individual.¹⁵⁸

Perhaps one may be excused for assuming that the learned judge was more concerned with political correctness than judicial interpretation, for it is hardly likely that a member of the Tokyo District Court would have been unaware of the Charters of the two international military tribunals and the finding of guilt against leading Japanese political and military leaders.¹⁵⁹

Any lacuna in the black-letter law has now been filled by Protocol I, 1977, Additional to the Geneva Conventions of 12 August 1949, and Relating to the Victims of International Armed Conflicts.¹⁶⁰ In language

154. *Id.* arts. 6-7.

155. Special Proclamation: Establishment of an International Military Tribunal for the Far East, Jan. 19, 1946, T.I.A.S. No. 1589, at 3; Charter for the International Military Tribunal for the Far East, *approved* Apr. 26, 1946, T.I.A.S. No. 1589.

156. 32 I.L.R. 626 (1965).

157. See Hague Convention No. IV, *supra* note 123, art. 3.

158. *Shimoda v. Japan*, 32 I.L.R. at 634-35.

159. See Case Concerning the Arrest Warrant of 11 April 2000 (Congo v. Belg.) 2002 I.C.J. 1 (Feb. 14), available at <http://www.icj-cij.org/icjwww/idocket/iCOBE/iCOBE-frame.htm>.

clearly reflecting the *Yamashita* and *Meyer* decisions as well as the British and American manuals, Article 86, paragraph 2, provides:

The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them, to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.¹⁶¹

The duty of commanders is spelled out in Article 87:

1. The High Contracting Parties and the Parties to the conflict shall require military commanders, with respect to the armed forces under their command and other persons under their control, to prevent and, where necessary, to suppress and report to competent authorities breaches of the Conventions and of this Protocol.

2. In order to prevent and repress breaches, High Contracting Parties and Parties to the conflict shall require that, commensurate with their level of responsibility, commanders ensure that members of the armed forces under their command are aware of their obligations under the Conventions and this Protocol.¹⁶²

Article 82 requires legal advisers to be available to military commanders so that they may advise on the instruction to be given to the troops so that they are aware of their obligations under the Conventions and Protocol. Finally, paragraph 3 of Article 87 stipulates:

The High Contracting Parties and Parties to the conflict shall require any commander who is aware that subordinates or other persons under control are going to commit or have committed a breach of the Conventions or of this Protocol, to initiate such

160. Protocol I, *supra* note 146, reprinted in *THE LAWS OF ARMED CONFLICTS*, *supra* note 49, at 621.

161. *Id.* art. 86, para. 2.

162. *Id.* art. 87.

steps as are necessary to prevent such violations of the Conventions or of this Protocol, and, where appropriate, to initiate penal or disciplinary action against violations thereof.¹⁶³

While the Protocol does not specifically refer to the personal responsibility of the commander in respect of breaches committed by those under his command consequent upon obeying an order, Article 86 does impose liability if, knowing a breach, whether in compliance with an order or not, was likely to be committed, he failed to prevent or repress it. Similarly, Article 87 does not impose direct responsibility, but since it creates obligations, it follows that failure to fulfill such duties would result in responsibility.

Protocol I relates solely to international armed conflicts, while Protocol II¹⁶⁴ is concerned with non-international armed conflicts, known more generally as civil wars. This Protocol makes no reference to superior orders or the duties or responsibility of a commander. However, Article 1 provides that it shall apply during a conflict

which takes place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, *under responsible command*, exercise such control over a part of its territory as enable them to carry out sustained and concerted military operations and to implement this Protocol.¹⁶⁵

This clearly indicates that the forces involved must be properly disciplined and engaged in a system able to ensure compliance with, at least, the customary rules operative in conflict. As the above discussion demonstrates, at least since 1945 there has been general agreement that the basic principles of humanity and civilized conduct as mentioned in the Martens Clause are applicable whenever armed forces are involved.¹⁶⁶

From the point of view of enforcement of the law arising from breaches of the law of armed conflict and the responsibility of a commander, the Statute of the International Criminal Tribunal for the former

163. *Id.* art. 87, para. 3.

164. Additional Protocol II to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, *adopted* 8 June 1977, *entered into force* 7 Dec. 1978, U.N. Doc. A/32/144 Annex II, 1125 U.N.T.S. 609 [hereinafter Protocol II], *reprinted in* THE LAWS OF ARMED CONFLICTS, *supra* note 49, at 689.

165. *Id.* art. 1 (emphasis added).

Yugoslavia¹⁶⁷ and the similar Statute for the International Criminal Tribunal for Rwanda¹⁶⁸ are important. The two Statutes differ only in the need to deal with the fact that the demise of the former Yugoslavia resulted in a series of both international and non-international armed conflicts, while Rwanda was ravaged by non-international conflict. For Yugoslavia, therefore, the jurisdiction of the Tribunal is somewhat wider than is the case for Rwanda. This is not the place, however, to examine the differences involved, or to pay attention to the nature of the various conflicts in the former Yugoslavia with a concomitant discussion of the relevant law applicable.¹⁶⁹ For our purposes, it is enough to point out that both Statutes contain the same provision with regard to command responsibility, and reflect the law as interpreted in the various cases discussed above, as well as the provisions of Protocol I:

Individual criminal responsibility.

(1) A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning or preparation of a crime referred to in . . . the present Statute, shall be individually responsible for the crime.

[—Nuremberg, *The Peleus*—]

(2) The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.

[—shades of Napoleon, Wilhelm II, Nuremberg]

(3) The fact that any of the acts referred to [as crimes in] the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knows or had reason to know that the subordinate was about to commit¹⁷⁰ such acts or

166. The continued relevance and general significance of the Martens Clause has recently been confirmed by the International Court of Justice. See Advisory Opinion, *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, 1996 I.C.J. 226, 257, paras. 78-79 (July 8), available at <http://www.icj-cij.org/icjwww/icas/ianw/ianwframe.htm>.

167. 32 I.L.M. 1192 (1993) [hereinafter ICTY Statute].

168. 33 I.L.M. 1602 (1994) [hereinafter ICTR Statute].

169. See, e.g., Leslie C. Green, *Erdemović—Tadić—Dokmanović: Jurisdiction and Early Practice of the Yugoslav War Crimes Tribunal*, 27 ISRAEL Y.B. ON HUM. RTS. 313 (1997).

had done so and the superior failed to take the necessary and reasonable measures to prevent such or to punish the perpetrators thereof.

[—echoes of Charles VII and von Rundstedt]

(4) The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires.¹⁷¹

A careful reading of the provision indicates that what the Statute does is give conventional form, though only for its own purposes, to what has been established as customary law by the practice of centuries.

A decision relevant to command responsibility as it relates to a political as distinct from a military superior was delivered by the Rwanda Tribunal in *Prosecutor v. Jean-Paul Akayesu*.¹⁷² The accused was mayor of a commune charged with

the performance of executive functions and the maintenance of public order [enjoying] . . . exclusive control over the communal police, as well as any gendarmes put at the disposition of the commune. He was responsible for the execution of laws and regulations and the administration of justice.¹⁷³

During his period of office, some 2000 Tutsis were killed, and he was accused of genocide and crimes against humanity, together with violations of Article 3 common to the 1949 Conventions establishing a “minor” code of behavior during non-international conflicts, as well as violations of Protocol II, 1977. In most cases, he was not charged with having personally and directly committed any criminal act himself, but with having incited

170. No indication is given as to how the superior is to read the subordinate’s mind in order to have knowledge that he was “about” to commit a crime. Reference might be made to the old common law dictum that “only God and the Devil know the mind of man.”

171. ICTY Statute, *supra* note 167, art.7; ICTR Statute, *supra* note 168, art. 6.

172. No. ICTR-96-4-T (Sept. 2, 1998) (Judgment), *available at* <http://www.ictr.org/wwwroot/default.htm>.

173. *Id.* para. 4 (Amended Indictment), *available at* <http://www.ictr.org/wwwroot/default.htm>.

others so to do and with having known of the commission of such acts and failing to institute proceedings against offenders.

In the course of its judgment, the Tribunal examined the nature of instigation, incitement and ordering:

[Instigation] involves prompting another to commit an offence, but this is different from incitement in that it is punishable only where it leads to the actual commission of an offence desired by the instigator. . . .

. . . By ordering the commission of one of the crimes referred to in . . . the Statute, a person also incurs individual criminal responsibility. Ordering implies a superior-subordinate relationship between the person giving the order and the one executing it. . . . [T]he person in a position of authority uses it to convince another to commit an offence. . . .

. . . .
. . . [W]hen dealing with a person accused of having aided and abetted in the planning, preparation and execution of genocide, it must be proven that such a person did have the specific intent to commit genocide, namely that he or she acted with the intent to destroy, in whole or in part a national, ethnical, racial or religious group, as such.¹⁷⁴

Commenting specifically upon command responsibility, the Tribunal stated that

in the case of civilians, the application of the principle of individual criminal responsibility . . . remains contentious. . . . [I]t is [therefore] appropriate to assess on a case by case basis the power of authority actually devolved upon the Accused in order to determine whether or not he had the power to take all necessary and reasonable measures to prevent the commission of the alleged crimes or to punish the perpetrators thereof. . . .

. . . .
Insofar as the issue arises in connection with “incitement,” . . . direct and public incitement must be defined . . . as directly provoking the perpetrator(s) to commit [the offence], whether

174. *Id.* paras. 482-83, 485 (Judgment). See Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, art. 2, 78 U.N.T.S. 277.

through speeches, shouting or threats uttered in public places or at public gatherings, or through the public display of placards or posters, or through any other means of audiovisual communication.

. . . The *mens rea* required for the crime of direct and public incitement lies in the intent . . . on the part of the perpetrator to create by his actions a particular state of mind necessary to commit such a crime in the minds of the persons he is so engaging.¹⁷⁵

As to the accused's criminal liability,

The Chamber finds that . . . Akayesu, as burgomaster, was responsible for maintaining law and public order . . . and as "leader" of [the] commune, of which he was one of the most prominent figures, the inhabitants respected him and followed his orders. Akayesu himself admitted . . . that he had the power to assemble the population and that they obeyed his instructions. . . . [He] was also present during the acts of violence and killings, and sometimes even gave orders himself for bodily or mental harm to be caused to certain Tutsis, and endorsed and even ordered the killing of several Tutsi.

. . . [T]he said acts indeed incur the individual criminal responsibility of Akayesu for having ordered, committed, or otherwise aided and abetted in the preparation or execution of the killing and causing serious bodily or mental harm to the members of the Tutsi group. Indeed, . . . the fact that Akayesu, as a local authority, failed to oppose such killings and serious bodily or mental harm constituted a form of tacit encouragement, which was compounded by being present to such criminal acts.

. . . [O]n several occasions, by his presence, his attitude[,] and his utterances, [he] encouraged such acts [as mass rapes and other inhumane offences] . . . [.]

. . . render[ing] him individually criminally responsible for having abetted in the preparation or execution [of these various criminal activities].

. . . .

175. *Jean-Paul Akayesu*, No. ICTR-96-4-T, paras. 491, 559-60.

. . . [Moreover], he [joined a named gathering] and took this opportunity to address the public, he led the meeting and conducted the proceedings. He then called on the population to unite in order to eliminate what he referred to as the sole enemy . . . [,] and the population understood that he was urging them to kill the Tutsi. Indeed, Akayesu himself, knew of the impact of this statement on the crowd and of the fact that his call to fight . . . would be understood as exhortations to kill . . . [and did lead] to widespread killings¹⁷⁶

The Tribunal also found that he had handed certain persons to the militia with orders that they be killed.

The Akayesu judgment is a clear example of the application of command responsibility to a person exercising civil authority, not only on account of his orders to commit genocide or crimes against humanity, or because of his presence when some of these offenses were committed. It also demonstrates that speeches by a public authority inciting the commission of grave offenses will also carry liability, particularly if his hearers act in accordance with the incitement, and this would probably extend to statements made over the radio or through similar means.

The issue of command responsibility has also been considered and analyzed by the International Criminal Tribunal for the former Yugoslavia. It was dealt with in some detail in the *Tihomir Blaškić* case.¹⁷⁷ Blaškić was commander of the Croatian Defense Council (HVO) forces in central Bosnia and was charged with offenses against the laws and customs of war, grave breaches of the Geneva Conventions, and crimes against humanity. He was

accused of having, in concert with other members of the HVO, planned, instigated, ordered or otherwise aided and abetted in the planning, preparation or execution of each of the crimes alleged . . . [and with] having known or having had reason to know that subordinates were preparing to commit those crimes or that they had done so and that he had not taken the necessary and reasonable measures necessary to prevent the said crimes from being committed or to punish the perpetrators.¹⁷⁸

176. *Id.* paras. 704-07, 709.

177. No. IT-95-14-T (Mar. 3, 2000) (Trial Chamber, Judgment), available at <http://www.un.org/icty/judgement.htm>.

In the course of its judgment, the Tribunal stated:

[T]he principle of command responsibility *stricto sensu* forms part of customary international law. . .

....

. . . [A] commander may incur criminal responsibility for crimes committed by persons who are not formally his (direct) subordinates, insofar as he exercised effective control over them.

...

. . . [T]he commander need not have any legal authority to punish or prevent acts of his subordinates. What counts is his material ability, which, instead of issuing orders or taking disciplinary action may entail, for instance, submitting reports to the competent authorities in order for proper measures to be taken. .

..

. . . [T]he test of effective control exercised by the commander implies that more than one person may be held responsible for the same crime committed by a subordinate. . . .

....

. . . Knowledge may not be presumed . . . [but] may be proved through either direct or circumstantial evidence. . . . [I]n determining whether in fact a superior must have had the requisite knowledge[, the Tribunal] may consider *inter alia* the following indicia . . . : the number, type and scope of the illegal acts; the time during which the illegal acts occurred; the number and type of troops involved; the logistics involved, if any; the geographic location of the acts; the widespread occurrence of the acts; the speed of the operations; the *modus operandi* of similar illegal acts; the officers and staff involved; and the location of the commander at the time. . . .

. . . [A]n individual's position *per se* is a significant indicium that he knew about the [acts] committed by his subordinates. . . .

....

. . . [I]f a commander has exercised due diligence in the fulfilment of his duties yet lacks knowledge that crimes are about to be or have been committed, such lack of knowledge cannot be held against him. However, taking into account his particular position of command and the circumstances prevailing at the

178. *Id.* at 3 (restating paragraph 9 of the indictment).

time, such ignorance cannot be a defence where the absence of knowledge is the result of negligence in the discharge of his duties. . . .

. . . .

. . . [I]n the case of instigation, proof is required of a causal connection between the instigation, which may entail an omission, and the perpetration of the act. . . . [T]his means it must be proved that the subordinates would not have committed the subsequent crimes if the commander had not failed to punish the earlier ones . . . [and] such a causal link may be considered inherent in the requirement that the superior failed to prevent the crimes which were committed by the subordinates. In other words, “the superior may be considered to be causally linked to the offences, in that, but for his failure to fulfil his duty to act, the acts of his subordinates would not have been committed.” . . .

. . . .

. . . [T]here can be no doubt that command position may justify a harsher sentence, which must be much harsher because the accused held a high position within the civilian or military command structure. In this instance, actual authority exercised seems more decisive than command authority alone. . . .

. . . [W]hen a commander fails in his duty to prevent the crime or punish the perpetrator thereof[,] he should receive a heavier sentence than the subordinates who committed the crime insofar as the failing conveys some tolerance or even approval on the part of the commander towards the commission of the crimes by his subordinates and thus contributes to the commission of new crimes. It would not in fact be consistent to punish a simple perpetrator with a sentence equal or greater to that of the commander. . . . [The Trial Chamber] is satisfied beyond all reasonable doubt that General Blaškić ordered attacks which targeted the Muslim civilian population and thereby incurred responsibility for crimes committed during these attacks or at least made himself an accomplice thereto and, as regards those crimes not ensuing from such orders, he failed in his duty to prevent them and did not take the necessary measures to punish their perpetrators after they had been committed. . . .

. . . [A]lthough the fact that he did not take a direct and active part does not constitute an aggravating circumstance in

itself, it can in no way counterbalance the aggravation arising from the accused's command position. . . .

. . . .

. . . Not only does the accused's awareness of the criminality of his acts and their consequences and of the criminal behaviour of his subordinates count[,] but also his willingness and intent to commit them. . . . As a professional soldier who, as he himself explained, took a course on the law of armed conflicts while in the former JNA (Yugoslav National Army), the accused knew perfectly well the range of his obligations. It is inconceivable that [he] was unable to assess the criminal consequences stemming from the violation of such obligations. . . .¹⁷⁹ [Finally,] as a commander, he failed to take the necessary and reasonable measures which would have allowed these crimes to be prevented or the perpetrators thereof to be punished.¹⁸⁰

There is much in these comments to remind one of earlier judgments, going back at least to *Yamashita*, most of which were based on customary law and not on any specific international document.

