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W. Kent Davis

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## Articles

# SWORDS INTO PLOWSHARES THE DANGEROUS POLITICALIZATION OF THE MILITARY IN THE POST-COLD WAR ERA

W. Kent Davis\*

### I. INTRODUCTION

*And they shall beat their swords into plowshares, and their spears into pruning hooks. Nation shall not lift up sword against nation, neither shall they learn war any more.<sup>1</sup>*

With the dissolution of the Soviet Union and the demise of the Cold War in the early 1990's, the American public rejoiced at the thought of new roles for its military. With the Soviet threat a memory, politicians and commentators began planning new missions for the nation's fighting forces and reveled at the many plowshares they believed could be formed from the swords of the old Cold War forces. As a result, the armed forces have been called on to perform a wide variety of tasks only marginally involving fighting and winning wars, tasks commonly called in military jargon "Operations Other Than War," or simply "OOTW."<sup>2</sup> These tasks have encompassed everything from involvement in criminal law enforcement, to international peacekeeping (or even *peacemaking*), to bold social experiments within the ranks.<sup>3</sup> As one journalist has put it,

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\* Member of the State Bar of Georgia. J.D. (magna cum laude), Georgia State University; B.S., Louisiana State University. Past Editor in Chief, Georgia State Law Review. The author served on active duty as a Naval officer from 1986 through 1994, serving aboard USS MISSOURI (BB 63), USS ABRAHAM LINCOLN (CVN 72), and at several shore installations. These experiences gave him the unique opportunity to closely observe many of the trends discussed in this article. The author would like to thank Professors L. Lynn Hogue and Charles A. Marvin of Georgia State University College of Law. Their instruction and guidance was instrumental in the completion of this article. The views and opinions expressed in this article are solely those of the author. This article is dedicated with great appreciation and respect to the men and women of the U.S. armed forces, who put their lives on the line for their country yet are not always given the thanks they so richly deserve.

<sup>1</sup> Isaiah 2:4.

<sup>2</sup> See Ron Martz, *Role of the Military: Caught Between a War and a Calm Place*, ATLANTA J. & CONST., Oct. 5, 1997, at G2.

<sup>3</sup> For a comprehensive list of military operations tackled by the U.S. armed forces in the 1990's, please see Appendix I. The list of operations in this appendix illustrates the wide variety and new nature of roles the military has been called upon to assume.

the military now finds itself "caught between a war and a calm place" when tackling these new roles.<sup>4</sup>

Despite the seemingly cheery predictions painted at the end of the Cold War, things have not always turned out as some had hoped.<sup>5</sup> The new roles have clearly caused some anxiety for the military and the public. Nowhere is this anxiety more pronounced than within the ranks of the armed forces themselves. For example, *Air Force Magazine* has reported that the "[m]orale and confidence of the troops are growing concerns. The men and women of the armed forces are more apprehensive than we have seen them in many years."<sup>6</sup> An even more alarmed observation comes from former Secretary of the Navy James Webb: "These have been uniquely difficult times for military leaders.

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<sup>4</sup> Martz, *supra* note 2.

<sup>5</sup> The United States is by no means unique in this respect. Our former adversary, now reformulated as the Russian Republic, has undergone even more turmoil in its quest to restructure its military. At least one commentator worriedly compares the military situation in Russia with Weimar Germany prior to World War II and ominously notes that there is little civilian control over the Russian military. See Richard Pipes, *Is Russia Still an Enemy?*, FOREIGN AFFAIRS, Sept. 19, 1997, at 65. Though beyond the scope of this paper, the sometimes-hectic Russian attempts to restructure the former Red Army are worth further exploration. For some incisive comments on these efforts, see the following sources: Ralph Ruebner, *Foreword to Development of the Democratic Institutions & the Rule of Law in the Former Soviet Union*, 28 J. MARSHALL L. REV. 767 (1995); Robert Sharlet, *Reinventing the Russian State: Problems of Constitutional Implementation*, 28 J. MARSHALL L. REV. 775 (1995); Robert Sharlet, *Transitional Constitutionalism: Politics and Law in the Second Russian Republic*, 14 WIS. INT'L L.J. 495 (1996); Mark Galeotti, *Russia's Military Under a New Minister*, JANE'S INTELLIGENCE REV., Sept. 1, 1997, at 387; Ian Kemp, *Russia Pledges Better Conditions for Military*, JANE'S DEFENCE WKLY., Jan. 15, 1997, at 3; Paul Mann, *Russia's Defense Paralysis*, AVIATION WK. & SPACE TECH., May 26, 1997, at 64; Gloria Gibbs Marullo, *Woes of a Crumbled Empire*, THE RETIRED OFFICER MAG., Feb. 1997, at 32; Pipes, *supra* (noting that "[i]t is common knowledge that Russia's armed forces are destitute and demoralized. Officers drive taxis; soldiers engage in crime for the money. There is so much draft-dodging that officers are believed to constitute half of military personnel."); *Defense Official Outlines Military Modernization Plan*, AEROSPACE DAILY, Mar. 3, 1997, at 319; *Russia--New Defense Chief Fits New Kremlin Criteria*, PERISCOPE-DAILY DEF. NEWS CAPSULES, May 23, 1997, available at 1997 WL 7724550; *Yeltsin Fires Defense Minister Over Stalled Reforms*, FLORIDA TODAY, May 23, 1997, at 10A.

Military woes in the wake of the end of the Cold War are not limited to the U.S. and Russia by any means, nor to their allies. The Third World has seen turmoil in this respect, a byproduct of "heightened international intolerance for military governments after the Cold War." *Indonesia's Military Faces Big Trial Ahead*, MARIETTA DAILY J., Feb. 22, 1998.

<sup>6</sup> Colonel Charles J. Dunlap, Jr., *Welcome to the Junta: The Erosion of Civilian Control of the U.S. Military*, 29 WAKE FOREST L. REV. 341, 373 n. 232 (1994) (quoting *Warning Signs on National Security*, AIR FORCE MAG., Nov. 1993, at 2); see also *FRONTLINE Show #1502* (PBS television broadcast, Oct. 15, 1996) (transcript available at <<http://www2.pbs.org/wgbh/pages/frontline/shows/navy/script.html>>) (quoting Senator John McCain: "But we've got to restore the morale, which I think is suffering right now in the Navy, for the national security.")

Our generation's complex and volatile political debates [have] resulted in unprecedented intrusions into command relations because of new concepts of limited warfare, increased judicial oversight, and a variety of programs mandated under the rubric of equal opportunity."<sup>7</sup>

These observations may have evidence in some alarming statistics coming out of the armed forces these days. For example, in 1995, 53% of the military leaders finishing tours as commanding officers of naval aviation squadrons—officers who had performed well for two decades in a manner that put them on track as potential admirals—left the Navy out of concern over the future of the military rather than continue their careers.<sup>8</sup> In no previous year had that number risen to even 25%.<sup>9</sup> Situations such as these can operate as a metaphor for the entire military. Dire statistics are not limited to compartments of the U.S. military, however, for they extend to our global strategic abilities as well. For example, *Jane's International Defense Review* reports that NATO military readiness has slipped so markedly since Desert Storm that the alliance can only mobilize 2% of its fighting forces in the first twelve hours of a crisis compared to the 70% figure during the Cold War.<sup>10</sup> The decline in military readiness is so dramatic that, given even *a year* to mobilize, NATO could still field 10% fewer forces than those it could mobilize in *half a day* in 1989.<sup>11</sup>

Given these alarming reports, an examination of the new military policies of the United States would seem in order. Though no article could possibly hope to explore all of the vast changes that the armed forces have seen in the 1990's, a few of the changes stand out for their significant impact on the fundamental role of the military. This article explores some of those noteworthy changes, examines the impact they have had on the men and women of the military and the American public in general, and conjectures on the political reasons behind the changes. Part II begins with an examination of the increasing use of the military for domestic purposes such as drug interdiction and border patrol.<sup>12</sup> Part III examines the new missions faced by the military

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<sup>7</sup> James Webb, Address at the Naval Institute's 122nd Annual Meeting and Sixth Annapolis Seminar (Apr. 25, 1996).