The most senior officer to be tried by the Yugoslav Tribunal to date (March 2002) is Lieutenant-General Krstić,¹⁸¹ Chief of Staff/Deputy Military Commander of the Bosnian Serb Army (VRS) Drina Corps. He was charged with a series of offenses, including genocide, war crimes, and crimes against humanity, primarily in Srebrenica and the surrounding area. His guilt depended largely on his command function at the time and his place in the chain of command. Ultimately, he was found guilty and sentenced to forty-six years' imprisonment. A number of statements and documents were attributed to him, including an allegation that, referring to Muslim men, he had said "kill them all," and that a number of these were in fact killed as a consequence. There were also allegations concerning the relocation of civilians by way of "ethnic cleansing," mass executions, and mass rapes. Where a number of atrocities were concerned, the Tribunal found there was no evidence that the Drina Corps was actually involved. However, it was of opinion that the Drina Corps Command must have known what was going on and that mass executions were taking place,

179. *Id.* paras. 290, 301-03, 307-08, 332, 339, 788-90, 792 (citations omitted).

180. *Id.* (Disposition).

181. Prosecutor v. Krstić, No. IT-98-33-T (Aug. 2, 2001) (Judgment), available at <http://www.un.org/icty/judgement.htm>.

while in other instances evidence tended to show that some members of the Corps were present. The Tribunal pointed out that

[t]here is no evidence that the Drina Corps devised or instigated any of the atrocities that followed the take-over of Srebrenica . . . The evidence strongly suggests that the criminal activity was being directed by the VRS Main Staff under the direction of General Mladić. . . .

. . . However, the Main Staff did not have the resources to carry out the activities in the area of the former enclave[, which was a Security Council-declared “safe area,”] following the take-over of Srebrenica on its own. The Main Staff was an organizational shell and was largely dependent upon the personnel and equipment of its subordinate Brigades to implement its objectives. It stands to reason that the Drina Corps, the VRS subordinate Corps stationed in the area[, . . . would have been called upon[, and the evidence bears this out. . . .

. . . [T]he Drina Corps was not oblivious to the overall VRS strategy of eliminating the Srebrenica enclave. This had always been the long-term Drina Corps objective in the area. . . . [T]he Drina Corps continued to shell the enclave intensively with the intent to cause the Bosnian Muslim civilians to flee the area. The Drina Corps was also fully cognisant of the catastrophic humanitarian situation of the Bosnian refugees in Potočari and the fact that Bosnian Serb forces were terrorising the population there. . . .

. . . .
. . . [T]he massive scale of the atrocities, all of which occurred within a section of the Drina Corps zone of responsibility (in an area that was no more than about 80 kilometres at its longest and widest points) meant, inescapably, the Drina Corps must have known about their occurrence. [Moreover,] in the absence of sufficient personnel and equipment of its own, the Main Staff had to rely upon resources of the Drina Corps to assist with the executions. . . .

. . . Certainly the evidence does not conclusively demonstrate that the Drina Corps was informed of all aspects of the executions plan from the outset. Rather, it appears that the Corps’ knowledge of, and involvement in, these atrocities gradually

increased as the events unfolded. . . . Drina Corps Command could not but have known that thousands of . . . captured Bosnian Muslim men had been taken . . . aboard buses originally procured by the Drina Corps . . . and that these men were subsequently executed the same day. . . . The Trial Chamber finds that . . . the Drina Corps Command must have been aware of the VRS plan to execute all the thousands of military aged Bosnian men who were captured in the area of the former enclave. . . .

. . . [T]here is substantial and compelling evidence showing that [subsequently] the resources of subordinate Drina Corps Brigades were utilised to assist with the mass executions. Given that these subordinate Brigades continued to operate under the Command of the Drina Corps, the Command itself must have known of the involvement of its subordinate units in the executions. This is particularly so in view of the pressing military situation facing these units which must have prompted especially careful monitoring of Corps resources.¹⁸²

As to the personal liability of General Krstić:

[He] repeatedly stressed that, as a career military officer, he fully respected the laws of armed conflict. Several witnesses who testified on his behalf confirmed his strict approach to ensuring compliance with the Geneva Conventions among his troops and the humanitarian manner in which he treated members of the civilian population during the course of the war in Bosnia. . . .

. . . .
. . . Despite efforts to distance himself from . . . the capture of Srebrenica, the Trial Chamber is left without doubt that he was no ordinary participant in these events. . . . [I]t is clear that [he] was fully informed of the conduct of the operation. . . . [H]e must have known the VRS military activities against Srebrenica were calculated to trigger a humanitarian crisis, eventually leading to the elimination of the enclave. He thus played a leading role in the events that forced the terrorised civilian population . . . to flee the town in fear of their lives and move towards Potočari, setting the stage for the crimes that followed. . . . It is inconceivable that a commander so actively involved in the campaign would not have been aware of such an obvious cause and effect

182. *Id.* paras. 290-92, 294-96 (citations omitted).

relationship between the shelling and the exodus of residents from Srebrenica that was apparent to virtually all UN military personnel in the area.¹⁸³

The Tribunal then referred to a number of statements made by the accused derogatory of the Muslim population, including a description of them as “Ustasha-Muslim hordes,” as well as the role he played in the removal of Muslim women, children, and the elderly. However,

[t]here is no evidence that General Krstić was personally present at any of the execution sites. . . .

. . . Nonetheless, the Trial Chamber has already found that the executions began on 13 July 1995 and, as of that evening, the Drina Corps Command must have known about the plan to execute all military aged Bosnian Muslim men in Srebrenica. The Trial Chamber has further found that the Drina Corps Command must have known of the involvement of Drina Corps subordinate units in the mass executions as of 14 July and, by implication, that the fate of thousands of Bosnian Muslim men . . . was to be death by execution. Given his position in the Drina Corps Command, . . . [the accused] must have been informed about the participation of his subordinate units in the executions commencing on that date. . . .

. . . .

. . . Documentation linking the Drina Corps to the reburial activity [—of executed Muslims—] is scant and the available evidence discloses no direct involvement [by the accused] in this aspect of the crimes. . . . [However], an operation of the scale required to dig up thousands of corpses and transfer them to remote locations, all within the zone of responsibility of the Drina Corps, could hardly have escaped his notice. . . .

. . . [A]t minimum, General Krstić, the Commander of the Drina Corps, must have known that the massive reburial operation was occurring within his zone of responsibility. . . .

. . . .

. . . [He] was aware that men under his command had participated in the execution of Bosnian Muslim men . . . and failed to take steps to punish any of them. . . .

183. *Id.* paras. 301, 335.

....
... [T]he evidence presented . . . does not support the notion that [the accused] himself ever envisaged that the chosen method of removing the Bosnian Muslims from the enclave would be to systematically execute part of the civilian population. Rather, [he] appears as a reserved and serious career officer who was unlikely ever to have instigated a plan such as the one devised for the mass execution of Bosnian Muslim men, following the take-over of Srebrenica Left to his own devices, it seems doubtful that General Krstić would have been associated with such a plan at all. . . .

. . . [Nevertheless], in July 1995, [he] found himself squarely in the middle of one of the most heinous wartime acts committed in Europe since the Second World War. The plan to execute the Bosnian Muslim men may not have been of his own making, but it was carried out within the zone of responsibility of the Drina Corps. Furthermore[,] Drina Corps resources were utilised to assist with the executions from 14 July 1995 onwards. By virtue of his position as Drina Corps Commander, from 13 July 1995, [he] must have known about this. . . .

....
... On 15 July 1995, thousands of prisoners were still alive; had General Krstić intervened even at that late date they might have been saved.

....
... [T]here is no doubt . . . that all the criminal acts described in the indictment form part of a widespread or systematic attack against a civilian population and were committed with discriminatory intent¹⁸⁴

Perhaps the clearest expression as to Krstić's command responsibility is found in the following excerpt from the judgment:

General Krstić did not conceive the plan to kill the men, nor did he kill them personally. However, he fulfilled a key coordinating role in the implementation of the killing campaign. In particular, at a stage when his participation was clearly indispensable, [he]

184. *Id.* paras. 378-79, 414-15, 418, 420-21, 423, 482. *See also id.* paras. 606-54 (discussing Krstić's responsibility or role in so far as became clear from the evidence on each charge).

exerted his authority as Drina Corps Commander and arranged for men under his command to commit killings. He thus was an essential participant in the genocidal killings in the aftermath of the fall of Srebrenica. In sum, in view of both his *mens rea* and *actus reus*, [he] must be considered a principal perpetrator of these crimes. . . .

. . . .
 . . . First, [he] exercised effective control over Drina Corps troops involved in the killings. Second, in terms of *mens rea*, not only was [he] fully aware of the ongoing killing campaign . . . , but the Drina Corps (and Main Staff) officers and troops involved in conducting the executions had to have been aware of the genocidal objectives. Third, [he] failed to prevent his Drina Corps subordinates from participating in the crimes or to punish them, thereafter [—even though he testified that he was aware of his duty so to do by the law of Bosnia and Herzegovina].¹⁸⁵

The significance of the Krstić judgment lies primarily in the careful analysis of what must have been within his knowledge by reason of his command and failure to act in the light of that knowledge.

The combined effect of the Blaškić and Krstić judgments seems to be that, regardless of a commander's responsibility for any order he may have given, or action in which he might personally be involved, he will also be responsible for acts of a criminal character carried out systematically through the region of his command, since such widespread activity must have come to his knowledge, while his failure to suppress or punish such acts must have led his subordinates to believe that he approved or was tolerant of such behavior.

With military officers it is often relatively easy to produce evidence sufficient to sustain their guilt on the basis of command responsibility. With political leaders, especially those at the highest level, this may not be the case. It may be difficult to produce evidence of a policy directed at criminality or to prove the required intent, especially when the accused has been far from the battlefield. This may well become clear when the trial of

185. *Id.* paras. 644-49 (citations omitted). See ORDER ON THE APPLICATION OF THE RULES OF THE INTERNATIONAL LAW IN THE ARMY OF THE SERBIAN REPUBLIC OF BOSNIA AND HERZEGOVINA para. 2 (1992), *quoted in Krstić*, No. IT-98-33-T, at 230 ("It is the duty of the competent superior officer to initiate proceedings for legal sanctions against individuals who violate the rules of the international law of war.").

Milosević finally gets under way. In the meantime, however, the Yugoslav tribunal has had occasion to deal with the issue.

In February 2001, the Tribunal convicted Kordić, the Croat former vice-president of the self-proclaimed Bosnian-Croat State, for his role. The Tribunal stated: “[Kordić] played his part as surely as the men who fired the guns. Indeed, the fact that he was a [political] leader aggravated the offences.”¹⁸⁶ While the Tribunal was of opinion that he was not the “architect” of the ethnic cleansing campaign, “[Kordić] joined the campaign enthusiastically and played an instrumental part in the [offences], in particular ordering the attack on [Ahmici and other villages]. For his part in that dreadful episode[,] he deserves appropriate punishment.”¹⁸⁷

This discussion of the decisions rendered by the two Tribunals created by the United Nations illustrates that, in interpreting their powers under their respective Statutes, they have fleshed out what was already established in the customary law of armed conflict, confirming that the principles regarding command responsibility are equally applicable, whether the conflict is international or non-international in character. However, it is necessary to bear in mind that the two Tribunals are *ad hoc*, intended to deal with specific conflicts. When they have completed the series of trials associated therewith, they become *functus officio* and, strictly speaking, their decisions will only have relevance to the conflicts and trials with which they have been seized. Nevertheless, to the extent that they have analyzed general principles relating to command responsibility and have created a *jurisprudence constante*, the overall impact of the *rationes decidendi* should serve as a guide for future tribunals facing similar problems. This should prove of great help when the International Criminal Court comes into operation, especially as its jurisdiction is not tied to any particular conflict, but is general in character.

What has become established both by customary law and by decisions of the United Nations-created tribunals in regard to two specific situations is now extended as a general principle, insofar as genocide, crimes against humanity, war crimes, and the crime of aggression are concerned. As to genocide and crimes against humanity, this jurisdiction arises even if no

186. Prosecutor v. Kordić, No. IT-95-14/2-T, para. 853 (Feb. 26, 2001) (Judgment).

187. *Id.*

armed conflict exists. By Article 21 of the Rome Statute establishing the International Criminal Court,

1. The Court shall apply:

(a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;

(b) In the second place, where appropriate, applicable treaties and the principles and rules of the international law of armed conflict;

(c) Failing that, general principles of the law derived by the Court from the national laws of legal systems of the world, including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.¹⁸⁸

Article 25 provides:

2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment

....

3. . . . if that person:

(a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;

(b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted¹⁸⁹

Article 28 is concerned with “responsibility of commanders and other superiors,” and having stated, “In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the

188. ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, art. 21, U.N. Doc. A/CONF.183/9 (1998), *reprinted in* 37 I.L.M. 999 (1998).

189. *Id.* art. 25.

Court,” which would seem to embrace the generality of Article 25, becomes more specific:

(a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

(i) That military commander or person either knew or, owing to the circumstances at the time, should have known, the forces were committing or were about to commit such crimes; and

(ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

(b) With respect to superior and subordinate relationships not described in paragraph (a)[, covering political and civic dignitaries], a superior shall be criminally responsible for crimes within the jurisdiction of the Court by subordinates under his or her effective control, as a result of his or her failure to exercise control properly over such subordinates, where:

(i) The superior either knew, or consciously disregarded information which clearly indicated that the subordinates were committing or about to commit such crimes;

(ii) The crimes concerned activities that were within the effective responsibility and control of the superior, and

(iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.¹⁹⁰

190. *Id.* art. 28.

As if to emphasise the extent of command responsibility, Article 27 provides:

1. This Statute shall apply equally to all persons without distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.¹⁹¹

The Article widens the range of official personalities who are identified as possibly possessing some sort of state representation by including members of parliament and other elected representatives. It does not, however, any more than Article 28, include an individual who, while not holding any position of authority, by speeches or other means induces others to commit acts within the Court's jurisdiction. On the other hand, it would now appear to be clearly established that such persons would fall within the ambit of Article 21 (1)(b) and (c) with their reference to "the principles and rules of international law . . . [and] general principles of law derived . . . from national laws of legal systems of the world"¹⁹²

Despite the provisions in the various international instruments here discussed and the practice of international tribunals concerning the non-immunity of state dignitaries and officials, no customary law principle has evolved authorizing individual states to institute proceedings against such persons, even though national legislation may exist purporting to create such competence.

Finally, it is submitted that the principles of command responsibility and superior orders have been well recognized in international law, particularly that part relating to armed conflict, since early times, and now constitute inherent parts of customary international law, so that those treaties affirming their significance are only declaratory of established principles.

191. *Id.* art. 27.

192. *Id.* art. 21(1)(b)-(c).

Accordingly, any state not a party to such treaties would still be bound by principles relating to command responsibility and the limits of superior orders as a defense, which are now clearly applicable in both international and non-international armed conflicts.

**THE EIGHTH ANNUAL HUGH J. CLAUSEN LECTURE ON
LEADERSHIP¹**

MAJOR GENERAL KENNETH D. GRAY²

I. Introduction

General and Mrs. Clausen, General Marchand, General Wright, Ladies and Gentlemen, it is indeed an honor to return to the JAG School, especially to be asked to give the lecture on leadership named after General Clausen, one of my mentors. This is my first trip back since I retired. I have fond memories of my service and must admit that, on occasion, I do miss serving this great country, and the camaraderie and friendships I developed over my thirty-plus years of service.

For those of you just starting your careers, you will remember your first JAG assignment more fondly than any other. Those in the room who are more senior can tell you that you will develop relationships that will last for a lifetime. My wife (Carolyn) and I still stay in touch with friends we made during our first assignment.

I am also honored to have the opportunity to share with you some of my thoughts on leadership, how I used the skills I developed to help me in my current job, and what serving in the United States Army has meant in my life. I also want to talk about this generation of young people and what it takes to recruit them. Finally, time permitting, I want to talk about our soldiers.

1. This is an edited transcript of a lecture delivered by Major General Kenneth D. Gray to members of the staff and faculty, their distinguished guests, and officers attending the 50th Judge Advocate Officer Graduate Course at The Judge Advocate General's School, Charlottesville, Virginia, on 25 March 2002. The Clausen Lecture is named in honor of Major General Hugh J. Clausen, who served as The Judge Advocate General, United States Army, from 1981 to 1985 and served over thirty years in the United States Army before retiring in 1985. His distinguished military career included assignments as the Executive Officer to The Judge Advocate General; Staff Judge Advocate, III Corps and Fort Hood; Chief Judge, Army Court of Military Review; The Assistant Judge Advocate General; and finally, The Judge Advocate General. On his retirement from active duty, General Clausen served for a number of years as the Vice President for Administration and Secretary to the Board of Visitors at Clemson University.

II. Random Thoughts on Leadership

I have also found that the leadership skills and experience developed in the JAG Corps can be transferred to just about any job you choose. The skills I developed in the Army have served me well in my current job. I

2. United States Army (Retired) Major General Kenneth D. Gray was born in Excelsior, West Virginia, on 27 April 1944. He received his Bachelor of Arts degree from West Virginia State College in 1966 and was commissioned a second lieutenant through the Reserve Officers Training Corps. In 1969, he received his law degree from West Virginia University (WVU) and entered active duty in The Judge Advocate General's Corps (JAGC). He is a member of the bars of West Virginia and Texas, and he is admitted to practice before various federal courts, including the Court of Appeals for the Armed Forces and the United States Supreme Court. In addition to his civilian schooling, General Gray is a graduate of the JAGC Basic and Graduate Courses, the Military Judge's Course, the Command and General Staff College, and the Industrial College of the Armed Forces.

General Gray's first assignment was as a defense counsel at Fort Ord, California. Later, in 1970-1971, he served as a defense counsel and command judge advocate in Vietnam. In 1971, he worked briefly as an assistant military affairs officer at Fort Meade, Maryland, before being assigned to the Personnel, Plans, and Training (PP&TO) Office of The Judge Advocate General, as a personnel management officer. After attending the JAGC Graduate Course, General Gray became an instructor and later the senior instructor in the Criminal Law Division. In 1978, he was assigned as Deputy Staff Judge Advocate, 1st Armored Division, for two years, then attended the Army's Command and General Staff College at Fort Leavenworth, Kansas. From 1981-1984, General Gray served as Staff Judge Advocate for the 2d Armored Division, Fort Hood, Texas. In 1984, he was assigned as Chief of PP&TO, a position he held for three years. After attending the Industrial College of the Armed Forces, General Gray was assigned as the III Corps and Fort Hood Staff Judge Advocate. In 1991, he was promoted to brigadier general and assigned as the Commander of the U.S. Army Legal Services Agency and the Chief Judge of the U.S. Army Court of Military Review. He was promoted to major general and sworn in as The Assistant Judge Advocate General on 1 October 1993.

On 1 May 1997, Major General Gray retired from the Army. On 5 May 1997, he assumed the duties of Vice President for Student Affairs at West Virginia University in Morgantown, West Virginia. General Gray's awards and decorations from his over thirty years of military service include the Army Distinguished Service Medal, Legion of Merit, Bronze Star, Meritorious Service Medal (with Second Oak Leaf Cluster), Army Commendation Medal, Army Achievement Medal, and Army Staff Identification Badge.

He is married to the former Carolyn Jane Trice of Glen Jean, West Virginia. They have two sons: Christopher and Michael. Both are graduates of WVU.

had to modify some of my expectations and practices, but this has been a smooth transition for me.

When I arrived at WVU, one of the first things that I did was to drop the title of General. I asked everyone to call me by my first name. I learned later that the staff was apprehensive about having a military person come to be their boss. They felt relieved when I dropped the title. It was a small thing for me, but huge for them.

In his book, *The 21 Irrefutable Laws of Leadership*,³ John Maxwell says, “The only thing a title can buy is a little time—either to increase your level of influence with others or to erase it.”⁴ He goes on to quote his favorite leadership proverb, “‘He who thinks he leads, but has no followers, is only taking a walk,’” and, Maxwell continues, “If you can’t influence others, they won’t follow you. And if they won’t follow, you’re not a leader.”⁵

The culture is different in academia, and there is a different professional ethic among some. For example, generally speaking, in the Army, when someone looks you in the eye and tells you they are going to do a job, for the most part, you can rely on that person to do the job. In academia, I found that someone would say they were going to do something, and later I would find that it wasn’t done. It took a couple of years, but those individuals have moved on. I didn’t fire anyone; they decided that they didn’t fit in the organization and found other jobs.

A. Establish Mission, Vision, Goals, and Objectives

It’s important to understand the big picture: understand the Army’s mission, develop a vision for success, and routinely create measurable goals and objectives. It’s also important to know the purpose of your work, and you do that by knowing the mission and then developing a vision for your organization to follow.

Our vision at WVU is for West Virginia University to be a student-centered learning community meeting the needs of West Virginia and the nation through teaching, research, service, and technology: a very clear

3. JOHN C. MAXWELL & ZIG ZIGLAR, *THE 21 IRREFUTABLE LAWS OF LEADERSHIP* (1998).

4. *Id.* at 14.

5. *Id.* at 20.

and concise vision statement. I have a mission for my division to support the university vision. I work closely with the deans and directors of my units to cascade that vision down through the entire organization. When I think of vision, I think of seeing the future. Mission, vision, goals, and objectives help a leader begin the process of creating a high performance organization.

B. Set Realistic Goals

I mentioned earlier that I didn't have a dream of being a general officer or The Assistant Judge Advocate General of the Army. I also did not set being a general officer as one of my goals. During my early career, I always felt that making colonel would be a successful career. Later in my career, as times changed and the Army changed, I felt that making lieutenant colonel would not be a bad career.

I have always tried to do the best job I could in whatever job I was assigned so that I would be competitive with everyone else for a promotion, assignment, or a school, realizing that there are never enough slots to accommodate all of the officers who are qualified for selection. Over the years, I saw many officers crushed emotionally and physically because they did not get selected for a particular promotion, or a school, or an assignment.

It really is okay to have a dream that you want to accomplish, but it's also important to make sure the goal is realistic, and that you can accept the disappointment if the goal is not achieved. I believe that an important leadership trait is how one handles setbacks and disappointments. I can recall several disappointments in my career; one occurred when I was on the faculty here. I was in a pool of six officers on the faculty—five were selected, and I was not. Although I knew my chances were very slim, it didn't help to ease the disappointment.

What did I do? I went home to talk to my best friend who made me a cup of tea, and we talked. We laugh about it today, but it was important for me to have someone to talk to who would understand and help me through

the disappointment. I use minor setbacks as a learning experience and a basis for renewing my determination to succeed.

C. Develop Shared Values: Create and Adhere to a Foundation of Shared Values

Near the end of my first year at WVU, I took the leaders of the respective units on a retreat. I asked them to look at and revise our mission statement to support the university's vision more accurately. I also had them create shared values for the organization by working in teams, and they agreed on the following values for our organization:

- (1) Absolute integrity—honest at all times: *Always tell the truth*;
- (2) Commitment to excellence—set and adhere to high standards: *Do the right thing*;
- (3) Wisdom—competence in your job: *Know your job and do it well*;
- (4) Respect human dignity and cultural diversity: *Respect for others*;
- (5) Compassion and humility—a little tolerance of others never hurts: *Be kind, understanding, and humble*; and
- (6) Clear and concise communication: *Pass on the right information*.

Later, they submitted goals and objectives for their units based on the vision, mission, and values established at the retreat. The team building and foundation established during the retreat allowed me to make necessary changes and meet the challenge of change that was taking place at the University.

We also developed a motto out of that retreat, and the motto is "Students are our number one priority." I also told them that it's easy to say we are student centered, but a lot harder to make it a reality every day. So I challenged them to think about the impact their decisions will have on the students.

The following is one example of why establishing the mission, values, goals, and objectives was extremely important. I was hired for this job about nine months before I retired from the Army. During that interim, Carolyn and I received the student newspaper at home so we could keep

up with what was happening on campus. About two months before I was scheduled to arrive on campus, Carolyn was reading the school newspaper, and she said, "I see you are chairing the student seating and tailgating committee." The article quoted the university president as saying that he was waiting for me to arrive to chair this committee, and that I would solve the problems of the student tailgating lot. The students called this place "the Pit," and you can imagine what it was like. It was off campus and just a mess.

When I arrived, I attended the first two committee meetings as an observer. I didn't take charge right away. During the first two meetings nothing was really accomplished. The third meeting I chaired, and I had one item on the agenda: location. Once that was decided, the rest fell into place. We kept the lot in the same place and leased the property from the owner during football season. It was called "the New Pit." We graveled the lot and had it pressed down, and we served free hot dogs, soft drinks, hot chocolate, and coffee. Those of legal age could bring beer, but no other alcohol was permitted. At the first game, volunteers outnumbered the students, but today thousands come, and it's a safe, fun place with no injuries or problems. We are charged with taking care of our students, and parents expect us to keep them safe. We had to recognize that they are our students all of the time, on campus and off.

In their book, *Encouraging the Heart: A Leader's Guide to Rewarding and Recognizing Others*,⁶ James Kouzes and Barry Posner say that leaders must engage individuals in a discussion of what the values mean and how their personal beliefs and behaviors are influenced by what the organization stands for. I believe it's necessary to discuss values and expectations in recruiting and orienting new members to your staff; it's always good to let people know what's expected of them. I will come back to values later in this presentation to discuss some values that are personal to me.

6. JAMES M. KOUZES & BARRY Z. POSNER, *ENCOURAGING THE HEART: A LEADER'S GUIDE TO REWARDING AND RECOGNIZING OTHERS* (1998).

D. Create a Cohesive and Balanced Team

When you go to an assignment, you will find that everyone in your office will not have the same talent level, but you still have to get the job done. I always felt a responsibility to help all individuals perform well.

Efficiency reports. I am told that there is a new form that allows only a certain percentage in the top block. In that case, the words will have to provide the picture for the officers not in the top block so that you can communicate to the board that this person would be in the top block if I could just put her there. Bottom line: learn how to write those reports.

E. Be Innovative, Creative, and Think Outside the Box

A leader has to take risks. As a young captain in the early 70s, I was given an opportunity to start a new program for the Corps and the Army to recruit more minorities and women for the JAG Corps. There were five parts to the program that I created. One part was the Summer Intern Program, which I was given the opportunity to design, get approved by the Secretary of the Army, find the funding, and establish.⁷

The Summer Intern Program was designed to hire one hundred law students—fifty first-year and fifty second-year law students—to serve in JAG offices as General Service 5s and 7s. The concept was to give law students the opportunity to experience JAG law practice and actually work closely with JAG officers. Also, it gave them a chance to do so without incurring a military service obligation. We believed that once they experienced what we do every day, they would apply to join our practice. How many are familiar with the Summer Intern Program? Anyone in the audience serve as a summer intern? Did we take a risk? Yes, because it was a big program and there was the possibility that only a few would apply. But law students are always looking for summer jobs. The rest is history; the program is still going strong today.

Sometimes taking risks can be very challenging, especially if you are trying to change the culture and create a tradition. At WVU, the students came to us and said they didn't have enough to do on the weekends. They

7. The other parts of the program were an advertising campaign, visiting historically black law schools and those with large minority populations, using reservists, and contracting with the National Bar Association.

would stay in their rooms in the residence halls, go home for the weekend, or go downtown to the bars and drink.

As you know, underage drinking is a problem faced by colleges and universities around the country. Being a nontraditional vice president of student affairs, I said let's create a program. I put my assistant in charge of a committee and asked her to come back to me in two weeks with a plan. We created an internationally recognized program called "Up All Night" that takes place on Thursday, Friday, and Saturday nights. Why Thursdays? The students told us that was the biggest party night of the week.

So we created the program as an alternative to going to the bars. We offer entertainment in our student union, including movies, comedy clubs, and free food from ten p.m. to midnight, and on Fridays and Saturdays, we offer a free breakfast from midnight to two a.m. Bars close at three a.m., so students leave the bars and come back to campus to get food. Vandalism is down in residence halls and around town, and injuries are down. ABC's *Good Morning America* visited campus, the BBC called, and over fifty colleges have visited to learn about our program. It was a tremendous risk, but the reward has been significant.

I set the example, by rolling up my sleeves and working with everyone. I served eggs, bussed tables, and did what was necessary to get this program off the ground. I always think of General Powell when I talk about this program because he said, "You have achieved excellence as a leader when people will follow you everywhere, if only out of curiosity."⁸

F. Be a Mentor and Take Care of Subordinates: Pass on Your Success

Remember where you came from and who helped you become successful. I have always realized that I am standing on the shoulders of many officers who served before me and had a hand in my success. I have also mentored officers, and they would come and thank me for what I had advised. I always told them that the best thanks they could give me would be to help someone else along the way. In other words, pass the support on to someone else.

I was asked once whether I thought having a certain type of mentor or supporter would help a person get a particular job. First, you won't get the

8. OREN HARARI, *THE LEADERSHIP SECRETS OF COLIN POWELL* (2002).

job unless you are qualified, and second, once in the job, you have to perform.

Taking care of subordinates also means sharing power—empower them to act and to develop their skills. Constantly train, teach, and coach them to perform at peak efficiency. Leaders must identify and develop the leaders of the future.

G. Be Yourself and Continue to Learn

I did not try to do the job the same as the person who held the job before me. I always did the job based on my skills and how it fit my personality. I learned a lot from the bosses I had along the way. I tried to extract the good things that fit my personality and style of management. There were other traits, although good, that did not fit my style, so I don't use them. There were also some that I would not use under any circumstances because they would not work for me.

I followed several officers in assignments who had a different style than mine. I chose to approach the job in a way that fit my style and personality. I also continue to learn, read, and attend conferences. It's also helpful to have a little humility; try not to let your ego get too big.

H. Celebrate and Reward Success

Award ceremonies, certificates of achievement, promotions: there are many ways to reward and celebrate success. I have a senior management staff meeting twice a month. I reward my immediate staff members who arrange this meeting by taking them to lunch and letting them know what a good job they did. On a larger scale, I will have a kickoff event that starts the school year. We do it at the new student recreation center, a \$34 million complex that's state of the art and one of the top five in the country. They can swim, climb the climbing wall, enjoy lots of food, and participate in activities for them and their children. This takes place at the beginning of the academic year because it's a great way to kickoff the year on a positive start.

I. Communicate, Listen, Communicate

Communication is key up and down the chain of command. It's also good to check the information or guidance given to insure it is the same guidance originally issued. A leader is also a good manager who hires quality people and listens to them. This is also the concept of management by walking around. You can find out more about what's happening in your organization by just walking around and talking informally with your staff, and listening to what is on their minds.

J. Don't Worry About Who Gets the Credit

The former Judge Advocate General of the Army, Mike Nardotti, and I would talk on occasion about leadership, and we always agreed that an important trait was not worrying about who got the credit for an accomplishment. True leaders earn respect by making sound decisions, admitting their mistakes, and doing what's best for subordinates and the organization, and not trying to satisfy a personal agenda.

III. Ken Gray's Leadership Philosophy

- (1) Establish mission, vision, goals, and objectives;
- (2) Set realistic goals;
- (3) Develop shared values;
- (4) Create a cohesive and balanced team;
- (5) Be innovative, creative, and think outside the box;
- (6) Be a mentor and take care of subordinates;
- (7) Be yourself and continue to learn;
- (8) Celebrate and reward success;
- (9) Communicate, Listen, Communicate;
- (10) Don't worry about who gets the credit;
- (11) Be humble (manage your ego); and
- (12) Remember your family.

I believe it's also important to have a strong foundation underlying all we do. For me, that foundation is a set of values that guides my everyday life. I'm talking about duty, honor, selfless service, love and loyalty to family and country, personal responsibility, and absolute integrity; values

that were instilled in me when I was growing up and during my service in the Army.

I want to share with you something else that I consider very important in my success. I call them the “five C’s.” You may have seen these in some of our publications on values, and I hope these are still emphasized in the Army today. They are significant for me, and they really describe what we should all aspire to achieve. Former Chief of Staff of the Army General Gordon Sullivan called these the qualities of professionalism. The five C’s are commitment, competence, candor, courage, and compassion.

Commitment is selfless service: the dedication and willingness to support a cause over your individual desires. In their book, *Everyone’s a Coach*,⁹ Ken Blanchard and Don Shula say that effective leaders are conviction driven and stand for something. In other words, you have to stand for something, or you will fall for anything. Commitment reflects the character of a leader.

Competence is technical proficiency. Be the best at what you do, know your job, and do it well. It comes from hard work, dedication to excellence, and tough preparation through education and training. My philosophy has always been to do the best job you can in every assignment to give yourself the opportunity to compete. Be qualified for consideration, and have a personnel file that is competitive with anyone else. I had a learning curve when I assumed my current job. I didn’t have a student services background. There were many who thought I would not succeed. I used the leadership skills developed in the Army and began a learning process that still continues today.

Candor. Be honest and trustworthy, so others can trust what you tell them. Candor means honesty and straight talk. It’s the basic stuff of soldiering, according to General Wickham, former Chief of Staff.¹⁰ It’s absolute integrity—being straightforward and honest with others.

Courage. A leader must have strength of character and the moral and physical strength to take risks, the will to persevere in any difficulty. Stand up for what is right, even in the face of obstacles. General Colin Powell

9. KEN BLANCHARD & DON SHULA, *EVERYONE’S A COACH* (1995).

10. General John A. Wickham, *Values*, *SOLDIERS*, Dec. 1986, at 2.

has said, "Whatever the cost, do what is right."¹¹ Act calmly and firmly in stressful situations, and accept responsibility for your mistakes.

Compassion. Understand that everyone is not perfect. People make mistakes. Good leaders help others overcome their mistakes and achieve success. Rick Pitino, former coach of the Boston Celtics, now at the University of Louisville, said, "Failure is good! It's fertilizer. Everything I've learned about coaching, I've learned from making mistakes."¹²

IV. Generations

I had the opportunity in December to speak at the Pittsburgh recruiting brigade awards banquet, and I told them that the five C's were important in their work. Their mission as recruiters is critical to the future of the Army and the quality of the force. I know this theme is preached to them all of the time, but the ability of our Army to meet the challenges it faces today depends on how well they do their jobs. The quality of our Army is a direct result of their efforts.