<sup>8</sup> *See id.*

<sup>9</sup> *See id.*

<sup>10</sup> *See* Holger Jensen, *Expanded NATO a Clumsy Monster*, ROCKY MOUNTAIN NEWS, May 25, 1997, at 57A.

<sup>11</sup> *See id.* Ironically, despite the dire statistics and commentary on morale and readiness, the military seems to be riding a high when it comes to public respect. *See infra* note 326 and accompanying text.

<sup>12</sup> *See infra* notes 15 to 127 and accompanying text.

overseas, particularly as a participant in NATO and the United Nations.<sup>13</sup> Part IV examines the broad new social policies that the armed forces have been required to implement, specifically the integration of women and homosexuals within the ranks.<sup>14</sup> Having examined these changes, this article concludes that the nation still appears to be searching for an appropriate post-Cold War mission for its armed forces, with potentially dire consequences for the future.

## II. THE INCREASING USE OF THE MILITARY FOR DOMESTIC PURPOSES

### A. *Civilian Control of the Military and the Posse Comitatus Act*

"Civilian rule is basic to our system of government."<sup>15</sup> The subordination of the military to the civilian authorities is an Anglo-American tradition that stretches back to the Magna Carta of 1215.<sup>16</sup> Indeed, the strong interest in limiting military involvement in civilian affairs was recognized in the Declaration of Independence, which stated among its reasons for seeking liberty from Great Britain that the King "has affected to render the Military independent of and superior to the Civil power."<sup>17</sup> Though the Constitution does not contain an explicit provision addressing the use of the military for domestic purposes,<sup>18</sup> the Founding Fathers mandated civilian control of the military in the Federal Constitution through the government structure.<sup>19</sup> The Supreme Court has recognized this concept in its decisions as well.<sup>20</sup> General Douglas MacArthur's defiance of administration policy and President Truman's unceremonious sacking of the General during the Korean War silenced any further doubts about this tradition of civilian control of the military.<sup>21</sup>

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<sup>13</sup> See *infra* notes 128 to 251 and accompanying text.

<sup>14</sup> See *infra* notes 252 to 324 and accompanying text.

<sup>15</sup> STEPHEN DYCUS ET AL., NATIONAL SECURITY LAW 589 (2d ed. 1997).

<sup>16</sup> See Roger Blake Hohnsbeen, *Fourth Amendment and Posse Comitatus Act Restrictions on Military Involvement in Civil Law Enforcement*, 54 GEO. WASH. L. REV. 404, 404-05 (1986).

<sup>17</sup> THE DECLARATION OF INDEPENDENCE para. 14 (U.S. 1776); see also DYCUS ET AL., *supra* note 15, at 589.

<sup>18</sup> See John P. Coffey, *The Navy's Role in Interdicting Narcotics Traffic: War on Drugs or Ambush on the Constitution?*, 75 GEO. L.J. 1947, 1951 (1987).

<sup>19</sup> See Matthew Carlton Hammond, *The Posse Comitatus Act: A Principle in Need of Renewal*, 75 WASH. U.L.Q. 953, 958 (1997).

<sup>20</sup> See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 646 (1952) (Jackson, J., concurring) ("The purpose of lodging dual titles in one man was to insure that the civilian would control the military, not to enable the military to subordinate the presidential office.").

<sup>21</sup> See Dunlap, *supra* note 6, at 346; JOHN HART ELY, WAR AND RESPONSIBILITY:

Despite this tradition, the government *has* used the military for domestic purposes as early as 1794 when President Washington called out the militia to quell the Whiskey Rebellion.<sup>22</sup> In the ensuing years, troops have been periodically called to keep the peace, to provide humanitarian assistance to local communities, and to enforce the civilian laws.<sup>23</sup> Early acts of Congress supported the use of the military for law enforcement,<sup>24</sup> and public fear of the power of the military seemed to wane in the years between the Revolutionary and Civil Wars.<sup>25</sup> The mid-1800's, however, saw a resurrection of the traditional fear of oppressive military power. One catalyst for this renewed apprehension was the Fugitive Slave Act of 1850, which allowed federal marshals to call on a posse comitatus<sup>26</sup> to aid in returning slaves to their owners.<sup>27</sup> After its passage, the Attorney General issued an advisory opinion that defined posse comitatus to include use of the military.<sup>28</sup> During the Reconstruction era, the use of the military in Southern states heightened the public distaste for the use of troops in pursuing domestic duties.<sup>29</sup> In the most extreme example, President Grant had authorized the use of federal troops as a posse comitatus to police polling stations in the South.<sup>30</sup> Allegedly, troops were used to influence the outcome of the 1876 presidential election.<sup>31</sup> Abuse of the military in these situations—some of the most central to a democracy—cried out for a statutory solution.<sup>32</sup>

Congress formulated a solution to the growing public concern by passing the Posse Comitatus Act in 1878.<sup>33</sup> Updated in 1956 to include the Air Force as part of its coverage,<sup>34</sup> the Act now states the following:

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CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH 11 (1993).

<sup>22</sup> See DYCUS ET AL., *supra* note 15, at 587.

<sup>23</sup> See *id.*

<sup>24</sup> See *id.* at 593.

<sup>25</sup> See Hammond, *supra* note 19, at 959.

<sup>26</sup> "The term 'posse comitatus' ('power of the county') denotes a sheriff's common law authority to command the assistance of able-bodied citizens in order to enforce the law." Brian L. Porto, Annotation, *Construction and Application of Posse Comitatus Act (18 U.S.C. § 1385), and Similar Predecessor Provisions, Restricting the Use of United States Army and Air Force to Execute Laws*, 141 A.L.R. FED. 271 (1997).

<sup>27</sup> See Hammond, *supra* note 19, at 959-60.

<sup>28</sup> See *id.* at 960.

<sup>29</sup> See *id.*

<sup>30</sup> See *id.* at 960-61.

<sup>31</sup> See DYCUS ET AL., *supra* note 15, at 593.

<sup>32</sup> See *id.*; Hammond, *supra* note 19, at 961.

<sup>33</sup> See DYCUS ET AL., *supra* note 15, at 593; Hammond, *supra* note 19, at 961.

<sup>34</sup> See *United States v. Yunis*, 924 F.2d 1086, 1093 (D.C. Cir. 1991).

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.<sup>35</sup>

The Posse Comitatus Act embodies the traditional separation of the military and civilian spheres.<sup>36</sup> Accordingly, its intent is to restrict the direct and active use of the military for civilian law enforcement purposes.<sup>37</sup> A few caveats are in order when discussing the Act, however. First, it only refers by direct reference to the Army and Air Force, and some courts have been reluctant to apply it to the sea services.<sup>38</sup> However, Navy regulations have long applied the underlying principles to forbid the use of Navy and Marine Corps assets as a posse comitatus, but only as a matter of Department of Defense policy.<sup>39</sup> Moreover, because the Act was not intended to limit the use of state militias, National Guard forces are not subject to the strictures of the Act while remaining under state control.<sup>40</sup>

Despite its nature as a criminal statute, no reported court cases involving criminal prosecution of a person for violating the Posse Comitatus Act exist.<sup>41</sup> In addition, the Act provides no private right of action.<sup>42</sup> Instead, defendants, including the government itself, have raised alleged violations of the Act as defenses in court proceedings.<sup>43</sup> From these proceedings, two clear procedural rules have emerged. First, the decisions have uniformly held that a violation of the Act by the government does not erase the trial court's jurisdiction over the person

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<sup>35</sup> 18 U.S.C. § 1385 (1994).

<sup>36</sup> See Hammond, *supra* note 19, at 953.

<sup>37</sup> See CHARLES A. SHANOR & L. LYNN HOGUE, *MILITARY LAW IN A NUTSHELL* 37 (1996).

<sup>38</sup> See, e.g., Yunis, 924 F.2d at 1093 ("Nothing in [the legislative] history suggests that we should defy the express language of the Posse Comitatus Act by extending it to the Navy, as we decline to do so.") One commentator argues, however, that "[c]ourts have generally construed the Act to apply to all of the services." Coffey, *supra* note 18, at 1955.

<sup>39</sup> See *DYCUS ET AL.*, *supra* note 15, at 597.

<sup>40</sup> See *id.* at 599; Hammond, *supra* note 19, at 964. Congress has explicitly approved the use of National Guard units for "drug interdiction and counter-drug activities" as long as they remain under state control. *DYCUS ET AL.*, *supra* note 15, at 599-600 (citing 32 U.S.C. § 112 (1994); *United States v. Kyllo*, 809 F. Supp. 787 (D. Or. 1992), *vacated on other grounds*, 37 F.3d 526 (9th Cir. 1994); *United States v. Benish*, 5 F.3d 20 (3d Cir. 1993)).

<sup>41</sup> See *DYCUS ET AL.*, *supra* note 15, at 595; SHANOR & HOGUE, *supra* note 37, at 37; Hohnsbeen, *supra* note 16, at 408.

<sup>42</sup> See Porto, *supra* note 26.

<sup>43</sup> See Hohnsbeen, *supra* note 16, at 408.

or the crimes alleged.<sup>44</sup> Secondly, the exclusionary rule (barring introduction of evidence seized) does not apply when there has been a violation of the Act.<sup>45</sup>

Perhaps surprising in light of the concerns that gave rise to it, there are many exceptions to the Posse Comitatus Act. First, as previously stated, the Act was meant to limit only *direct* and *active* use of troops—that is, actions of a “regulatory, proscriptive, or compulsory” nature—for civilian law enforcement.<sup>46</sup> In other words, the *indirect* use of military assets, such as providing advice to civilian law enforcement officials and loaning military equipment to the police, would appear to be inherently acceptable.<sup>47</sup> Other forms of indirect assistance that have not been held to violate the Act include the use of Air Force assets to fly surveillance missions for civilian law enforcement and military officers’ advice in quelling civilian disorders.<sup>48</sup> Even the direct and active use of troops is allowed in some circumstances under constitutional, statutory, and common law exceptions. As one authoritative source explains, “[t]he constitutional exceptions are (1) emergency authority to prevent loss of life or property destruction and (2) authority to protect federal property and functions when ‘duly constituted local authorities are unable’ to provide adequate protection.”<sup>49</sup> Many statutory exemptions allow the

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<sup>44</sup> See *id.*

<sup>45</sup> See Porto, *supra* note 26. At least one commentator takes issue with this rule, arguing that “courts should exclude evidence obtained in violation, be it outright or constructive, of the various prohibitions against civil law enforcement by military personnel.” Coffey, *supra* note 18, at 1950. In a final interesting comment on the litigation rules, Professors Shanor and Hogue note that “[a]n unresolved issue with respect to the Posse Comitatus Act is whether it applies outside the nation’s borders. . . . The question arose in the trial of Panamanian military leader Manuel Noriega but was not resolved.” SHANOR & HOGUE, *supra* note 37, at 40 (citing *United States v. Noriega*, 746 F. Supp. 1506 (S.D. Fla. 1990) (motions to dismiss based on alleged violations of the Posse Comitatus Act withdrawn)).

<sup>46</sup> Porto, *supra* note 26; see also *supra* note 37 and accompanying text. Porto further defines direct and active participation to include situations where military personnel make arrests, engage in search and/or seizure, investigate crimes, interview witnesses, and pursue escaped prisoners. See Porto, *supra* note 26. For an up-to-date and comprehensive summary of court cases where actions were found to be direct and active (and therefore violative of the Posse Comitatus Act), see *id.*

<sup>47</sup> See SHANOR & HOGUE, *supra* note 37, at 37; Porto, *supra* note 26.

<sup>48</sup> See *United States v. Casper*, 541 F.2d 1275 (8th Cir. 1976) (per curiam), *cert. denied*, 430 U.S. 970 (1977). For a very recent and comprehensive summary of court cases finding that actions were sufficiently passive to pass muster under the Posse Comitatus Act, see Porto, *supra* note 26. In recent years, Congress has added statutory backing to many indirect uses of military forces for domestic purposes, such as drug interdiction, border patrol, and tariff law enforcement. SHANOR & HOGUE, *supra* note 37, at 39 (citing 10 U.S.C. §§ 371-380). These new provisions will be discussed in greater details in the sections to follow.

<sup>49</sup> SHANOR & HOGUE, *supra* note 37, at 38 (citing 32 C.F.R. § 215.4).



direct use of troops for domestic purposes as well. Three of these involve the use of federal troops for the suppression of civilian insurrection.<sup>50</sup> A fourth statutory exception not only allows but also specifically requires that the military, upon request from the Secret Service, assist it in carrying out its duties to protect political figures and candidates from physical harm.<sup>51</sup> The common law exceptions are two-fold: (1) No violation of the Act occurs when military personnel assist civilian police on their own initiative as private citizens; and (2) No violation occurs when military personnel assist civilian police "to achieve a military purpose and only incidentally enhance civilian law enforcement," such as protecting people on a military base from fleeing felons or investigating drug dealing by military personnel.<sup>52</sup>

For almost 100 years following its passage, the Posse Comitatus Act was rarely a topic of discussion in the judicial system, prompting one court to describe it as "obscure and all-but-forgotten."<sup>53</sup> Two unrelated events in the 1970's—the armed occupation of the Indian village of Wounded Knee by members of the American Indian Movement and the illegal possession and sale of military weapons in the civilian community—resulted in the use of federal troops to assist civilian police, and the Act suddenly became a hot topic once more.<sup>54</sup> Interest in the Act rose in the 1980's, as the nation began to view the military as a potential asset in the famous "war on drugs" and reached a crescendo in the 1990's with the search for new post-Cold War roles for the military, as the following sections will discuss.<sup>55</sup>

## *B. The Increased Domestic Roles of the Military in the 1990's*

### *1. The "War on Drugs"*

By 1981, Congress had grown deeply concerned about the nation's growing drug problems and began to turn to the military as a potential solution.<sup>56</sup> As a result, in that year Congress created a statutory exception to the Posse Comitatus Act to direct the use of the military for drug interdiction efforts on the nation's borders.<sup>57</sup> These amendments gave the military limited authority to provide, operate, or maintain

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<sup>50</sup> See *id.* (citing 10 U.S.C. §§ 331-335).