In my job as Vice President at West Virginia University, I work with young people every day. It's important to be honest with them and tell them the truth, whether it's telling them what's expected of them as soldiers or what is expected of them as students. I told the recruiters that they should always tell the truth about the jobs that they can expect to get, and what the needs of the Army are, and that the mission will sometimes dictate what that job will be. Candor is very important in all that we do, and failing to be candid will adversely impact the attitude of that future soldier.

I recall when I first heard our new advertising slogan, "Army of One," I was concerned because I am part of the "Be all You Can Be" Army. I read somewhere that George Will, the columnist, had poked fun at the slogan when he was giving a speech at the Naval Academy. Again, in my job as a university vice president, I supervise those who recruit students for the university. We face competition from many other schools. How do we get our message out there? How do we appeal to the youth of today? What are they looking for? What turns them on to want to be involved? What

11. HARARI, *supra* note 8.

12. Rick Pitino, *quoted in* JOHN C. MAXWELL, *FAILING FORWARD: HOW TO MAKE THE MOST OF YOUR MISTAKES* (2000).

would motivate them to want to attend WVU? Or how do we get them interested in joining the Army?

The message has to be one that they are tuned in to. I read a news article from the Army News Service that asked the question, "Why change a slogan that one study claims to have been the number two recognized advertising ditty of the 21st century?"¹³ The response was that the Army's message has to be relevant to today's youth and what motivates them.¹⁴

In their book *Millennials Rising: The Next Great Generation*,¹⁵ Neil Howe and William Strauss say generations are a great key for unlocking the history of any society that believes in progress. As we look back to generations in the past—40s, 60s, 80s—there is a new perspective on where our society is headed. In this generation, we must elevate their expectations, set goals, and provide the right kind of leadership. Far too soon, they will be on their own and will be the next generation.

When you think about the great generations in the past, we know that the tragedy of September 11 will have a profound impact on this generation and our society for years to come. All of us witnessed the display of the American flag on cars, homes, and even hanging from office buildings and overpasses on interstates. The terrorist attack unified this country in a way not felt since the surprise attack on Pearl Harbor.

When we held our memorial service at WVU, over 7000 students and members of the WVU community attended the event. We observed a moment of silence that lasted for five full minutes; not a sound was uttered. At noon the chimes sounded on the clock at Woodburn Hall, and in honor of the victims, we rang the bell that's on our campus from the mast of the *USS West Virginia*. It was a tremendously moving ceremony.

During this crisis, WVU's president was trapped in Washington. Flights had been grounded, and it took eight hours to get back to Morgantown. The chief of staff immediately assumed the leadership, and we took care of our students. We provided the necessary support to calm fears, provided counseling, and set up stations in our student union for students to

13. Joe Burtas, *Army Message More Relevant to Youth*, ARMY NEWS SERVICE, Jan. 10, 2001, available at <http://www.dtic.mil/armylink/news/Jan2001/a20010110sloganside.html>.

14. *Id.*

15. NEIL HOWE & WILLIAM STRAUSS, *MILLENNIALS RISING: THE NEXT GREAT GENERATION* (2000).

call home. We also had to support our international students because their parents were worried about them. We contacted the embassies of the respective countries so they could communicate with the parents. You may have heard that Kuwait recalled its students from campuses around the country. They have all since returned to campus.

When the president returned, within forty-eight hours he sent a letter to parents to calm their fears, and they were happy to hear from him. Leaders rise to the occasion during times of crises, from the President of the United States, to the Mayor of New York, to the presidents and chancellors of our universities.

This generation will be united as never before. The popular singing group N'Sync has a song called *Forever Young*, and the lyrics say, "We can reach our destiny, we will feast in harmony as one."¹⁶ Every generation has its heroes; this one is no different. United we stand—an Army of one. Does that sound familiar? We have to have a message that appeals to the youth of today.

The new ad campaign on television talking about the generations of soldiers causes me to reflect back over the generations of soldiers who have gone before us. We know they persevered in the face of danger and hardship, and even death. We know that their selfless service to our nation is their legacy to us, and also our legacy and challenge for the next generation.

On October 29, 1941, Winston Churchill was invited to speak at Harrow School, his alma mater. After his introduction, he rose, went to the podium, and said, "Never, never, never give up."¹⁷ Then he took his seat.¹⁸ As we deal with the aftermath of the September 11 tragedy, this is a time when we as a nation must not give up. It's important that we respond in such a way that will discourage anyone from ever doing this again.

Now that we are engaged in a War on Terror, our men and women in uniform are again asked to step forward and lead the way. We know they are placing themselves in harm's way, and may, in the end, make the ultimate sacrifice to preserve our freedom and our way of life. They come from a long generation of brave women and men. Before we had inau-

16. N'SYNC, *Forever Young*, on N'SYNC (1997) (German release).

17. Winston Churchill, Speech at Harrow School (Oct. 29, 1941).

18. *Id.*

rated our first President or ratified the Constitution, even before we had written the Declaration of Independence, making us a country, we counted on our soldiers to defend American liberty. We must look back and draw strength from those generations of soldiers who sacrificed their lives in wars to defend democracy.

We must look back to the generations of soldiers who served during periods of peace. Although having a mission to fight and win wars, they have served as peace keepers, providing humanitarian aid and emergency relief, providing shelter for victims of hurricanes, fighting forest fires, providing flood relief, and now, today, fighting terrorism at home and abroad. Whatever our age or our memory of war, we have good reasons to honor our generations of soldiers. In truth, our soldiers are the very embodiment of America itself. They are the composite of our nation and all that has made it great.

Some of the soldiers currently serving will become well-known heroes who receive widespread acclaim. Most will not. Most will be just ordinary citizens who answer the call to duty. They postpone their private lives, their peaceful pursuits of farm, factory, and office. They pour all their talents and energy into becoming soldiers. Often, the call to duty leads them to war's hardship, danger, and death. Today they are engaged in the war against terrorism.

Let us recall what one great leader, General MacArthur, said about the American soldier:

His name and fame are the birthright of every American citizen. In his youth and strength, his love and loyalty, he gave all that mortality can give. He needs no eulogy from me or from any other man. He has written his own history and written it in red on his enemy's breast.¹⁹

From Lexington and Concord, the tradition of our soldiers has sustained us in every battle and every war, right up through today's War against Terror. It has marched with us and stood vigil with us in the frozen camps of Valley Forge, the steaming jungles of the Pacific Rim, the bloody beaches of Normandy, Korea, Vietnam, the scorching sands of Saudi Arabia, and the difficult terrain in Afghanistan. In that tradition, young, inex-

19. General Douglas MacArthur, Farewell Speech to the Corps of Cadets, West Point, New York (May 12, 1962).

perienced Americans become tough, experienced soldiers and leaders. No matter where or when our soldiers serve, they always serve with distinction. They know they have to fight. They know they have to sacrifice. They know they have to win. And they do just that, time after time, battle after battle.

At this crucial time in our history, we must look back to the generations of soldiers who came before us and know that they were led by visionary and principled leaders; that their service was based on a foundation of values; that they are the epitome of the five C's that I described; and that they shared a willingness to persevere and never, never, ever gave up.

V. Conclusion

As I conclude my remarks, I recall an old Korean War movie called *The Bridges at Toko-Ri*.²⁰ The final scene in the movie shows the admiral of an aircraft carrier watching the planes continue to strike at enemy positions entrenched in the side of a mountain, getting shot down, and others continuing to strike the targets knowing they would not survive. And he looks at the camera and asks the question, "Where do we get such men?"²¹ Today that question would be, "Where do we get such men and women who are willing to make the ultimate sacrifice for their country?"

We get them from the coal fields of West Virginia; the beaches of California; from the farms in Iowa; the mountains in Tennessee; and the great cities like New York, Chicago, and Washington, D.C. They come because they want to serve. They come because they see the greater good of preserving our way of life, even when preserving that way of life might mean the loss of their own lives. They come to offer the greatest gift that can be given.

Soldiers and their families are truly special people. During my travels on active duty, I recall seeing a sign over the door of a post exchange that read, "Through these doors pass the finest people in the world: soldiers and their families."

General Sullivan used to talk about the battlefield at Antietam. On that battlefield stands a statue of a soldier. That statue represents all gen-

20. *THE BRIDGES AT TOKO-RI* (Paramount 1955).

21. *Id.*

erations of soldiers everywhere, past and present. It represents the epitome of the soldier in every respect. On the statue are inscribed the words, "Not for themselves, but for their country." Not for themselves, but for their country. As we look back to the past generation of leaders and soldiers, we know they did it not for themselves, but for their country. Our men and women serving around the world and in Afghanistan do it not for themselves, but for our country. As judge advocates, you do it not for yourselves, but for your country. Thank you for all that you do in service to our nation

God bless all of you, God bless our great Army, and God bless the United States.

THE PARADOX OF AMERICAN POWER: WHY THE WORLD'S ONLY
SUPERPOWER CAN'T GO IT ALONE¹

REVIEWED BY MAJOR JOHN HYATT²

*America will continue to be number one, but . . . number one ain't gonna be what it used to be.*³

To nearly every American, the above quotation is both heartening and vaguely troubling. Americans like the idea that the United States will continue to be the most powerful country on Earth. Yet, if this is so, Americans wonder why some problems seem insoluble and that the United States' vulnerabilities seem to be increasing. What costs, compromises, and sacrifices must America *really* make to secure its future.

In *The Paradox of American Power*, James S. Nye, Jr., explains the sources and condition of America's power and gives his audience a prescription for maintaining and even extending the country's might. Nye's voice merits considerable attention. He is currently the Dean of the Kennedy School of Government at Harvard, formerly served as an assistant secretary of defense in the Clinton Administration, and is a frequent contributor to numerous prestigious periodicals.⁴ Furthermore, his track record for understanding America's global position is solid. In 1989, in his book *Bound to Lead*,⁵ Nye took the unfashionable position (recall the enormous budget deficits and seemingly unstoppable rise of Japan) that America was poised to soar to new heights.⁶ Of course, readers should not take Nye's word as gospel. While his credentials and track record are impres-

1. JOSEPH S. NYE, JR., *THE PARADOX OF AMERICAN POWER* (Oxford University Press 2002).

2. United States Army. Written while assigned as a student, 51st Judge Advocate Officer Graduate Course, The Judge Advocate General's School, United States Army, Charlottesville, Virginia.

3. NYE, *supra* note 1, at 171.

4. *Id.* (dust jacket).

5. JOSEPH S. NYE, JR., *BOUND TO LEAD: THE CHANGING NATURE OF AMERICA'S POWER* (1989).

6. See Martin Walker, *Safety in Numbers*, WASH. POST, Mar. 3, 2002, at T4 (construing Nye's argument in *Bound to Lead*, *supra* note 5)

sive, Nye is unmistakably a Democratic partisan, and his audience should view his work in that light.⁷

The essence of Nye's argument in *Paradox* is that the United States is on course to maintain its leading position in the world, but to do so it must acknowledge and take advantage of global changes elevating the importance of so-called "soft" power and diminishing the importance of more traditional "hard" power. *Hard* power, as Nye uses this term, is a nation's ability to coerce or force a change through sources such as military might and economic strength. It does not have to be negative; a nation can exercise such power through inducements as well as threats. *Soft* power, on the other hand, refers to a nation's ability to get other countries to want what that nation wants, to co-opt, rather than coerce.⁸ If other countries respect, admire, and want to be like a nation, they will likely work for outcomes favorable to that nation. The reason "number one ain't gonna be what it used to be," and why Nye describes America's position vis-à-vis its global power as a "paradox," is that the very process of acknowledging and harnessing soft power requires the United States to refrain from unilateral, "arrogant" policies—in short, to give up some of the benefits of being number one.

Nye does not argue that soft power is more important than hard power. Rather, he argues that soft power is gaining in importance because America cannot solve many of the problems it faces today, at acceptable cost, by resort to hard power alone.⁹ For instance, imagine the difficulty of solving any of the following problems without the cooperation of other states: the spread of infectious disease, the flow of illegal migrants, international industrial pollution, habitat destruction, drug smuggling, or terrorism. The list could continue, but the point is that even America, with the most powerful military and the strongest economy in the world, needs the cooperation of other states to address many significant issues it faces. Therefore, America must pay heed to the opinions, concerns, and perceptions of other countries and peoples in the conduct of its affairs.

Nye begins his analysis with a comprehensive exploration and evaluation of the current distribution of global power. In very clear and persuasive terms, he demonstrates that the United States is by far the most powerful country in the world. Nye's comparative analysis devotes sev-

7. See Max Frankel, *Sound of One Saber Rattling*, N.Y. TIMES, May 26, 2002, at 16.

8. NYE, *supra* note 1, at 8.

9. *Id.* at 40.

eral pages each to China, Japan, Russia, India, a combined Europe, and several of their possible combinations. He provides a wide range of factors bearing on a country's power, including the number of nuclear warheads, defense budget, personal computers per 1000 residents, Gross Domestic Product, population, high-tech exports, manufacturing capacity, and several others.¹⁰ Nye includes a helpful chart that summarizes and displays the relationships.¹¹

Next, Nye shows how the various factors interrelate. In Nye's view, power is a multifaceted and comprehensive concept, which he explains using the metaphor of a three-level chessboard. Military power occupies the top chessboard. At this level of power, the world is unipolar. The "United States is the only country with both intercontinental nuclear weapons and large, state-of-the-art air, naval, and ground forces capable of global deployment."¹² Economic power resides on the second, multipolar chessboard, upon which Europe and Japan can already balance the United States, and China will probably become a significant power early this century. The bottom chessboard is the realm of "non-state actors as diverse as bankers electronically transferring sums larger than most national budgets, at one extreme, and terrorists carrying out attacks and hackers disrupting Internet operations, at the other."¹³ Here, power is widely dispersed, rendering any discussion of polarity obsolete.

Nye then explores and explains two macro-trends that he believes are increasing the importance of soft power such that the United States must embrace this concept. The first trend is the "Information Revolution."¹⁴ Nye offers some "gee-whiz" statistics to create a sense of the magnitude of the information explosion that has occurred over the past years. The growth in Web pages, e-mail messages, and gigabytes of stored data is so vast, it defies practical comprehension: "If the price of automobiles had fallen as quickly as the price of semiconductors, a car today would cost \$5."¹⁵ Fortunately, Nye's statistical onslaught is relatively short, and it

10. *Id.* at 18-35.

11. *See id.* at 37, tbl.1.2.

12. *Id.* at 39.

13. *Id.*

14. *Id.* at 41.

15. *Id.* at 42.

makes the point that the information revolution is objectively and measurably happening and therefore undeniable.

No one can seriously dispute the existence of the information revolution; however, the impacts Nye ascribes to this global development are debatable. First, Nye argues that the information revolution will result in the decentralization of information, power, and authority. Other scholars point out that previous waves of technological innovation have tended to have a centralizing effect and that for much of the past century, national governments have grown dramatically.¹⁶ Although arguing for the reversal of a historical trend is difficult, Nye convincingly answers this criticism by highlighting a crucial difference between the information revolution and all previous rounds of technological innovation.

According to Nye, the information revolution has made very inexpensive “many-to-many” communications possible for the first time.¹⁷ Telephones and telegraphs have long allowed cheap “one-to-one” communications, and radio and television have allowed affordable “one-to-many” communication. But the Internet, like nothing before it, allows many-to-many communication at very low cost and on a global scale. Virtual communities in cyberspace claim the attention and loyalties of citizens across geographical boundaries.¹⁸

Nye cites a variety of examples to illustrate this point: Transnational corporations exert a great deal of control over the flow of capital, the location of factories, and the provision of goods;¹⁹ ordinary consumers have access to information once the exclusive preserve of the world’s top-tier militaries, such as global positioning systems and high-resolution satellite photos;²⁰ and a Vermont-based grass roots activist mobilized international support and ultimately succeeded in the creation of an international convention banning anti-personnel land mines over the opposition of the Pentagon, the most powerful bureaucracy in the most powerful country on Earth.²¹

The most convincing illustration of Nye’s decentralization argument is the growth in the power of human rights activists. Activists have been

16. *Id.* at 45.

17. *Id.* at 52.

18. *Id.* at 54.

19. *Id.* at 56.

20. *Id.* at 65.