<sup>51</sup> See *id.* at 39 (citing H.J.R. 1292, June 6, 1968, P.L. 90-331, 82 Stat. 170).

<sup>52</sup> Porto, *supra* note 26.

<sup>53</sup> *Id.* (quoting *Chandler v. United States*, 171 F.2d 921 (1st Cir.), *cert. denied*, 336 U.S. 918, *reh. denied* 336 U.S. 947 (1949)).

<sup>54</sup> See *id.*

<sup>55</sup> See *infra* notes 56 to 127.

equipment and to furnish information, advice, training, and facilities for civilian law enforcement officials involved in enforcing the federal drug laws.<sup>58</sup> However, the amendments also barred the *direct* use of military personnel for search, seizure, or arrest, and even indirect assistance if it would impair military readiness.<sup>59</sup>

The 1981 amendments to the Posse Comitatus Act have arguably made enforcement of the nation's drug laws more effective.<sup>60</sup> However, they faced tough opposition both within Congress and from outside influences,<sup>61</sup> including such unlikely partners as the Department of Defense itself, criminal defense lawyers, and civil libertarians.<sup>62</sup> A quick look at one specific incident involving these amendments may illustrate the critics' concerns. Pursuant to the 1981 amendments, the Navy began embarking small teams of Coast Guard Tactical Enforcement Teams (TACLETs) on board its warships that patrolled known drug smuggling areas.<sup>63</sup> On July 14, 1983, one such team aboard the Navy destroyer USS KIDD (DDG 993) sighted a suspicious fishing boat. When the boat refused a request by the Coast Guard officers to stop, the KIDD checked the registry of the vessel and found that the registry was fraudulent.<sup>64</sup> The KIDD then ordered the boat to stop. When the boat refused to do so--in an amazing turn of events in naval history--the commanding officer of the destroyer ordered the raising of the Coast Guard ensign (essentially declaring the ship a Coast Guard law enforcement asset rather than a Navy warship) and gave chase.<sup>65</sup> After firing warning shots (which were ignored), the KIDD fired directly at the fishing boat, disabling it and allowing the TACLET team to board.<sup>66</sup> The TACLET team subsequently found almost 900 bales of marijuana aboard the fishing boat, and the crewmembers were later prosecuted in federal court.<sup>67</sup> Incidents such as this prompted one observer in the mid-1980's

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<sup>56</sup> See Hohnsbeen, *supra* note 16, at 416.

<sup>57</sup> Hammond, *supra* note 19, at 954; DYCUS ET AL., *supra* note 15, at 598 (citing 10 U.S.C. §§ 371-381 (1994)); Hohnsbeen, *supra* note 16, at 417-18. The amendments also allowed the Department of Defense to assist in enforcement of immigration and tariff laws. DYCUS ET AL., *supra* note 15, at 598 (citing 10 U.S.C. §§ 371-381 (1994)).

<sup>58</sup> See Hohnsbeen, *supra* note 16, at 417-18.

<sup>59</sup> See 10 U.S.C. §§ 375-376 (1994).

<sup>60</sup> See Hohnsbeen, *supra* note 16, at 419.

<sup>61</sup> See *id.* at 420.

<sup>62</sup> See *id.*

<sup>63</sup> See Coffey, *supra* note 18, at 1949; see also 10 U.S.C. § 379 (1994).

<sup>64</sup> See Coffey, *supra* note 18, at 1949.

<sup>65</sup> See *id.*

<sup>66</sup> See *id.*

<sup>67</sup> See *id.* at 1949-50.

to comment that "[t]he 1981 amendments to the Posse Comitatus Act portend an increased military role in civil law enforcement."<sup>68</sup> Time would prove him right.

Since the late 1980's and the diminishment of the Soviet threat, the legislative and executive branches have repeatedly expanded the military's role in the enforcement of drug laws, going so far as adopting the militaristic term "war on drugs" to describe the national effort.<sup>69</sup> By 1989, Congress had even designated the Department of Defense as the "single lead agency" in the nation's drug interdiction efforts.<sup>70</sup> In 1994, Congress firmly tied the drug issue to national security, thus formally legitimizing the use of the military in drug interdiction efforts, by enacting a statute with the following language: "Personnel of the Department of Defense may not be detailed to another department or agency in order to implement the National Drug Control Strategy unless the Secretary of Defense certifies to Congress that the detail of such personnel is in the national security interest of the United States."<sup>71</sup>

This new linkage prompted one military officer to observe with concern that "[g]ranting the military the responsibility for the general national welfare under the aegis of 'national security' is a major expansion of its customary function."<sup>72</sup> Still, the drive to use the military in ever-increasing drug law enforcement roles continues. There have even been proposals to use military troops to patrol neighborhoods in Washington, D.C. in an effort to stop drug trafficking.<sup>73</sup> The expanded military role became so pervasive by the mid 1990's that the Department of Defense had begun to establish entire military units dedicated solely to drug interdiction. One example can be found at Naval Air Station Atlanta. On November 18, 1995, for the first time in its history, the Navy commissioned a unit, Airborne Early Warning Squadron 77 (VAW-77), whose entire mission is to fight the war on drugs.<sup>74</sup> Instead of training to fly its E-2C reconnaissance planes from the decks of aircraft carriers, this new Atlanta-based squadron will patrol the waters of the Caribbean

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<sup>68</sup> Hohnsbeen, *supra* note 16, at 425.

<sup>69</sup> See DYCUS ET AL., *supra* note 15, at 598.

<sup>70</sup> See Hammond, *supra* note 19, at 954.

<sup>71</sup> DYCUS ET AL., *supra* note 15, at 599 (citing Pub. L. No. 103-337, § 1011(c), 108 Stat. 2836 (1994)).

<sup>72</sup> Dunlap, *supra* note 6, at 357.

<sup>73</sup> See DYCUS ET AL., *supra* note 15, at 600.

<sup>74</sup> See Luke Johnson, *NAS Atlanta Gets Drug-Fighting Squadron*, MARIETTA DAILY J., Nov. 19, 1995, at 1C; Doug Payne, *New Unit to Boost Area Military Base*, ATLANTA J. & CONST., Nov. 16, 1995 ("Cobb Extra" section, at G19). The author of this paper participated in the commissioning of VAW-77.

looking for drug runners, a tremendous diversion of resources to law enforcement efforts.<sup>75</sup>

## 2. Border Patrol, Battling Domestic Terrorism, and Other New Missions

When Congress modified the Posse Comitatus Act in 1981, it gave permission for the *indirect* use of the military for purposes beyond drug interdiction, such as enforcement of the immigration and tariff laws.<sup>76</sup> Responding to this new role, the Department of Defense established Joint Task Force 6 (JTF-6) in 1989.<sup>77</sup> JTF-6 coordinates activities between military and law enforcement agencies along the 2,000-mile Mexican border.<sup>78</sup> Since its inception, JTF-6 has been involved in more than 3,000 separate missions, a clear sign of the expanding role of the military in this effort.<sup>79</sup>

In the years following the 1981 amendments, Congress considered legislation that would *directly* involve troops in enforcing customs and immigration laws at the nation's borders.<sup>80</sup> By 1996, these calls had reached such a point that presidential candidate Lamar Alexander ran on a platform calling for the creation of a new branch of the armed forces that would replace the Immigration and Naturalization Service and the Border Patrol.<sup>81</sup>

The line between direct and indirect actions can sometimes be blurred, however, as one tragic incident illustrates. The concerns of critics of the use of military personnel along the border came into sharp focus in May, 1997, when Marines on patrol in Texas shot and killed an eighteen-year old.<sup>82</sup> The Marines, operating under the direction of JTF-6, were conducting a clandestine mission along the Mexican border looking for smugglers when they encountered Esequiel Hernandez as he herded his family's goats.<sup>83</sup> The Marine corporal who fired the fatal shot said

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<sup>75</sup> See Johnson, *supra* note 74; Payne, *supra* note 74. The expanding role of the military in drug interdiction was a hot topic in the 1996 presidential election, when candidate Bob Dole pledged to increase the use of the military in the war on drugs. See Hammond, *supra* note 19, at 954.