21. *Id.* at 41.

able to mobilize enough support within sovereign states to get those states to mount certain attacks on the concept of sovereignty itself. The North Atlantic Treaty Organization's intervention in Kosovo, the British arrest and extradition of General Augusto Pinochet, and a French magistrate's effort to summon a former U.S. Secretary of State to Paris to testify in a trial about Chile all exemplify the global influence human rights activists can exert.²²

The second impact that Nye credits to the information revolution is a fundamental change to the prerequisites for effectively communicating any message. Too much information creates a "paradox of plenty."²³ In an information age in which virtually any voice can have a global reach, power does not flow merely from the ability to broadcast information; rather, to communicate effectively, the audience must believe your message over various competing voices. Thus, power flows from credibility. Nye concludes that to enhance the credibility necessary to take advantage of this trend, countries must emphasize liberalism and autonomy and have access to multiple channels of communication.²⁴

Nye's reasoning on this point is seductive, but he does not adequately support his conclusion. Despite a robust democracy, an aggressively free press, a lengthy record as the foremost champion of the ideals cited by Nye, and lots of access to communications channels, the United States suffers from a profound lack of credibility in certain parts of the world, in particular among Islamic countries. The proposition that ideals that generate soft power in one culture may undercut it in another is certainly understandable, but even this allowance does not rescue Nye. One could certainly expect Nye's ideals that America exhibits to resonate in France and Germany; however, France's continuous effort to balance the United States diplomatically, and Gerhard Schroeder's complete reversal of his political fortunes in Germany's recent elections by rejecting American claims about the danger posed by Iraq,²⁵ clearly illustrate that factors beyond Nye's analysis powerfully influence people's beliefs.

The second macro-trend Nye identifies as propelling the rise of soft power is globalization. Globalization does not refer only to economic interdependence, although that is an important component. Rather, Nye

22. *Id.* at 58.

23. *Id.* at 68.

24. *Id.* at 67-69.

25. See *Germany Speaks*, N.Y. TIMES, Sept. 24, 2002, at 26 (linking Schroeder's resurgence to his stand against the United States on Iraq).

uses globalization as a rubric for the entire range of intercourse between countries, peoples, and regions, including infectious disease, drug smuggling, global warming, habitat destruction, terrorism, immigration, tourism, and trade.²⁶ While globalization is not new, the information revolution has served to “quicken and thicken it.”²⁷ As the preceding list illustrates, globalization is clearly a “mixed bag.” But even if a government chooses to forego the economic benefits associated with this trend, many of the negative consequences would persist.²⁸

The vast expansion of transnational contacts and intercourse puts a continually increasing number of “issues up for grabs internationally.”²⁹ Private actors now heavily influence regulations and practices once the exclusive preserve of national governments, “ranging from pharmaceutical testing to accounting and product standards to banking regulation.”³⁰ For instance, if a transnational corporation raises the minimum age of its factory workers in response to pressure brought by international nongovernmental organizations, that corporation’s decision may countermand that of a sovereign, elected government, such as India’s.³¹ Another example is large pharmaceutical companies deciding not to pursue lawsuits over infringement of their patents on AIDS drugs in South Africa.³² Finally, supranational organizations, such as the World Health Organization, the World Trade Organization, and the United Nations, increasingly exert influence over sovereign states.³³

Globalization by its very nature creates issues beyond the reach of any single country, even the United States. Furthermore, globalization, at least its detrimental aspects, is virtually unstoppable. To Nye, the implication of these two points is straightforward: the United States must not withdraw to isolationism, nor may it resort to unilateral action to attack international problems. Either approach would undercut America’s soft power by alienating or offending countries and international groups whose cooperation the United States needs. Rather, Nye urges the United States to use

26. NYE, *supra* note 1, at 77-93.

27. *Id.* at 85.

28. *Id.*

29. *Id.* at 89.

30. *Id.*

31. *Id.* at 107.

32. *Id.* at 106.

33. *Id.* at 107-09.

its preeminence to engage governmental and nongovernmental international players to shape international norms and institutions.³⁴

Quibbling with Nye over the fact and effects of globalization is impossible; however, his assertion that unilateral action will undercut America's soft power is an overgeneralization. Certainly some unilateral actions could improve America's image and enhance its soft power. Without admitting it, Nye concedes as much at other points in the book when he lauds unilateral actions taken by the British in the nineteenth century, such as eradicating piracy and enforcing open-trade standards, as the creation of "public goods."³⁵ Why Nye does not consider the eradication of terrorism or the enforcement of nuclear nonproliferation (especially among totalitarian states such as Iraq and North Korea) similarly as public goods worthy of unilateral action is uncertain.

After completing his analysis of America's potential competitors and the changing environment the United States faces, Nye focuses on America itself. In the fourth chapter, "The Home Front," Nye examines a wide range of issues and indicators that he believes either enhance or undercut America's soft power. This chapter is particularly well-written and persuasive. Nye does an excellent job quantifying and explaining notoriously slippery issues such as whether America suffers from cultural and moral decay,³⁶ whether American's are losing confidence in their societal institutions,³⁷ America's immigration policy,³⁸ and the fundamental health and attractiveness of the American economy.³⁹ Nye does indulge in some partisan sniping; for example, he casts America's approach to gun control,⁴⁰ capital punishment,⁴¹ and "income inequality"⁴² in a negative light. But this does not distract much from the thrust of his message.

In his concluding chapter, entitled "Redefining the National Interest," Nye delivers his prescription for America. Addressing an audience apparently ranging from President Bush to the common voter, Nye's ambitious hope is to impact both American foreign and domestic policy. This is the

34. *Id.* at 110.

35. *Id.* at 144.

36. *Id.* at 112.

37. *Id.* at 119.

38. *Id.* at 116.

39. *Id.* at 124.

40. *Id.* at 116.

41. *Id.*

42. *Id.* at 132.

most overtly partisan chapter of the book; at one point Nye calls upon Congress to put “[America’s] own house in order in economics, environment, criminal justice, and so forth.”⁴³ But Nye does make some good points, and he provides some interesting strategies for American engagement with the rest of the world. Unfortunately, Nye’s prescription ultimately falls short and ends up looking like a recipe for a long, slow slide in American power and the maintenance of a dismal status quo for the less fortunate peoples of the world.

Nye’s failure lies in his inability to rebut persuasively his critics’ argument. Nye summarizes their position as follows:

Some unilateralists advocate an assertive damn-the-torpedoes approach to promoting American values. . . . [A] principal aim of American foreign policy should be to bring about a change of regime in undemocratic countries such as Iraq, North Korea, and China. Unilateralists believe that [America’s] intentions are good, [and that] American hegemony is benevolent.⁴⁴

Nye’s uninspired response is that Americans are not immune to hubris and do not have all the answers.⁴⁵ Such platitudes are a hollow dodge of the hard questions Nye’s intellectual adversaries are attempting to answer: Would the aggressive promotion of American values such as liberty, autonomy, and human dignity be a good thing? Should the world have a place for totalitarian regimes, such as Iraq and North Korea, that seem to exist solely for the pleasure and aggrandizement of their rulers? Before America leads, must it wait for others to follow?

Nye’s unfortunate failure to address the unilateralists convincingly in the final chapter undermines the potency of his prescription and overshadows some of his truly insightful ideas. Nonetheless, *The Paradox of American Power* is a worthwhile read. Nye’s approach is thoughtful, thorough, and well-researched,⁴⁶ and he does a very good job educating his audience on a topic of current significance. No matter your political viewpoint, there is wisdom in this book, even if it lacks inspiration.

43. *Id.* at 134.

44. *Id.* at 154.

45. *Id.* at 155.

46. The book contains over thirty pages of endnotes. See *id.* at 173-207.

WINNING AT THE MERIT SYSTEMS PROTECTION BOARD: A STEP-BY-STEP HANDBOOK FOR FEDERAL AGENCY SUPERVISORS, MANAGERS, LAWYERS, AND PERSONNEL OFFICIALS¹

REVIEWED BY RICHARD W. VITARIS²

In 1998, Harold Ashner wrote a handbook on Merit Systems Protection Board (MSPB or Board) practice and procedure called *Representing the Agency Before the Merit Systems Protection Board*.³ That book provided the equivalent of an introductory training course on MSPB practice for the advocate. It took the mystery out of adverse action appeals by explaining in plain English concepts such as nexus, the *Douglas* factors,⁴ and the performance improvement period.⁵

While invaluable to the inexperienced agency representative, *Representing the Agency* was just an introductory primer on Board practice, not a treatise or comprehensive deskbook. A reader with more than a basic legal question about the Board had to look either to Board case law itself, or to the mammoth treatise by Peter Broida, *A Guide to Merit Systems Protection Board Law and Practice*,⁶ a tome of some 3892 pages. A supervi-

1. HAROLD J. ASHNER, WINNING AT THE MERIT SYSTEMS PROTECTION BOARD: A STEP-BY-STEP HANDBOOK FOR FEDERAL AGENCY SUPERVISORS, MANAGERS, LAWYERS, AND PERSONNEL OFFICIALS (Dewey Publications 2002) [hereinafter ASHNER, WINNING AT THE MSPB], available at <http://www.deweypub.com>.

2. LL.M. Labor Law, The George Washington University National Law Center; J.D., with highest honors, Rutgers University School of Law; B.A., Georgetown University. The author is an administrative judge with the U.S. Merit Systems Protection Board, Atlanta Regional Office. Before his appointment as an administrative judge, the author served as both a civilian attorney with the Department of the Army and as an active duty Army judge advocate. The views expressed are solely those of the author and do not purport to reflect the position of the Merit Systems Protection Board.

3. HAROLD J. ASHNER, REPRESENTING THE AGENCY BEFORE THE MERIT SYSTEMS PROTECTION BOARD: A HANDBOOK ON MSPB PRACTICE AND PROCEDURE (Dewey Publications 1998) [hereinafter ASHNER, REPRESENTING THE AGENCY].

4. When an employee challenges an adverse action (for example, discharge) in the ordinary course by initiating MSPB review, the government, to have the action upheld, must establish: (1) that the charged conduct occurred; (2) that there is a nexus between that conduct and the efficiency of the service; and (3) that the penalty imposed is reasonable. See *Pope v. U.S. Postal Srv.*, 114 F.3d 1144, 1147 (Fed. Cir. 1997).

5. Before initiating an action for unacceptable performance under 5 U.S.C. § 4303, an agency must give the employee a reasonable opportunity to demonstrate acceptable performance. See *Smith v. Dep't of Health & Human Srvs.*, 35 M.S.P.R. 101, 104 (1987).

6. PETER BROIDA, A GUIDE TO MERIT SYSTEMS PROTECTION BOARD LAW AND PRACTICE (Dewey Publications 2002).

sor or personnel specialist with a practical question on Board practice could turn only to agency regulations or to a few superficial 50-100 page guidebooks available from a number of publishers.⁷ Everyday, how-to-proceed guidance was not available in written form anywhere.

With *Winning at the MSPB*, Mr. Ashner has now written a comprehensive deskbook on MSPB Practice which strikes a near perfect balance between the unwieldy Broida treatise, which tells the typical user more than she needs to know, and the superficial guidebooks, which tells her far too little. *Winning at the MSPB* gives all agency employees involved in the disciplinary process—managers, personnelists, and representatives—a clear, detailed roadmap on how to take and win an adverse action before the Board, including comprehensive advice both on the law and on everyday practice.

Winning at the MSPB is a complete rewrite and major expansion of Ashner's earlier book, *Representing the Agency*. Ashner expands his scope from simply representing the agency to how to create the successful adverse action charge itself. He adds a major section, Building a Winning Case,⁸ which teaches how to get the facts by asking the right questions, conducting an investigation, and documenting a potential adverse action. This makes *Winning at the MSPB* not only an important reference for representatives, but for managers and personnel specialists as well.

Managers often feel intimidated by the disciplinary process, and are themselves worried about ending up on the blame line for an action gone bad since a finding of discrimination or retaliation against a manager may ruin a career. With the passage of the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002,⁹ known as the "No FEAR" legislation, a federal manager's fears will be even more acute since federal agencies must now pay for settlements or judgments against them in whistleblower and discrimination cases from the agency's own budget, and can no longer resort to the Judgment Fund.¹⁰ Given this environment, many managers will not even consider bringing an adverse action charge

7. For example, FPMI Communications, Inc., offers a series of guidebooks for supervisors in the \$19-29 price range, with such titles as *Federal Managers's Guide to Discipline* and *RIF and the Federal Employee, What You Need to Know*.

8. ASHNER, *WINNING AT THE MSPB*, *supra* note 1, pt. II.

9. Pub. L. No. 107-174 (2002).

10. *Id.* § 201(b) (federal agencies must reimburse the judgment fund for any payment made from the fund for retaliation or discrimination in violation of 5 U.S.C. § 2303(b)(8)-(9)).

against an employee without a high degree of confidence that it is the right thing to do and that the action will stick.

Reading *Winning at the MSPB* will give federal managers the confidence they might otherwise lack to take an appropriate disciplinary action. It provides managers with practical advice on how to deal with union representatives,¹¹ and how to react when an employee asserts his *Weingarten* rights¹² or refuses to cooperate in an investigation by asserting the Fifth Amendment. Importantly, *Winning at the MSPB* makes clear that it is not a substitute for legal advice, and advises its readers when to seek legal counsel from its Staff Judge Advocate or Office of General Counsel. For example, Ashner explains that an employee may be given immunity through *Kalkines* warnings,¹³ but appropriately cautions federal managers against doing so except upon advice of counsel.¹⁴

Winning at the MSPB contains a lengthy glossary, putting into plain English most of the “terms of art” of federal personnel, such as “competitive level”¹⁵ and “prohibited personnel practice,” to help novice representatives. It provides an equal number of entries to help managers and

11. In addition to *Weingarten* rights, see *infra* note 12, the book discusses the union’s right to participate in formal discussions and the union representative’s role at interviews. See ASHNER, *WINNING AT THE MSPB*, *supra* note 1, at 166-69.

12. *Weingarten* rights, which involve a private sector employee’s right to request union representation at an investigatory interview that the employee reasonably believes might result in disciplinary action, *NLRB v. Weingarten, Inc.*, 420 U.S. 251, 260 (1975), are comparable to the federal sector provision found at 5 U.S.C. § 7114(a)(2)-(3).

13. An employee may be removed for not replying to questions in an investigation by an agency if he is adequately informed both that he is subject to discharge for not answering and that his replies and their fruits cannot be employed against him in a criminal case. See, e.g., *Kalkines v. United States*, 473 F.2d 1391, 1393 (1973); *Ashford v. Dep’t of Justice*, 6 M.S.P.R. 458, 465-66 (1981). The right to remain silent, however, attaches only when there is a reasonable belief that the elicited statements will be used in a criminal proceeding. *Ashford*, 6 M.S.P.R. at 466.

14. See ASHNER, *WINNING AT THE MSPB*, *supra* note 1, at 159-60.

15. For example, the glossary defines competitive level as

For reduction-in-force purposes, all positions in the competitive area and in the same grade or occupational level that are sufficiently alike in qualification requirements, duties, responsibilities, pay schedules, and working conditions that an agency may readily assign the incumbent of one position to any of the other positions without changing the terms of his or her appointment or unduly interrupting the work program. *Compare with* competitive area.

Id. at 886.

personnelists understand Board litigation, such as “affirmative defense,” and “official notice.”¹⁶

Winning at the MSPB is also an indispensable tool for employee relations specialists. Unlike *Representing the Agency*,¹⁷ Ashner’s new book provides comprehensive guidance on how to draft adverse action charges.¹⁸ It teaches when an agency should use a specific charge versus a general charge,¹⁹ and most importantly, it explains how to determine what the elements are.²⁰ Ashner also advises how to avoid overcharging without undercharging—a fine skill for an employee relations specialist to glean.

Winning at the MSPB includes a detailed chapter on performance-based actions under 5 U.S.C. chapter 43, identifying all of the potential pitfalls for the unwary. For example, Ashner discusses the adequacy of performance standards, including a discussion of prohibited absolute standards and “backwards” or “negative standards.”²¹ He counsels how to modify performance standards in the performance improvement plan (PIP) letter appropriately,²² and how to monitor the adequacy of the PIP period

16. For example, the glossary defines official notice as “A process whereby the Administrative Judge, on his or her own motion, or on the motion of a party, may accept as true matters of common knowledge or matters that can be readily verified. Official notice of any fact satisfies a party’s burden of proving that fact.” *Id.* at 893.

17. Mr. Ashner’s earlier book did little to explain the complexity of charging before the MSPB, except to lay out some bare-boned boilerplate. Richard W. Vitaris, Book Review, 161 MIL. L. REV. 216, 219 (1999) (reviewing ASHNER, REPRESENTING THE AGENCY, *supra* note 3). It did not discuss the pros and cons of whether to charge an employee with a specific label charge, that is, theft of government property, versus using a generic charge, that is, conduct unbecoming a federal employee, or even using no label for the charge at all. *Id.* These topics are now thoroughly discussed in Ashner’s new book. See ASHNER, WINNING AT THE MSPB, *supra* note 1, ch. 10.

18. ASHNER, WINNING AT THE MSPB, *supra* note 1, at 243-85.

19. *Id.* at 257-58.

20. *Id.* at 251-52.