<sup>76</sup> See *supra* note 57.

<sup>77</sup> See Martz, *supra* note 2, at G1.

<sup>78</sup> See *id.*

<sup>79</sup> See *id.*

<sup>80</sup> See Hammond, *supra* note 19, at 953-54 (citing Border Integrity Act, H.R. 1224, 104th Cong.)(1995).

<sup>81</sup> See *id.* at 954.

<sup>82</sup> See Martz, *supra* note 2.

<sup>83</sup> See *id.*

that he fired in self-defense after Hernandez shot at the camouflaged military patrol.<sup>84</sup>

Although JTF-6 troops have been involved in other shooting incidents, Hernandez was the first U.S. citizen killed in this ongoing roll. As a result, the incident raised alarm among some observers.<sup>85</sup> For example, author Timothy Dunn remarked that this case "starkly illustrates the difference between a military approach to the problem and a law enforcement approach to the problem."<sup>86</sup> Maria Jimenez of the Immigration Law Enforcement Project was even more to the point, saying, "In a democracy, the military should have a limited role, and that role should be fighting foreign enemies. This is not a life-threatening situation that would warrant military action."<sup>87</sup> Even the Department of Defense seemed worried as a result of this shooting. The Department's temporary suspension of ground patrols along the border, while still providing more traditional indirect help such as air reconnaissance through JTF-6, illustrates this concern.<sup>88</sup>

Notwithstanding the Hernandez incident, Congress continues to expand the use of military troops for border patrol. In June, 1997, it passed a measure written by Representative James Traficant (D-Ohio) that authorizes the use of up to 10,000 military personnel along the border; it reaffirmed the measure in September, 1997.<sup>89</sup>

The year 1993 ushered in a new potential domestic role for the military. At lunchtime on February 26, 1993, a bomb exploded in the parking garage beneath the World Trade Center, "immeasurably harm[ing] America's notions of security from terrorism."<sup>90</sup> Two years later a truck bomb planted by Timothy McVeigh leveled the federal building in downtown Oklahoma City, shattering any remaining sense of security from terrorism that Americans had.<sup>91</sup> The sabotage of an Amtrak passenger train in Arizona soon followed the Oklahoma City

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<sup>84</sup> See *id.*

<sup>85</sup> See *id.* Apparently believing the corporal, however, a grand jury refused to indict any of the Marines. See *id.*

<sup>86</sup> Martz, *supra* note 2.

<sup>87</sup> *Id.*

<sup>88</sup> See *id.* Helicopters from Marine Aircraft Group 42, based at Naval Air Station Atlanta, have participated in these reconnaissance flights along the border. See *id.*

<sup>89</sup> See *id.*

<sup>90</sup> DYCUS ET AL., *supra* note 15, at 671.

<sup>91</sup> See generally *id.* at 672-73.

bombing.<sup>92</sup> All of these incidents illustrated to Americans the danger from terrorist attacks that originate within the United States.<sup>93</sup>

Although the United States had long had statutes dealing with such threats,<sup>94</sup> Americans called for military intervention. Within one week of the Oklahoma City bombing, for example, President Clinton proposed an exception to the Posse Comitatus Act that would have allowed the military to assist civilian law enforcement agencies in cases involving "weapons of mass destruction."<sup>95</sup> The exception would have been codified in the Counterterrorism Act of 1995.<sup>96</sup> However, Congress deleted this exception to ensure the passage of the Counterterrorism Act against some heady opposition in the House of Representatives.<sup>97</sup> Still, one commentator asked, "Should military troops be used in responding to a terrorist threat, either at home or abroad" and "Should we be prepared to subject such defendants to military trials?"<sup>98</sup> These incidents of terrorism and the subsequent legislative proposal by President Clinton paved the path for greater military involvement.

Lacking clear direction on its role in combating domestic terrorism, the Department of Defense has attempted to delineate the parameters of military involvement in this effort. Specifically, a 1994 Department directive addresses terrorism and other civil disturbances.<sup>99</sup> It states that the president can order the deployment of troops in such emergencies but allows their deployment without presidential authority when necessary to "prevent loss of life or wanton destruction of property, or to restore government functioning and public order."<sup>100</sup> The same directive, however, states that the Attorney General maintains his duty of directing federal response to acts of domestic terrorism and mandates that any troops used "remain under military command and control at all times."<sup>101</sup> Using these and other guidelines, the government has

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<sup>92</sup> See *id.* at 604.

<sup>93</sup> See *id.* at 604.

<sup>94</sup> For example, the Civil Obedience Act, passed at the height of Vietnam War protests in 1968, provided punishment for anyone who: "teaches or demonstrates to any other person the use, application, or making of any firearm or explosive device, or technique capable of causing injury or death to persons, knowing or having reason to know or intending that the same will be unlawfully employed for use in, or in furtherance of, a civil disorder . . . ." 18 U.S.C. § 231(a)(1) (1994).

<sup>95</sup> See Hammond, *supra* note 19, at 953.

<sup>96</sup> See *id.* at 953 n. 6, 972.

<sup>97</sup> See Hammond, *supra* note 19, at 953 n.6.

<sup>98</sup> DYCUS ET AL., *supra* note 15, at 605.

<sup>99</sup> See *id.* at 606.

<sup>100</sup> DOD Dir. 3025.12 (Feb. 4, 1994), at 4.

<sup>101</sup> *Id.*

deployed military troops in several recent situations to counter potential domestic terrorism; the 1996 Olympics in Atlanta is a prime example.<sup>102</sup>

Congress has not limited the expanding domestic role of the military to traditional police work.<sup>103</sup> For example, the National Defense Authorization Act of 1993 allows the use of the military for a wide range of activities that were once the exclusive job of local civilian authorities. The Act sets up the Civil-Military Cooperative Action Program to use the "skills, capabilities, and resources of the armed forces to assist civilian efforts to meet the needs of the United States."<sup>104</sup> As a result, the military now lends its services to local schools and youth projects, provides medical care and conducts repair projects in local communities, provides greater humanitarian relief after natural disasters, and engages in environmental restoration, among many other civilian endeavors.<sup>105</sup>

### C. *Why the Expanding Domestic Role is Questionable*

The preceding examples illustrate that the once-distinct line between the military and civilian spheres has blurred over the past few years, particularly since the demise of the Cold War.<sup>106</sup> A series of decisions by the executive and legislative branches have greatly expanded the exceptions to the Posse Comitatus Act, clearly allowing greater use of the armed forces for domestic purposes.<sup>107</sup> In short, both

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<sup>102</sup> The author of this paper was one of the military members who participated in the joint task force set up for the 1996 Olympics. Approximately 13,000 troops were deployed for the Olympics at a cost to taxpayers of \$51 million, with the threat of terrorism as one of the motivating factors. See John J. Fialka, *Join the Army to See the World; Drive Athletes Around Atlanta*, WALL ST. J., June 12, 1996, at B1. However, not all of the troops were used for security purposes; some were used for such mundane tasks as watering field-hockey arenas and driving buses, which led Senator John McCain (R-Ariz.) to call the assignments "demeaning and degrading" to the troops. *Id.*; see also *Business, Capitol Hill Question Military's Role in Olympics*, DEFENSE WEEK, July 22, 1996. Newspaper editorials around the nation were generally very critical of the role played by the military at the 1996 Olympics. See, e.g., *Atlanta Storm*, RICHMOND TIMES-DISPATCH, June 24, 1996, at A6; *Olympic Personnel Carriers*, ST. PETERSBURG TIMES, May 23, 1996, at 14A.

<sup>103</sup> See Dunlap, *supra* note 6, at 359.

<sup>104</sup> *Id.* at 359-60 & n.136 (quoting the National Defense Authorization Act for Fiscal Year 1983, Pub. L. No. 102-484, 106 Stat. 2315 (codified as amended in scattered sections of 10 U.S.C. §§113-2825 (1988))).

<sup>105</sup> See *id.* at 360. See Appendix I for a list of major relief projects the Department of Defense has participated in. For an in-depth discussion of one particular project, the provision of medical services to international athletes at the 1996 Paralympic Games in Atlanta, see LCDR W. Kent Davis et al., *Atlanta Medical Reservists Help Host the World*, NAVY MEDICINE, March-April 1997, at 2.

<sup>106</sup> See Martz, *supra* note 2; Hammond, *supra* note 19, at 955.

<sup>107</sup> See Martz, *supra* note 2; Hammond, *supra* note 19, at 955.

the government and the public have come to see the military as a panacea for the nation's problems, consequently shifting many functions to military control.<sup>108</sup> Several observers—both within the military and among civilians – have speculated that the armed forces have eagerly embraced the new domestic roles as a means of preserving force structure and improving public relations.<sup>109</sup> The problem with these expanded duties, however, is that they fail “to preserve that necessary and traditional separation of civilian and military authority” and “undermine civilian control of the military, damage military readiness, and inefficiently solve the problems that they supposedly address.”<sup>110</sup>

Nowhere are these dangers more prevalent than in the use of the military for civilian law enforcement. Civilian supremacy over the military rests on the assumption that organization and maintenance of the military is separate from the local and more decentralized police forces of the nation.<sup>111</sup> The paramount reason for the separation of these two entities is their fundamentally different roles and missions, resulting in distinct training methods.<sup>112</sup> Police officers must recognize individual rights and seek to protect those rights.<sup>113</sup> Prior to using force, police officers must try to de-escalate a situation, and they draw their weapons only when prepared to use them.<sup>114</sup> On the other hand, members of the armed forces are trained to carry out the external mission of defending the nation.<sup>115</sup> In doing so, troops do not focus on individual rights and may use deadly force without any prior aggression by the target.<sup>116</sup> The traditional separation of the military and police forces warranted by these differing roles, however, is being steadily eroded by the growing exceptions to the Posse Comitatus Act, which could prove to have dire consequences.<sup>117</sup> The most dangerous consequence is that using the military to seize civilians can expose civilian government to the threat of military rule and the suspension of constitutional liberties. As an Air Force officer has warned, “[t]he military's elevated standing, combined with other circumstances of the contemporary political landscape, invites an unprecedented insinuation of the military into American life,” a

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<sup>108</sup> See Hammond, *supra* note 19, at 953.

<sup>109</sup> See, e.g., Dunlap, *supra* note 6, at 361; Hammond, *supra* note 19, at 976.

<sup>110</sup> Hammond, *supra* note 19, at 953, 955.

<sup>111</sup> See Dunlap, *supra* note 6, at 359.

<sup>112</sup> See Hammond, *supra* note 19, at 973.

<sup>113</sup> See *id.*

<sup>114</sup> See *id.*

<sup>115</sup> See *id.*

<sup>116</sup> See *id.*

<sup>117</sup> See *id.*



situation which "challenges civilian control of the [military]."<sup>118</sup> This danger is even more ominous when one considers that the peacetime military forces performing domestic duties before the Cold War were very small compared to the rest of American society, a situation that is very different today.<sup>119</sup>

Undoubtedly, military involvement in the domestic sphere produces some benefits to pressing domestic problems.<sup>120</sup> The need to fight the war on drugs, to deter illegal immigration and smuggling, and to combat domestic terrorism, however, are all serious problems that will only disappear with long-term social solutions.<sup>121</sup> Austere budgets and the public desire for a quick-fix do not warrant the emergency use of the military in a nontraditional and dangerous role.<sup>122</sup> The Supreme Court recognized this when it said "[e]mergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions placed upon power granted or reserved."<sup>123</sup> Delegating domestic duties to the military under the guise of an emergency can pose risks not only to individual liberty, but also to the history and the underlying structure of the United States.<sup>124</sup> So far, Congress and the President have shown little interest in stemming the transfer of domestic duties to the military.<sup>125</sup> If the trend continues, however, the courts will inevitably have to restore the traditional subordination of the military to civilian control.<sup>126</sup> Even the intervention of the courts might not be enough in the end, however. No better closing commentary can be made on this ultimate danger than the words of Colonel Charles J. Dunlap:

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<sup>118</sup> Dunlap, *supra* note 6, at 342, 357.

<sup>119</sup> *See id.* at 361.

<sup>120</sup> *See* Hohnsbeen, *supra* note 16, at 433.

<sup>121</sup> *See* Hammond, *supra* note 19, at 984.

<sup>122</sup> *See id.*

<sup>123</sup> Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 425-26 (1934). Contrast this with Abraham Lincoln's view of the effect that emergencies can have on the ability to expand certain government powers:

By general law life *and* limb must be protected; yet often a limb must be amputated to save a life; but a life is never wisely given to save a limb. I felt that measures otherwise unconstitutional, might become lawful, by becoming indispensable to the preservation of the constitution, through the preservation of the nation.

DYCUS ET AL., *supra* note 15, at 89-90 (quoting Letter to Albert G. Hodges (Apr. 4, 1864), in VII Collected Works 281 (Roy P. Basler ed. 1953-55)) (justifying Lincoln's issuance of the Emancipation Proclamation under questionable legal grounds).

<sup>124</sup> *See* Hammond, *supra* note 19, at 984; Hohnsbeen, *supra* note 16, at 433.

<sup>125</sup> *See* Coffey, *supra* note 18, at 1966.