21. *Id.* at 335-37. An absolute performance standard is one under which a single incident of poor performance will result in an unsatisfactory rating as to a critical element of a position. *Hurd v. Dep’t of Interior*, 53 M.S.P.R. 107, 111 (1992). An absolute standard generally constitutes an abuse of discretion unless death, injury, breach of security, or great monetary loss could result from a single failure to meet the standard. *Sullivan v. Dep’t of Navy*, 44 M.S.P.R. 646, 652 (1990).

A “backwards” or “negative” standard describes unacceptable rather than acceptable performance and, thus, fails to inform the employee what she had to do to attain acceptable performance. See *Eibel v. Dep’t of Navy*, 857 F.2d 1439, 1443-44 (Fed. Cir. 1988); *Ortiz v. Dep’t of Justice*, 46 M.S.P.R. 692, 695 (1991).

to ensure that the employee receives adequate time and assistance, and that obstacles to improvement are avoided. Finally, Ashner guides the employee relations specialist on how to decide whether to take a performance-based action under 5 U.S.C. chapter 43 or under 5 U.S.C. chapter 75.²³

Winning at the MSPB also includes a chapter on veterans appeals under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA),²⁴ and the Veterans Employment Opportunities Act of 1998 (VEOA).²⁵ This chapter is especially important since many agency management officials are not even aware that Congress has afforded new appeal rights to veterans. It is not uncommon, for example, for agency representatives to respond to a USERRA or VEOA appeal involving a nonselection by moving to dismiss the appeal for lack of jurisdiction, citing well-established precedent that a nonselection is not an action appealable to the Board,²⁶ but entirely overlooking the fact that a nonselection based upon discrimination over military status²⁷ or a nonse-

22. ASHNER, WINNING AT THE MSPB, *supra* note 1, at 333-34. An agency may give content to an employee's written performance standards, thereby correcting certain deficiencies in the standards, by informing the employee of the specific requirements and application of the standards to her work situation through oral counselings, performance improvement plans, and the evaluation process. *Williams v. Dep't of Health & Human Svcs.*, 30 M.S.P.R. 217, 220 (1986). An agency may not, however, orally change a written performance standard under the guise of giving content to it. *Id.* An agency may not prove an employee's unacceptable performance of the critical element without regard to the written performance standard for that critical element. *See Blumenson v. Dep't of Health & Human Svcs.*, 27 M.S.P.R. 259, 261 (1985).

23. ASHNER, WINNING AT THE MSPB, *supra* note 1, at 344-46. Chapter 75 may be used to effect actions entirely or partially performance-based. *See Lovshin v. Dep't of Navy*, 767 F.2d 826, 843 (Fed. Cir. 1985) (en banc). An agency may not, however, process an action under chapter 43 and then change the theory of its case to chapter 75 after hearing, by which point it has determined that it has not complied with all chapter 43 requirements. *See Ortiz v. U.S. Marine Corps*, 37 M.S.P.R. 359, 363 (1988). In addition, conduct which can also be characterized as misconduct under 5 U.S.C. chapter 75 may be the basis of an action under 5 U.S.C. chapter 43. *See Gilbert v. Dep't of Interior*, 27 M.S.P.R. 605, 606 n.* (1985).

24. 38 U.S.C. §§ 4301-4333 (2000) (granting the Board jurisdiction to hear appeals by individuals who claim they have been discriminated against in their employment due to their prior or current service in the military at 38 U.S.C. §§ 4311(a), 4324).

25. The VEOA, codified at 5 U.S.C. § 3330a, grants preferences to veterans who seek federal employment. If the employing agency rejects the veteran's request for preference employment, the VEOA vests the veteran with the right to challenge that rejection before the Board. 5 U.S.C. § 3330a(d)(1) (2000). However, the Board may review that challenge only after the veteran first seeks relief from the Department of Labor. *Id.*

26. *See, e.g., Polen v. Dep't of Defense*, 72 M.S.P.R. 1, 4 (1996).

27. *See Sheehan v. Dep't of Navy*, 240 F.3d 1009, 1015 (Fed. Cir. 2001).

lection based upon failure to afford veterans preference²⁸ are now appealable to the Board.

As valuable as *Winning at the MSPB* is, adding a section on representing appellants could greatly improve its use. Ashner's preface acknowledges that his target audience is federal agencies, but he states he "hopes it will prove useful to many other audiences as well."²⁹ The book is certainly useful to private attorneys, union representatives, and pro se appellants as a reference, but it is not nearly as useful as it could be. A chapter with practical tips on successfully representing appellants would broaden the book's appeal to another large target audience and would help the federal agency audience as well.

For example, a surprisingly successful advocacy tactic for appellant's representatives—although one that can only be used once against the same adversary—is to waive hearing shortly before the hearing date and request that the Board adjudicate the appeal on the basis of the written submissions. A discussion of this option in a chapter on representing appellants would benefit both sides. Most appellants are unaware of the tactic, and most agencies are not practiced in proving its case on the record. Agency representatives are frequently blindsided when the agency receives the appellant's written submission without having had the opportunity to cross-examine or otherwise challenge its assertions. Indeed, because many agencies do not engage in discovery, the agency may even be unaware of the appellant's defense theories until it is too late to rebut them. In sum, a chapter of tips for appellants and their representatives would be instructive for agency readers as well.

Winning at the MSPB contains appendices consisting of sample pleadings and forms, Board regulations, and relevant statutes.³⁰ They are especially useful for managers who will not have ready access to a library, and to new representatives who have not yet developed their own boilerplate submissions. Appendix II contains a sample motion to compel and a sample objection thereto.³¹ While this appendix also contains a few sample discovery requests,³² this is one area for possible expansion. Too many agency representatives fail to use discovery, assuming—often incor-

28. See *Sherwood v. Dep't of Veterans Affairs*, 88 M.S.P.R. 208, 209 (2001).

29. ASHNER, *WINNING AT THE MSPB*, *supra* note 1, at v.

30. See *id.* app. II, at 707-59 (sample pleadings and forms), app. III, at 761-880 (statutes and regulations).

31. *Id.* at 756.

32. *Id.* at 751-52.

rectly—that since the agency took the adverse action, the agency already knows the relevant facts and need not use discovery. Adding some additional sample discovery requests, such as a motion for production of a document, would make *Winning at the MSPB* even more useful. Now, the novice representative has to hunt in standard federal practice form books for specific examples.

Winning at the MSPB also has a short appendix of research tools, identifying books, computer research tools, Web sites, and other information.³³ While helpful, this appendix could also benefit from expansion. While Ashner refers readers to the Broida treatise as a source of additional information, the appendix omits mention of other valuable reference books in the field, such as the superb treatise by Renn Fowler and Sam Vitaro on MSPB charges and penalties,³⁴ and Renn Fowler and Joseph Kaplan's new handbook on trial advocacy in federal sector employment litigation.³⁵ These omissions are surprising because, like the Broida treatise and the new Ashner handbook, they are also published by Dewey Publications. Finally, the appendix should have a list of Web site links, to include private organizations such as the major federal employee unions and public advocacy groups that represent employees before the Board; for example, the Government Accountability Project,³⁶ the Project on Liberty and the Workplace,³⁷ and Judicial Watch.³⁸

33. See *id.* app. I, at 701-06.

34. RENN C. FOWLER & SAM VITARO, *MSPB CHARGES AND PENALTIES* (Dewey Publications 1999).

35. RENN C. FOWLER & JOSEPH V. KAPLAN, *LITIGATING FEDERAL SECTOR EMPLOYMENT AND LABOR LAW DISPUTES: A PRACTITIONERS' HANDBOOK* (Dewey Publications 2002).

36. "The [Government Accountability Project] (GAP) is the nation's leading whistleblower organization. [The] GAP promotes government and corporate accountability by advocating occupational free speech, litigating whistleblower cases, publicizing whistleblower concerns, and developing policy and legal reforms of whistleblower laws." Government Accountability Project, *About Gap*, at <http://www.whistleblower.org/getcat.php?cid=24> (last visited Feb. 22, 2003).

37. "[The Project on Liberty and the Workplace] (Project LAW) is a public interest law firm devoted to advancing and defending the civil rights and liberties of individuals and community groups that are threatened by powerful institutions." Project on Liberty and the Workplace, *The Organization*, at <http://www.projectlaw.org> (last visited Feb. 22, 2003).

38. Judicial Watch, Inc., is a public interest group "which serves as an ethical and legal 'watchdog' over our government, legal, and judicial systems to promote a return to ethics and morality in our nation's public life." Judicial Watch, *Mission*, at <http://www.judicialwatch.org/about.shtml> (last visited Feb. 22, 2003).

Harold Ashner's *Winning at the MSPB* is a superb deskbook for any federal agency official involved in employee discipline. It teaches how to take a proper adverse action and make it stick, and provides the answers to all the frequently asked questions about the process. It is an indispensable reference for agency managers, personnel specialists, and representatives, and a helpful reference for appellants and appellant representatives. Readers of *Winning at the MSPB* will feel confident when they approach the Board. This new book will be a mainstay for those in the federal personnel business for years to come.

PRESIDENT BUSH'S DREAM TEAM GOES TO WAR

LIEUTENANT COLONEL DAVID WALLACE¹*Introduction*

I recommend that you read *Bush at War*² by Bob Woodward. Few books in recent times have received as much intense scrutiny and public attention during their early release as Woodward's latest work. Woodward, a well-known nonfiction author and assistant managing editor for the *Washington Post*, has been captivating readers with vivid accounts of contemporary historical events and national decision makers in action for over a quarter century.³ *Bush at War* chronicles the inner workings and internal debates of the Bush Administration's national security team during the first 100 days following the 11 September 2001 terrorist attacks on the United States. Woodward takes readers from the excitement of the early crisis on September 11th through various key war planning strategy sessions.

This review discusses three aspects of the book. First, it addresses Woodward's unique methodology for writing contemporary histories.

1. Judge Advocate General's Corps, United States Army. Presently assigned as an Academy Professor, Department of Law, United States Military Academy. 1995 LL.M., The Judge Advocate General's School, United States Army, Charlottesville, Virginia; 1993 M.S.B.A., Boston University, Germany; 1989 J.D., Seattle University, Tacoma, Washington; 1983 B.A., Carnegie-Mellon University, Pittsburgh, Pennsylvania. Previously assigned as Deputy Staff Judge Advocate, Office of the Staff Judge Advocate, Fort Bliss, Texas (2000-2001); Student, Command and General Staff College, Fort Leavenworth, Kansas (1999-2000); Vice-Chair and Associate Professor, Contract and Fiscal Law Department, The Judge Advocate General's School, United States Army (1999); Assistant Professor, Contract and Fiscal Law Department, The Judge Advocate General's School, United States Army (1996-1999); Trial Attorney, Contract Appeals Division, United States Army Legal Services Agency, Arlington, Virginia (1993-1995); Trial Counsel, Legal Assistance and Claims Attorney, 3d Infantry Division, Kitzingen, Germany (1990-1993). I would like to thank LTC Ritz Ryan, LTC Mike Sainsbury, and Robyn Scopeteuolo for their comments on this review. They made it immeasurably better.

2. BOB WOODWARD, *BUSH AT WAR* (2002).

3. Bob Woodward has authored or coauthored eight number one nonfiction best sellers. His books include: *The Choice* (1996), *The Agenda: Inside the Clinton White House* (1994), *The Commanders* (1991), *Veil: The Secret Wars of the CIA: 1981-1987* (1987), *Wired: The Short Life and Fast Times of John Belushi* (1984), *The Brethren* (1979), and *All the President's Men* (1974).

Second, the review highlights how Woodward masterfully sets the stage for his story. Finally, it provides some specific highlights about the book for military lawyers.

Woodward's Methodology

If *access* is the coin of the realm for reporters in Washington, D.C., Bob Woodward is certainly one of the richest. Other reporters must envy Woodward's ability to get the inside track to the key decision makers in all branches of the United States government. For *Bush at War*, Woodward interviewed more than 100 people who planned and executed the earliest phases of the war on terror, including the President, key war cabinet members,⁴ White House staffers, senior State and Defense Departments officials, and high ranking agents in the CIA. Woodward supplemented these personal accounts with notes taken from more than fifty National Security Council meetings as well as numerous internal documents and memoranda. Clearly, Woodward did his homework, and he did it well. His exhaustive and thorough research gives readers the sense that they are a "fly on the wall" during some of the most important discussions and debates in our time.

Some critics contend, however, that Woodward produced a "systematically biased" and flawed book because it was the product of journalistic blackmail; that is, "[t]alk to me, spill your share of secrets—or at least your personal, touchy-feely confidences—or I will cast you as the villain."⁵ Woodward generally paints individuals who were "cooperative sources,"⁶ such as Secretary of State Colin Powell, Director of the Central Intelligence Agency (CIA) George Tenet, National Security Advisor Condoleezza Rice, and President Bush, in a favorable light in *Bush at War*. Conversely, Secretary of Defense Donald Rumsfeld reportedly did not provide Woodward the same level of access.⁷ Woodward portrays Rumsfeld

4. Even critics of President Bush would concede that he assembled an extraordinarily talented and experienced group of national security advisors who have collectively nearly 100 years of full-time experience handling national security issues. WOODWARD, *supra* note 2, at 75.

5. Edward N. Luttwak, *Gossip from the War Room*, L.A. TIMES, Dec. 1, 2002 (book review), <http://www.calendarlive.com/books/bookreview/cl-bk-eluttwak1dec01.story>.

6. James Rubin, *Credulous Woodward a Fly on N.S.C. Wall in New Bush Book*, N.Y. OBSERVER, Dec. 12, 2002, at 1 (book review), <http://www.observer.com/pages/story.asp?ID=6668>.

7. *Id.*

as an ill-tempered egomaniac who regularly verbally embarrasses and abuses senior military leaders.⁸

If one were to ask most Americans post-September 11th for their impression of Secretary Rumsfeld, it would most likely be favorable. During his regular briefings at the Pentagon, Rumsfeld appears very witty, calm, and insightful. Some have even characterized him as a “pop hero” because of his captivating performances in front of the national media.⁹ Undoubtedly, Woodward’s portrayal of Secretary Rumsfeld is far more critical; however, the reader will have to draw his own conclusion about whether Rumsfeld is a victim of journalistic blackmail or simply an unpleasant individual.

For the most part, Woodward’s journalistic technique is valid, albeit not ideal. In writing a contemporary historical account, direct input from the primary figures is very helpful. Such authorities can provide insights into events and decisions, taking the author well beyond merely relying upon chronologies or reading some third party notes. As Woodward himself said, “[*Bush at War*] is an inside account, largely the story as the insiders saw it, heard it and lived it.”¹⁰

It should come as no surprise that those individuals who provided their input to Woodward generally characterized their actions in a positive light; that is human nature. Woodward’s audience should simply keep that criticism in the back of their minds as they read the book. Furthermore, the fact that *Bush at War* is principally a factual account of the first 100 days after September 11th at least partially moots this criticism. It is not an ana-

8. WOODWARD, *supra* note 2, at 64. One interesting anecdote from the book relates to an incident in which the Secretary of Defense found out that a mid-level officer at the National Military Command Center contacted the White House to confirm whether President Bush wanted a fighter escort accompanying Air Force One. According to Woodward, “Rumsfeld went nuts. ‘Somebody in my building is talking to the White House without my knowledge or permission.’” *Id.* at 64.

9. See, e.g., Phillip Smucker, *A History of the Afghan War, 10 Minutes Later*, CHRISTIAN SCI. MON., Dec. 19, 2002 (book review), <http://www.csmonitor.com/2002/1219/p15s01-bogn.html>.

10. WOODWARD, *supra* note 2, at xii.

lytical work in which Woodward offers his own insights and commentary. Readers are left to draw their own conclusions from the story.

11 September 2001—Setting the Tone

Woodward cleverly draws readers into the story by stepping into the lives of the principal characters on the morning of September 11th; a beautiful pre-Fall day on the East Coast with temperatures in the 70s. Woodward introduces us to the President and his national security “principals”¹¹ by placing them within the historical context of their routine events on that fateful morning before the attack. For example, Secretary of State Colin Powell was in Lima, Peru, attending an Organization of American States meeting. Secretary of Defense Donald Rumsfeld was at the Pentagon receiving his daily briefings.¹²

Meanwhile, at the time of the attack on the World Trade Center, President Bush was reading to second graders at the Emma E. Booker Elementary School in Sarasota, Florida. Seared in our collective memory is the look on President Bush’s face as his Chief of Staff, Andrew H. Card, whispered in his right ear that “[a] second plane has hit the second tower. America is under attack.”¹³

Woodward captures for posterity the immediate actions of President Bush, from the impromptu appearance before television cameras to denounce the attack, to the hurried motorcade ride to Sarasota Bradenton International Airport, and finally to the cross-country odyssey of Air Force One. Amidst the chaos and confusion of the first few hours after the attack, Woodward’s account leaves the reader with the distinct impression that President Bush is a strong leader, firmly in control of the reins of the government.¹⁴ For some, this is a rather different impression than what they

11. The “Principals” include: Vice President Richard Cheney; Secretary of State Colin Powell; Secretary of Defense Donald Rumsfeld; Assistant to the President for National Security Affairs, Condoleezza Rice; Director of the Central Intelligence Agency, George Tenet; Chairman of the Joint Chiefs of Staff, General Richard Myers, United States Air Force; and White House Chief of Staff, Andrew H. Card, Jr. *Id.* at xvii.