<sup>126</sup> *See id.*

In the final analysis, it is the American people who must make some hard decisions about the kind of nation in which they wish to live. If they continue to turn to the military for answers, if they abandon their attachment to the democratic process, if they fail to take the necessary action to reinvigorate civilian control, if they persist in exalting inflated notions of security over all other human values, then they will get, as it is often said, the government they deserve . . . . [J]ust as the military can keep a nation free, it can, without effective civilian control, enslave a nation as well.<sup>127</sup>

### III. THE SHIFTING WINDS OF MILITARY ALLIANCES AND NEW MISSIONS OVERSEAS

#### A. *The New NATO*

Changes in U.S. military policy have not been limited to the domestic sphere by any means. In the 1990's, changing international alliances have created new missions for the armed forces overseas. American participation in the North Atlantic Treaty Organization (NATO) has established many of these new roles. NATO originated in the years after World War II as a bulwark against perceived Soviet aggression in Europe.<sup>128</sup> Several of the World War II allies—Britain, France, Belgium, the Netherlands, and Luxembourg—took tentative steps toward NATO when they signed the Brussels Treaty of 1948 to protect against the possibility of a renewed threat from the East.<sup>129</sup> At the same time, Britain pushed for a treaty commitment from the United States to protect Western Europe.<sup>130</sup> These efforts culminated in the signing of the North Atlantic Treaty in Washington, D.C. on April 4, 1949, a few months before the Soviet Union detonated its first atomic bomb.<sup>131</sup> The United States Congress ratified the treaty and it became effective on August 24, 1949.<sup>132</sup> Under the treaty, the controlling

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<sup>127</sup> Dunlap, *supra* note 6, at 390, 392.

<sup>128</sup> See Jane E. Stromseth, *The North Atlantic Treaty Organization and European Security After the Cold War*, 24 CORNELL INT'L L.J. 479, 480 (1991); James T. Wilson, *North Atlantic Treaty Organization (NATO)*, in 17 COLLIER'S ENCYCLOPEDIA 607 (1990).

<sup>129</sup> See Stromseth, *supra* note 128.

<sup>130</sup> See *id.*

<sup>131</sup> See *id.*; see also Wilson, *supra* note 128.

<sup>132</sup> See DYCUS ET AL., *supra* note 15, at 294; Wilson, *supra* note 128. The Constitution deems treaties, along with the Constitution itself and the federal laws, to be "the Supreme Law of the Land." U.S. CONST. art. VI. Our first Chief Justice clearly recognized the importance of treaties and other forms of international law when he asserted that "the laws of the land

authority of NATO is the North Atlantic Council, a body of civilian representatives from the member states which meets at least once a week in Brussels, Belgium.<sup>133</sup> The Council held its first session on September 17, 1949.<sup>134</sup>

The most important obligation of the NATO treaty is embodied in Article 5, which deems that "an armed attack against one or more of them in Europe or North America shall be considered an attack against them all" and requires that each member nation will take "individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area."<sup>135</sup> Other provisions of the treaty encourage expansion of the size, mission, and outreach of NATO. For example, Article 2 states that "[t]he Parties will contribute toward the further development of peaceful and friendly international relations by strengthening their free institutions, by bringing about a better understanding of the principles upon which these institutions are founded, and by promoting conditions of stability and well-being."<sup>136</sup> Another provision provides that NATO can, by unanimous vote, "invite any other European state in a position to further the principles of this Treaty and to contribute to the security of the North Atlantic area to accede to this Treaty."<sup>137</sup>

Prior to the 1990's, NATO had taken a few steps to meet its outreach objectives. For example, having started with twelve members,<sup>138</sup> NATO subsequently expanded by adding Greece and Turkey in 1952, West

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admit of being classed under the three heads of descriptions. 1st. All treaties made under the authority of the United States. 2d. The laws of nations. 3d. The constitution, and statutes of the United States." *DYCUS ET AL.*, *supra* note 15, at 180 (quoting *Trial of Gideon Henfield* (C.C.D. Pa. 1793 (charge to the grand jury by C.J. Jay), *reprinted in* Wharton, *State Trials* 49, 52-53 (1849)).

<sup>133</sup> See Wilson, *supra* note 128.

<sup>134</sup> See *id.*

<sup>135</sup> Stromseth, *supra* note 128, at 481. To ensure the ability to meet this commitment, Article 3 pledges all parties to develop their "individual and collective capacity to resist armed attack" through "continuous and effective self-help and mutual aid." *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 481-82. The NATO treaty has other provisions relevant to the discussion here. For instance, it encourages (but does not require) joint action in response to out-of-area contingencies (such as Iraq), provides for consultation and review of the treaty in response to changes in European security (such as the end of the Cold War), and provides for the development of other institutions designed to maintain peace and security. See *id.* at 502.

<sup>138</sup> The original members were the United States, Canada, Iceland, Great Britain, France, Belgium, the Netherlands, Luxembourg, Portugal, Italy, Norway, and Denmark. See Wilson, *supra* note 128.

Germany in 1955, and Spain in 1982.<sup>139</sup> A reunified Germany replaced West Germany as a NATO member in 1990.<sup>140</sup> The end of the Cold War in the early 1990's, however, firmly pushed NATO to expand its outreach obligations.<sup>141</sup> With fear of the Soviet response diminished, the alliance announced its readiness to undertake peacekeeping and humanitarian missions in 1992.<sup>142</sup> In short order, NATO forces began monitoring the compliance of merchant ships with regard to a United Nations trade embargo against Serbia and Montenegro for their support of "ethnic cleansing" in Bosnia-Herzegovina.<sup>143</sup> Later, NATO undertook its first combat actions in history when its forces downed Serbian warplanes and bombed Serbian troop positions.<sup>144</sup>

In addition to these expanded missions, NATO began to reach out to its former Cold War adversaries. For example, in the mid-1990's, it established the Partnership for Peace (PfP) program, which offered a restricted associate membership to European countries outside the alliance, including Russia.<sup>145</sup> To further the PfP program, selected NATO members even went so far as to establish a school in Garmisch, Germany, the George C. Marshall European Center Security Studies, with a mission of assisting PfP "developing nations establish national security structures and supporting institutions which are compatible with democratic principles and processes and civilian oversight of the military, and market economies."<sup>146</sup> The classes offered by the Marshall Center quickly became busy with "executive military and civilian personnel" from nations such as Latvia, Russia, Hungary, Lithuania, Romania, Kazakhstan, Turkmenistan, and Bulgaria attending the training offered.<sup>147</sup> NATO and PfP nations have even begun conducting military

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<sup>139</sup> See *id.*; Stromseth, *supra* note 128, at 482.

<sup>140</sup> See Wilson, *supra* note 128.

<sup>141</sup> See Gail Garfinkel Weiss, *Redefining the Alliance's Mission*, COLLIER'S ENCYCLOPEDIA CD-ROM (1996).

<sup>142</sup> See *id.*

<sup>143</sup> See *id.*

<sup>144</sup> See *id.*

<sup>145</sup> See *id.* Even non-Soviet bloc countries, such as Austria, were offered membership in the Partnership For Peace Program. See *id.*

<sup>146</sup> The George C. Marshall European Center for Security Studies Homepage (visited May 18, 1998) <<http://www.marshall.adsn.int/marshall.html>>; see also Letter and enclosures from Mari K. Eder, Public Affairs Officer, George C. Marshall European Center for Security Studies, to W. Kent Davis (Dec. 11, 1997) (on file with the author) [hereinafter *Letter*].