12. *Id.* at 9-10.

13. *Id.* at 14.

14. *See id.* at 17-20. This impression comes from his actions as well as his demeanor and attitude. For example, upon the recommendation of Vice President Cheney, Bush unhesitatingly gave American fighter pilots an order to shoot down any commercial airlines controlled by terrorists. *Id.* at 18.

may recall from September 11th. For example, when the President spoke from Barksdale Air Force Base in Louisiana several hours after the attack, his 219-word statement was not reassuring. As Woodward notes, “[President Bush] spoke haltingly, mispronouncing several words as he looked down at his notes.”¹⁵

Another almost surreal example involves the CIA Director, George Tenet,¹⁶ a well-respected hold-over from the Clinton Administration. Tenet was having breakfast with former Oklahoma Senator David L. Boren¹⁷ in a hotel three blocks north of the White House when he learned of the attack. Interestingly, before learning of the attack, Boren asked Tenet what was worrying him the most in the world. Tenet told Boren it was Osama bin Laden (commonly referred to as “UBL”), the terrorist leader of the al Qaeda network.¹⁸

Woodward did an excellent job setting the tone for his book. In a few short minutes, the world for all Americans was changed forever. Woodward takes readers from benign to horrified, from ordinary to extraordi-

15. *Id.* at 19.

16. Although not as well known as most of the other principals, George Tenet played a critical role during the first 100 days after September 11th. According to his official biography, Mr. Tenet served as the Director of the CIA since President Clinton appointed him on 11 July 1997. Before that appointment, he

served as Deputy Director of Central Intelligence, having been confirmed in that position in July 1995. . . . [Beginning] in December 1996, he served as Acting Director. Mr. Tenet previously served as Special Assistant to the President and Senior Director for Intelligence Programs at the National Security Council. While at the NSC, he coordinated Presidential Decision Directives on “Intelligence Priorities,” “Security Policy Coordination,” “U.S. Counterintelligence Effectiveness,” and “US Policy on Remote Sensing Space Capabilities.” He also was responsible for coordinating all interagency activities concerning covert action. Before serving at the National Security Council, he served on President Clinton’s national security transition team. In this capacity, he coordinated the evaluation of the US Intelligence Community. Mr. Tenet also served as Staff Director of the Senate Select Committee on Intelligence for over four years under the chairmanship of Senator David Boren. In this capacity he was responsible for coordinating all of the Committee’s oversight and legislative activities including the strengthening of covert action reporting requirements, the creation of a statutory Inspector General at CIA, and the introduction of comprehensive legislation to reorganize US intelligence.

Central Intelligence Agency, *George J. Tenet: The Director of Central Intelligence*, at <http://www.cia.gov/cia/information/tenet.html> (last updated Feb. 23, 2003).

nary, from peace to war. Senior government officials, like the rest of this country, were in the midst of their normal daily routines when the unthinkable happened. Everyone knows where they were the morning of September 11th. Woodward's audience now knows where America's leadership was, too. It is a great technique for drawing the reader into the book.

Highlights for the Military Reader

Most of *Bush at War* involves the reconstruction of meetings, debates, and internal struggles among the principals. What makes *Bush at War* such a captivating read, at times, is that readers feel like they are in the war room or at Camp David while the President and the principals are formulating and executing a response to the September 11th attacks.

The good news: there are some very interesting pieces of information for the military reader. For example, one may not appreciate the important role the CIA played in formulating the nation's response to the September 11th attacks. Of all the principals, George Tenet was the most impressive. Like some bureaucrats, Tenet's response could have been retrenchment—circle the wagons. Let's face it, America was hit hard by a known international threat. Osama bin Laden, his top lieutenants, and the al Qaeda network of terrorists have been on America's intelligence radar screen for quite some time. America's intelligence services had been unable either to

17. Boren, a Rhodes Scholar, was "elected as a Democrat to the United States Senate in 1978[. He] was re-elected in 1985 and again in 1990[. He] served from January 3, 1979 until November 15, 1994, when he resigned[.]" Biographical Directory of the United States Congress, *BOREN, David Lyle*, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=B000639> (last visited Feb. 23, 2003). He also served as the chairman of the Select Committee on Intelligence for fifteen years, and was the Governor of Oklahoma. He is currently the President of the University of Oklahoma. *Id.*

Interestingly, Boren thought that Tenet had developed an "unhealthy obsession" about bin Laden. WOODWARD, *supra* note 2, at 4. In fact, two years earlier Tenet had warned Boren not to travel or appear at New Year's Eve/Day events because he believed bin Laden would stage an attack. *Id.* at 4.

18. WOODWARD, *supra* note 2, at 3.

find him or thwart his actions.¹⁹ By any measure, the CIA would be an easy scapegoat for this failure.

Instead, Tenet took the offensive.²⁰ He was the first to propose a bold, aggressive game plan. Arguably, Tenet filled a vacuum left by the military. Shortly after the attack, President Bush met with a half-dozen principals following a National Security Council meeting.²¹ President Bush pressed Secretary Rumsfeld on what the United States military could do immediately. “Very little, effectively,” replied Secretary Rumsfeld.²² United States Central Command (CENTCOM) Commander General Tommy Franks told Rumsfeld that it would take months to get forces into Afghanistan and plan a major assault.²³ Bush and Rumsfeld wanted something done much sooner.

In comparison, Tenet offered a plan that envisioned using CIA paramilitary teams, U.S. Special Forces, sophisticated technology, and lots of money to invigorate the Northern Alliance in Afghanistan.²⁴ Because of its familiarity with the region and warring factions, the CIA recognized

19. *Id.* at 34. About a week before President Bush took office, Tenet briefed him on the tremendous threat posed by bin Laden and his network. Tenet told the President that bin Laden and his network would undoubtedly come after America again. It was just not clear when and how. *Id.*

20. *Id.* at 78. In all fairness to the other agencies, the CIA had been working aggressively against terrorism for years. The CIA had done extensive target development and network analysis. *Id.* All they needed was more money, greater flexibility, and the broad authority to move quickly.

21. *Id.* at 43. The book does not make the date of the meeting entirely clear, but it appears to be 12 September 2001. *See id.*

22. *Id.*

23. *Id.* at 79-80. On Saturday, 15 September 2001, the war cabinet met at Camp David. General Hugh Shelton briefed the President on three quickly devised military options. Option One was a strike with cruise missiles from Navy ships or Air Force planes from hundreds of miles away. The targets included al Qaeda’s training camps. No one supported this option, in part, because it appeared to be very similar to former President Clinton’s actions. Option Two was only slightly different. It involved the use of cruise missiles and manned bombers. General Shelton left the most robust option for last. Option Three involved the use of not only cruise missiles and manned bombers, but also the use of elite Special Forces soldiers and marines on the ground. Some military planners were thinking “outside of the box.” One two-star special operations general was prepared to brief the President on a military option that included poisoning the food supply in Afghanistan. Senior staffers screened out the proposal before it got to the President. *Id.* at 100.

24. *Id.* at 75-76. In addition to action in Afghanistan, the plan called for an attack on al Qaeda’s financial resources, including clandestine computer surveillance and electronic eavesdropping to locate assets hidden and laundered among various charitable fronts and nongovernmental organizations. *Id.* at 76.

that al Qaeda and the Taliban were “joined at the hip,” so both would have to be engaged.²⁵ Central Intelligence operatives told the President that they could get to Afghanistan quickly and that they could accomplish their mission within weeks. This was quite a contrast from the military that talked in terms of months to establish a presence in the theater of operations. Needless to say, President Bush said, “I was impressed by [the CIA’s] knowledge of the area. We’ve had assets there for a long period of time. They had worked, had been through things.”²⁶ On 17 September 2003, President Bush announced that he was approving every one of Tenet’s recommendations. Additionally, he directed Secretary Powell to issue an ultimatum to the Taliban to turn over bin Laden, or suffer the consequences.²⁷

In addition to the CIA operations in Afghanistan, the President and his advisers also initially considered attacking Iraq.²⁸ Such a plan had some appeal. Unlike Afghanistan, where the enemy was elusive and fanatical with a track record of stymieing outside forces, Iraq was a “brittle” oppressive regime that might break easily. Ultimately, President Bush’s national security team unanimously recommended against initially attacking Iraq because of the impact such an attack would have on the growing coalition.²⁹ Plus, there was hardly a direct nexus between the September 11th terrorist attack on the United States and Iraq. At least initially, an attack against Iraq was off the table. Obviously, this topic has been overcome by recent events.

A rather surprising related point is how long it actually took the military to get its Special Forces teams on the ground in Afghanistan. The CIA’s first paramilitary team, led by a fifty-nine year-old CIA operative, “Gary,”³⁰ arrived in northern Afghanistan on 26 September 2001. The ten-man CIA team—codenamed “Jawbreaker”—arrived with communications gear and \$3 million in cash. In contrast, the first U.S. Special Forces

25. *Id.* at 52.

26. *Id.* at 53.

27. *Id.* at 98.

28. *Id.* at 49.

29. *Id.* at 87.

30. Gary had been an officer in the CIA’s Directorate of Operations for thirty-two years. He had previously worked undercover in Tehran and Islamabad. *Id.* at 139-40.

A-team, 555 (or Triple Nickel), arrived in Afghanistan on 19 October 2001.³¹

Now, the book makes it clear that once the Special Forces were actually engaged in theater, they made key contributions that resulted in a change of fortune for the Northern Alliance. The A-teams directed devastating fire from the air at the Taliban and al Qaeda forces. The precision and size of munitions had an overwhelming impact on the Taliban and al Qaeda, resulting in the destruction of hundreds of their vehicles and bunkers. Thousands of Taliban and al Qaeda fighters were killed, were captured, or fled.³²

Also, Woodward details the “shotgun wedding”³³ between the military and the CIA. Who was actually running the show, the military or the CIA? Was the operation in Afghanistan a covert or military operation? The CIA hatched the plan and had its paramilitary teams in theater first. But, this was a “war” on terrorism, and war is the domain of the military. Department of Defense and CIA operations created the classic problem of the lack of unity of command. Well into the operation, Woodward portrays Secretary Rumsfeld as tentative about the nature of the relationship between the military and the CIA. In a private conversation with National Security Advisor Rice, he expressed concern that he didn’t want to be seen as usurping what the CIA was trying to do. According to Rumsfeld, “It’s also George’s [Tenet] operation.”³⁴

Rice emphatically told Secretary Rumsfeld that it was a military operation and that he had to be in charge; one person had to be running the show.³⁵ This was easier said than done. The situation was more complicated than a hand-off from the CIA to the military because the CIA was going to remain engaged. From the CIA’s perspective, however, the military teams worked for the regional combatant commander, General Franks.

31. *Id.* at 249.

32. *Id.* at 301.

33. *Id.* at 244.

34. *Id.* at 245.

35. *Id.* at 245.

Some operatives at the CIA believed that the only person who didn't understand the chain of command was Rumsfeld.³⁶

Highlights for Lawyers

Another theme easily recognizable in the book is that certain senior administration officials seem to see lawyers and lawyering as an impediment to war fighting. For example, in an effort to get "exceptional authorities" for his agents to carry out the war on terrorism, CIA Director Tenet noted that the current process involved "too much time, lawyering, reviews and debates."³⁷ President Bush, reflecting upon his actions during the first 100 days, noted:

I also had the responsibility to show resolve. I had to show the American people the resolve of a commander in chief that was going to do whatever it took to win. No yielding. No equivocation. No, you know, lawyering this thing to death, that we're after 'em. And that was not only for domestic, for the people at home to see. It was also vitally important for the rest of the world to watch.³⁸

Secretary Rumsfeld, commenting about lawyers, said, "Reduce the number of lawyers. They are like beavers—they get in the middle of the stream and dam it up."³⁹ Will the Bush Administration marginalize the role of lawyers in the war on terrorism because they are seen as an impediment to

36. *Id.* at 247.

37. *Id.* at 76.

38. *Id.* at 96. President Bush has been particularly critical of trial lawyers within the context of medical care in the United States. For example, he made the following remarks about lawyers at the Medical College of Wisconsin: "We should be serving the interest of patients, not the self-interest of trial lawyers." President George Bush, Remarks at the Medical College of Wisconsin (Feb. 11, 2002), <http://membership.hiaa.org/pdfs/fact022002.pdf>.

39. Donald Rumsfeld, *quoted in* Brainy Quote, at <http://www.brainyquote.com/quotes/quotes/d/q135978.html> (last visited Feb. 23, 2003).

progress? We will certainly know better when a more complete history of the times unfolds.

Summary

Woodward's new book is worth the read for the military lawyer. Because of his access to the key decision makers, the book provides some new insights beyond what one typically hears from the talking heads on MSNBC or CNN. As a testament to the sensitivity and accuracy of the information in the book, Senator Trent Lott of Mississippi remarked at a Senate Select Intelligence Committee Hearing on National Security Threats on 11 February 2003, that he learned more about what was happening with the intelligence community in Afghanistan from *Bush at War* than he did from any classified intelligence briefing. He made the remark to Director Tenet who was testifying before the committee. Lott's comment was not a compliment.⁴⁰

Bush at War is by no means perfect. At times, it is tedious and choppy. Even meetings involving important national figures on profound issues can be a little dry and repetitive. But the book does give the reader a good sense of the historic events. The book would benefit from including more of Woodward's own analysis of events. It would also benefit from omitting some of the more tedious meetings and discussions that do not seem to add much value to one's overall appreciation for events during the first 100 days after September 11th. Even with those mild criticisms, I highly recommend that you read it.

40. CSPAN, *Senate Select Intelligence Committee Hearing on National Security Threats* (television broadcast Feb. 11, 2003), available at http://video.c-span.org:8080/ramgen/kdrive/ter021103_threats.rm (last visited Feb. 12, 2003). Lott believed that the book released too much classified material. *See id.*

*Whose War Is It Anyway?*SUPREME COMMAND¹REVIEWED BY MAJOR JEFF SPEARS²

Warfare is the greatest affair of state, the basis of life and death, the Way to survival or extinction. It must be thoroughly pondered and analyzed.

—Sun Tzu³

Supreme Command by Eliot Cohen is a study of the relationship between the political leadership and the high military command of modern democracies during wartime.⁴ Moreover, it is a study of civilian leadership during wartime. Cohen's work is built upon a critical analysis of the modern consensus that the "normal" civil-military relationship is one in which the civilian leadership should define the objective followed by military operations planned and executed with minimal or no political intervention.⁵ Cohen develops his thesis by examining the leadership style of those he considers the four greatest democratic wartime leaders of the modern era: Abraham Lincoln, Georges Clemenceau, Winston Churchill, and David Ben-Gurion. Cohen's thesis is clear: the great democratic wartime

1. ELIOT A. COHEN, *SUPREME COMMAND* (2002).

2. United States Army. Written while assigned as a student, 51st Judge Advocate Officer Graduate Course, The Judge Advocate General's School, United States Army, Charlottesville, Virginia.

3. SUN TZU, *THE ART OF WAR*, in *THE SEVEN MILITARY CLASSICS OF ANCIENT CHINA* 157, 157 (Ralph D. Sawyer ed., 1993).

4. COHEN, *supra* note 1, at xi.

5. *Id.* at 4-7. Cohen derives his consensus from a review of literature from military and civilian academic circles, public opinion, and popular culture. Further, Professor Cohen brings a wealth of experience to the analysis of this topic. He currently serves as a professor of Advanced International Studies at Johns Hopkins University and has served in the Department of Defense (DOD) in both civilian and uniformed status. He has published numerous articles on foreign policy and defense related matters. *Id.* (inside dust cover). Of recent note is his article on DOD reinvention under Secretary of Defense Donald Rumsfeld. See Eliot A. Cohen, *A Tale of Two Secretaries*, 81 *FOREIGN AFF.* 33 (2002).

leaders violate this normal relationship and succeed because of it, not in spite of it.⁶

Cohen's argument is as well-developed as it is provocative. But is he correct? Can a lawyer, medical doctor, high school underachiever, or bookish intellectual⁷ who arrives at the helm of a democracy preparing for war presume to meddle in military matters perhaps best left to a class of military professionals? Or should the most important affair of the state remain in the hands of those who have spent their careers studying the art and practice of war? This review focuses upon: (1) whether Cohen's argument that great democratic wartime leaders *should* meddle in martial matters is correct; (2) if so, how this affects the validity of the "normal" civil-military relationship; and (3) what insights future civilian and military leaders can gain from this framework.⁸

Whose War Is It Anyway?

The men that Cohen selected for his analysis all faced struggles of national survival.⁹ Further, they all operated in an environment transformed by the power of near real-time communications on the battlefield. This often permitted them to review timely reports from battles and cam-

6. Cohen confined his selection of leaders to a period of less than one hundred years. He notes that while technological improvements were made during this period, the leaders all operated in an environment that Cohen refers to as "industrialized warfare." COHEN, *supra* note 1, at 5. Perhaps more importantly, however, Cohen notes that none of the leaders were faced with the overarching issue of the potential use of strategic nuclear weapons. *See id.* Although Cohen makes this distinction from the nuclear reality that modern civilian leaders must face, he does not use this fact to further develop his thesis directly. It is the reviewer's opinion that as the continued proliferation of weapons of mass destruction becomes a reality, it will require that the civilian leadership play an increasing role in the management of conflict.

7. Abraham Lincoln, Georges Clemenceau, Winston Churchill, and David Ben-Gurion, respectively. *See generally id.* at 21, 57, 102, 134. Professor Cohen only makes an oblique reference to Churchill's undistinguished youth. For a balanced discussion of the young Churchill's academic shortcomings, see Celia Sandys, *The Young Churchill*, Address Before the International Churchill Society (Sept. 23, 1994), available at <http://www.winstonchurchill.org/p94sandys.htm>.

8. Early in American history, Alexis deTocqueville formed an interesting perspective on the officer corps of professional armies in democracies. While seeing the private soldier as, in essence, a civilian in uniform, deTocqueville viewed an officer as a man who "breaks all the ties attaching him to civilian life . . . [and] may perhaps eagerly desire war . . . at the very moment when the nation most longs for stability and peace." ALEXIS DETOCQUEVILLE, *DEMOCRACY IN AMERICA* 652 (George Lawrence trans., Harper 1988) (1839).

paigns over a large geographical area. The information transformation that began in the American Civil War and continues through today serves to provide civilian command authorities with an increasing ability to invade the traditional sphere of the field commander.

Unlike Roman commanders who were free “from constant interference from the home government,”¹⁰ modern technology has brought civilian leadership into the commander’s operations to a varying degree since the invention of the telegraph. Cohen cites the telegraph as the technology that permitted Lincoln to immerse himself in the day-to-day conduct of a war waged on many fronts. Even during the opening battle of the Civil War, Lincoln was able to receive and read real-time reports coming from First Bull Run at the rate of one “every ten or fifteen minutes.”¹¹ The impact of this technological transformation is clear. The most notable battle of the previous war fought on United States soil, the War of 1812, occurred a month after the Treaty of Ghent concluded hostilities with England.¹²

Like the other great leaders studied by Cohen, Lincoln embraced new technologies, and the telegraph gave him a platform upon which to collect information on his field commanders to ensure they executed the war consistently with his orders and political mandates. And like Clemenceau, Lincoln further projected his presence on the battlefield by regularly visiting the front. Lincoln also placed spies with suspect commanders to measure their competence and to monitor compliance with his war aims.¹³ Similarly, Cohen notes that Churchill and Ben-Gurion both demanded feedback from their military subordinates regarding how and when their subordinates had complied with their directives.¹⁴ But was this appropriate?

Many scholars regard any intermeddling by civilian leaders into military matters as antithetical.¹⁵ Notwithstanding, such conduct is not only

9. Abraham Lincoln was the President during the American Civil War, Georges Clemenceau was the Prime Minister of France during World War I, Winston Churchill was the Prime Minister of Great Britain during World War II, and David Ben-Gurion served to secure the State of Israel as an independent nation in the face of British and Arab opposition. COHEN, *supra* note 1, at 18, 52, 95, 135-37.

10. F.E. ADCOCK, *THE ROMAN ART OF WAR UNDER THE REPUBLIC* 84 (B&N reprint 1995) (1940).

11. See COHEN, *supra* note 1, at 27.

12. PAUL JOHNSON, *THE BIRTH OF THE MODERN* 41 (1991) (referring to General Andrew Jackson’s defeat of the British at the Battle of New Orleans).

appropriate for civilian leaders, but as Cohen effectively argues, an absolute necessity.¹⁶ In a democracy, the popularly elected executive, not his uniformed commanders, ultimately will face the political ramifications of warfare, as President Lyndon Johnson learned in the election of 1968. Further, and as Cohen notes,¹⁷ warfare is increasingly fought as part of multi-

13. President Lincoln seized upon the telegraph to extend his influence onto the battlefield. COHEN, *supra* note 1, at 18-20. When necessary, he would visit the battlefield to ensure that his orders were carried out. *See id.* at 42. Cohen notes that Lincoln used men on various stated missions to report regularly, if not daily, on some of his key commanders in the field. Notably, Lincoln dispatched such spies to look into the day-to-day affairs of General William Rosecrans of the Army of the Cumberland because of suspected incompetence and General Ulysses S Grant because of his known tendency to binge drink. *See id.* at 43-45.

Perhaps it is this oversight that lead to the politicized court-martial of lawyer turned Brigadier General James G. Spears who was sent to trial and convicted for disrespect to the President. Although Lincoln's Vice President, Andrew Johnson, had originally recommended Spears for his appointment, the staunch unionist began to question Lincoln's personal war aims. Letter from Andrew Johnson to Secretary of War E.M. Stanton (Apr. 17, 1862), *reprinted in* 10 SERIES I OFFICIAL RECORDS OF THE WAR OF REBELLION 110-11 (1884). Brigadier General Spears engaged in a series of conversations with peers and subordinates that included comments deemed "disloyal" to the President and speculation that President Lincoln was delaying the ultimate defeat of the Confederacy to provide a basis for a more radical abolitionist platform. At the time of his court-martial, there was no specific offense for prosecuting comments disloyal or disrespectful to the President, so Spears was tried under a theory that the disloyal language was "prejudicial to good order and military discipline." He was convicted and sentenced to be dismissed from the service. The convening authority, Major General Schofield, disapproved the conviction because he found that the offense was not a proper charge under the Articles of War. Perhaps out of his own sense of self-preservation, he forwarded the record to President Lincoln with the recommendation that the President disapprove Spears's court-martial, but that he dismiss General Spears nonetheless. President Lincoln followed this recommendation and "summarily dismissed" General Spears on 17 August 1864. Trevor K. Plante, *The Shady Side of the Family Tree: Civil War Union Court-Martial Case Files*, 30 NARA PROLOGUE 4 (1998) (citing General Court-Martial Orders, No. 267, War Department (1864)).

14. *See* COHEN, *supra* note 1, at 153.

15. Cohen thoroughly examines works that criticize excessive civilian management of warfare. His examination relies heavily on works written in response to the Vietnam War. *See id.* ch. 6.

16. For an excellent work that provides a thesis in conflict to Cohen's, see Harry Summers, *ON STRATEGY: A CRITICAL ANALYSIS OF THE VIETNAM WAR* (1982). As discussed herein, this reviewer concludes that the "normal" civil-military relationship must be dictated by the circumstances—the degree of civilian involvement driven primarily by the larger political questions related to the conflict coupled with the demonstrated ability of the senior military commanders to conduct effective operations consistent with the executive's desires.

17. *See* COHEN, *supra* note 1, at 115-18.

national coalitions. The civilian leadership, not the military command, is in the best position to ensure that the necessary level of popular support for modern warfare can be maintained at both home and abroad.

Great military and civilian leaders make certain their subordinates understand their commands and through various methods ensure compliance with their directives. Furthermore, few competent military officers would send their subordinates on an important mission without taking appropriate steps to confirm that the junior leader had a plan for execution. And if one accepts Sun Tzu's maxim on warfare—that warfare is the “greatest affair of state”—a democratically elected executive simply stating a war aim and walking away is both irresponsible and unrealistic.

Abnormal Civil-Military Relationships, or Same Relationship, New Name?

Professor Cohen's position that the civilian leadership must maintain constant engagement in the conduct of war is correct; but, are his thoughts “abnormal?” His argument that great civilian wartime leaders must direct, challenge, and when necessary, overrule and fire their military commanders may annoy adherents of the normal civil-military relationship. His analysis of the Vietnam War, however, might rouse some to anger.

Contrary to the notion held by many that the Vietnam War stands as an example of conflict gone awry at the hands of micromanaging and meddling civilian overlords,¹⁸ Cohen argues that the civilian leadership failed to engage themselves in the minutia of the prosecution of the war. Cohen marshals an exhaustive list of solid primary and secondary resources to support his proposition while deconstructing many of the arguments developed by traditional adherents of the normal model. Most significantly, Cohen notes that transcripts of conversations between the senior military and civilian leadership reflect a lack of a clearly defined strategy by senior military advisors. This was coupled with an apparent unwillingness of the

18. See, e.g., H.R. McMASTER, DERELICTION OF DUTY: LYNDON JOHNSON, ROBERT McNAMARA, THE JOINT CHIEFS OF STAFF, AND THE LIES THAT LED TO VIETNAM (1997); DOUGLAS KINNARD, THE WAR MANAGERS (1985); SUMMERS, *supra* note 16.

Johnson Administration to challenge their military subordinates in the face of vague planning.¹⁹

To Cohen, much of the blame for the failings in Vietnam rests with the Johnson Administration's failure to demand from military leaders the formation of a grand strategy for victory. Cohen further states that the Administration failed to ensure the armed forces were placed in the hands of the most competent flag officers, as opposed to those most politically acceptable.²⁰

Cohen's argument for active civilian involvement is sound. A cursory review of modern history reveals that the normal state of affairs in armed conflict includes heavy involvement of the civilian executive, be it a President, Prime Minister, or King.²¹ The difference between the involvement of the executive in 1800 and today is the speed at which information flows from the modern battlefield. This technological advancement empowers civilian leadership with the information necessary to formulate questions or dictate the conduct of their military commanders. Increasingly, new

19. See COHEN, *supra* note 1, at 177-80.

20. *Id.* at 180.

21. The same applies to a lesser extent in antiquity. A Roman legion far from home would win or lose a campaign long before news of the fates of war reached the Senate. Notwithstanding, Roman commanders were not free of the political control of the elected officials. Under the Roman Republic, popularly elected magistrates oversaw military operations within the various theaters, and many of the general officers in the Roman Army were former magistrates. See ADCOCK, *supra* note 10, at 101. In the years before telegraphy, the executive could ensure adherence with its desires by dispatching diplomats on diplomatic missions, accompanied by other subordinates capable of executing military operations if necessary, with the executive's authority vested with them.

The dispatch of Sir Hyde Parker by George III to Copenhagen in 1801 to break their "unnatural" alliance with Russia is such an example. In the event military operations became necessary, Admiral Horatio Nelson accompanied Sir Hyde. When negotiations broke down, Sir Hyde, also a British Admiral, directed Nelson to prepare battle plans for execution. Although Nelson was tasked with the execution of the operation, supreme command of the operation remained with Sir Hyde. Sir Hyde observed the execution of the battle from the rear and became fearful of excessive losses. Through the use of flag signals, he ordered Admiral Nelson to disengage. Although Nelson received the order, and many ships to his rear disengaged, Nelson disobeyed and routed the Danish, ultimately attaining the stated objective of the Crown. Although Sir Hyde considered punishing Nelson, news of the great victory reached George III through the press before news of Nelson's great disobedience. See DAVID HOWARTH & STEPHEN HOWARTH, NELSON: THE IMMORTAL MEMORY 243-60 (1999). The potential for celebrity status of successful military commanders is one factor that Cohen correctly cites as part of the grander political equation in wartime confronted by popularly elected civilian leaders. See COHEN, *supra* note 1, at 215-16.

technology provides the ability to obtain information from progressively smaller operational units or even an individual.

In light of history and the relationship of civilian leaders and their military commanders in wartime, the nature of the relationship espoused by Cohen appears to be less of a departure from the norm than it is an extension of the normal relationship. This is especially true in more recent history with technological advancements, primarily in the field of telecommunications. These advancements permit civilian leaders to learn of events from the front simultaneously with their generals in the same way it permits a commander to lead from another continent. Similarly, technological advancements have given rise to some scenarios that require far fewer soldiers, sailors, airmen, and marines to obtain victory at the decisive point and to hold ground thereafter.²² This further extends the ability of civilian leaders to monitor progress, ensure compliance with their directives, and for better or worse, direct operations in real time of smaller units of action.

Notwithstanding the accuracy of Professor Cohen's thesis that civilian leaders must remain engaged in the conduct of war, close scrutiny of his analysis of the Vietnam War reveals a weakness in his reasoning. Cohen effectively deconstructs the arguments of those seeking to blame a micromanaging executive for the military shortcomings of Vietnam. The shortcomings Cohen illustrates, however, provide little insight into the nature of the appropriate civil-military relationship. To the contrary, they reveal the disastrous consequences that flow from weak wartime civilian leadership coupled with military leadership that history has shown lacked the will and ability to formulate a grand strategy for victory. These deficiencies serve more to emphasize the need for both strong military and civilian leadership committed to leveraging their collective strength in furtherance of the nation's objectives.

While Cohen's analysis of the Vietnam War does little to support his thesis, his discussion of the Persian Gulf War provides valuable insight into the nature of the appropriate civil-military relationship. The Gulf War is often cited as an example of the normal civil-military relationship in which the political objective is translated into military action with minimal intermeddling by civilians once action begins.²³ Cohen effectively can-

22. For another provocative work that focuses on the appropriate force structures for American forces facing future foes, see Douglas A. MacGregor, *BREAKING THE PHALANX* (1997).

vasses a variety of sources, including the writings of the conflict's principal military and civilian leaders, to demonstrate that civilian leaders remained heavily engaged in the planning and prosecution of the war.²⁴ Of note, then Secretary of Defense Dick Cheney quietly surveyed more junior flag officers within the Pentagon regarding their war planning insights.²⁵

History reveals that the civil-military relationship must be one characterized by active engagement by civilians coupled with competent planning and execution by military leaders. Failure on one side of the equation will severely damage any war effort, while failure on both sides, as Vietnam teaches, will bring disaster.

Lessons for Students of the Civil-Military Relationship

Regardless of whether one accepts Professor Cohen's thesis in *Supreme Command*, technological advancements serve to bring the civilian leadership as close to the battlefield as the military leaders tasked with the execution of the war.²⁶ Civilian leaders in democratic societies should use this technology in ways Cohen argues Lincoln, Clemenceau, Churchill, or Ben-Gurion would. Military commanders should have their assumptions challenged, their plans questioned, and their methods of warfare subjected to executive scrutiny. This does not mean, however, that the civilian leader should take on the role of a general. To the contrary, the complexity of modern military operations, ranging from the deployment of advanced weapons systems to the sustainment of troops and equipment in the field, requires those well-trained in military operations to direct and

23. See *supra* note 18 and accompanying text.

24. See COHEN, *supra* note 1, at 188-99.

25. *Id.* at 190-92. Professor Cohen does not see the Persian Gulf War as an ideal model for students of the civil-military relationship. He cites the Bush Administration's limited battlefield objectives as a symptom of a lack of political leadership driven by an over reliance on the military's reluctance to invade and occupy Baghdad. See *id.* at 198-99. One can make the contrary argument that President Bush limited the military's objectives because of his need to maintain the coalition and political support for the war aims. Ironically, this interpretation of events is more consistent with Cohen's thesis.

26. For example, Central Command, headquartered in Florida, directed the War in Afghanistan. See United States Army Central Command, *About CENTCOM*, at <http://www.centcom.mil/aboutus/centcom.htm>. The President in Washington, D.C. is geographically closer to the theater of operations than Florida. While this fact alone means little, it does serve to further highlight the technological revolution underway that permits the Four-Star Combatant Commanders (previously known as Commanders in Chief or CINCs) or national executives to direct military operations from a world away in real time.

highly trained professionals to execute; however, as Cohen argues, and most would agree, making certain that warfare is conducted consistently with national objectives, to include maintaining often fragile alliances while ensuring popular support for military operations on the home front, is clearly the purview of the civilian leadership in a democracy.

Technology draws this relationship ever closer, creating challenges for civilian and military leaders. Military professionals have to accept the increasing presence of senior civilian leaders as operations unfold. Likewise, while close scrutiny of military operations continues to be the norm, civilian leaders must refrain from micromanaging military operations simply because technology facilitates it. Further, civilian war leaders must look to the examples of the great leaders of history and develop their own competencies in war. They must ensure their civilian leadership has the expertise necessary to walk the tightrope between effective and sometimes tough oversight, and unnecessary and potentially destructive operational micromanagement.

Thus, a close analysis of the “normal” civil-military relationship reveals that the relationship Cohen advocates is closer to historical reality than the notion of an executive that issues a directive and simply waits for results. In a democratic society, civilian leadership must remain engaged and must ensure that the nation’s military forces work to execute the national policy of the country by warfare when necessary. Likewise, senior military commanders must be prepared to confront their civilian leaders when their directives are militarily flawed or otherwise imprudent.

Cohen’s thesis is provocative and will become the subject of much debate. Regardless of one’s acceptance of his underlying premise, *Supreme Command* is an excellent treatise on both the civil-military relationship and leadership of the highest order. The leaders Cohen examines demanded much from their military subordinates and at times treated them roughly, but they all successfully met their national strategic objectives under the most difficult of circumstances. This fact alone supports the need to examine closely the approach to the civil-military relationship in the face of “the greatest affair of state.” Consequently, I recommend reading this book.

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