<sup>147</sup> The George C. Marshall European Center for Security Studies Homepage, *supra* note 146; see also *Letter*, *supra* note 146. Apparently, the Marshall Center has fared much better in its public relations efforts than another school—the School of the Americas at Fort Benning, Georgia—with a similar mission aimed at Latin America. While most Americans have never even heard of the Marshall Center and would likely applaud its efforts if they had,

training together in the field,<sup>148</sup> with NATO members providing instruction on topics as diverse as military tactics and how armed forces deal with journalists in a democratic society.<sup>149</sup>

Several Eastern European nations--Poland, Hungary, and the Czech Republic--applied for full admission to the alliance,<sup>150</sup> which caused turmoil in U.S. political circles and among NATO members.<sup>151</sup> For example, President Bush, and initially President Clinton, largely ignored the applications, but Speaker of the House Newt Gingrich, seeing a potential political boost among ethnic voters in big city enclaves, supported the applications and made NATO expansion a part of the Republican platform in 1994 and 1996.<sup>152</sup> Despite these platforms, a fellow Republican member of Congress, Senator John Warner, was less enthusiastic, questioning the wisdom of expanding NATO and urging a moratorium on additional nations joining the alliance if NATO extended an invitation for membership to these three countries.<sup>153</sup> President Clinton eventually reversed his course and supported the applications of the three nations by arguing to Congress in early 1997 that "[i]nclusion of new members into NATO's ranks is an indispensable element of a broader American strategy to create an undivided, democratic Europe for the 21st century."<sup>154</sup> The President began to lobby hard for the

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the School of the Americas has become extremely controversial. See, e.g., Gail Corcoran Freundt, *Editorial: Shut Down School of Americas*, ATLANTA J. & CONST., Feb. 27, 1998, at A17; *Army School Meets with Religious Group*, MARIETTA DAILY J., May 3, 1998, at 6B. Approximately 300 of the 60,000 graduates of the School of the Americas have been accused by activists of human rights abuses in Latin America. See *Army School Meets with Religious Group*, *supra*. Perhaps the most infamous incident of this nature occurred in 1989, when graduates of the School massacred six Jesuit priests and two female co-workers in El Salvador. See Freundt, *supra* this note.

<sup>148</sup> See Joris Janssen Lok, *Dutch Forces Conduct Brigade-Level Exercise in Poland*, JANE'S INT'L DEFENSE REV., June 1997, at 17.

<sup>149</sup> See LCDR Bob Kantor, *Four PAOs Staff NATO/PfP Exercise in Eastern Europe*, PACE NEWSLETTER (Navy Office of Information, Washington, D.C.), Feb. 1998, at 7.

<sup>150</sup> See William M. Burke, *U.S. Defense Contractors Behind NATO Expansion Push*, MARIETTA DAILY J., Apr. 26, 1998, at 8B.

<sup>151</sup> See *id.*; Tom Gjelten and Bob Edwards, *Iraq Straining NATO Alliance*, MORNING EDITION, Feb. 13, 1998, (NATIONAL PUBLIC RADIO, Feb. 13, 1998) (available in 1998 WL 3306375). Gjelten and Edwards note, in comments on the possibility of the alliance's expansion, that "NATO members . . . are divided over how the alliance should be organized and how fast it should grow." *Id.*

<sup>152</sup> See Burke, *supra* note 150.

<sup>153</sup> See Gjelten and Edwards, *supra* note 151 (summarizing the concerns of Senator John Warner (R-Va.)).

<sup>154</sup> Letter from President Bill Clinton to the Chairmen of the Senate Committees on Foreign Relations and Armed Services and the House Committees on International Relations and National Security, Feb. 24, 1997, available in 1997 WL 5710988.

expansion of NATO for the Poles, Hungarians, and Czechs, ultimately obtaining the reluctant support of the Pentagon and the unlikely backing of such allies as Henry Kissinger when the necessary two-thirds Senate vote was approaching in early 1998.<sup>155</sup> Finally, on April 30, 1998, the Senate voted 80-19 to approve adding the three new members to NATO.<sup>156</sup> Meanwhile, other former Soviet bloc nations began to express their interests in joining NATO, particularly the Baltic States and Romania.<sup>157</sup> Almost a dozen other nations now have applied for membership.<sup>158</sup>

The expanding role of NATO clearly caused problems for its members, especially the United States. The strains became clear in the first few weeks of 1998 when NATO members became bitterly divided on how to deal with new threats from the nation of Iraq, peacekeeping in Bosnia, and membership expansion.<sup>159</sup> The most ominous of these disputes involved the proposed expansion of NATO. Critics in the U.S. began to mercilessly assail the possibility of membership by former Soviet-bloc nations. For example, George Kennan warned that "[e]xpanding NATO would be the most fateful error of American policy in the entire post cold war era."<sup>160</sup> And columnist William Burke

<sup>155</sup> See Gjelten & Edwards, *supra* note 151; Burke, *supra* note 150.

<sup>156</sup> See Tom Raum, *Senate Approves NATO Expansion: Hungary, Czech Republic, Poland to Join Alliance*, DETROIT NEWS, May 1, 1998, at A5. Earlier in the day, the Senate rejected an amendment by Senator Warner that would have imposed a three-year moratorium before any further members were added, *see id.*, clearing the way for other nations to apply for NATO membership.

<sup>157</sup> See Taras Kuzio, *The Baltics, Ukraine, and the Path to NATO*, 9 JANE'S INTELLIGENCE REV. 300 (1997); ENS Bill Murray & LCDR Phil McGuinn, *Public Information Team Takes to the Road in Romania*, PACE NEWSLETTER (Navy Office of Information, Washington, D.C.), Nov. 1997, at 3. The prospects for the Baltic States joining NATO appear dim at present, however. U.S. Secretary of Defense William Perry has dismissed the possibility as follows: "The Baltic States are not ready to join NATO. These countries simply do not meet the alliance's standards, which call for developed democracy, the absence of conflicts with neighbours, market economies and armed forces capable of operating jointly with NATO." Kuzio, *supra* this note, at 301. This sentiment seems to be shared among our NATO allies. "With the exception of the Scandinavian countries, there is . . . a general pessimism among other Western governments regarding the Baltic nations' future NATO membership." *Id.* at 301. Romania, for its part, apparently believes that its prospects are good, and has "invited 'advisors' from NATO's Allied Forces Southern Europe (AFSOUTH) Command to instruct their senior Romanian military officers on the ways of the West." Murray and McGuinn, *supra* this note. Other Eastern bloc nations have taken a more moderate stance. Ukraine, for example, while regarding "NATO as a defensive alliance that poses no threat . . . has adopted a balanced foreign policy between [Russia] and the West" and thus has not applied for NATO membership. Kuzio, *supra* this note, at 301-303.

<sup>158</sup> See Raum, *supra* note 156.

<sup>159</sup> See Gjelten & Edwards, *supra* note 151.

<sup>160</sup> Burke, *supra* note 150.

charged that the proposed expansion rather nefariously stemmed from "the community of U.S. defense contractors, who have been struggling with a defense budget 21 percent smaller than the Gulf War peak [and] see a great opportunity to recoup their fortunes by outfitting all the Central European armies with spanking new NATO equipment, even while many U.S. units are operating with half rations."<sup>161</sup> In the wake of these general criticisms, more specific reasons for not expanding NATO began to appear in the U.S. These more exacting critiques have taken three approaches: 1) NATO is obsolete and therefore unnecessary; 2) NATO expansion would alienate Russia, causing even more problems for the alliance; and 3) NATO expansion is prohibitively expensive. An individual examination of these three criticisms is necessary.

### 1. NATO Is Obsolete

As previously discussed, NATO's original purpose was to counter the perceived threat from the Soviet Union. Now that the Soviet Union no longer exists, Professor Richard Anderson, among others, asks why NATO is still necessary, stating that:

NATO is a classic example of success producing obsolescence. The alliance that once shielded Europe against the real threat of Soviet armies in Germany protects against no real threat now that those armies have retreated. . . . Russia today is also a democracy. . . . Not likely to make war against democratic neighbors, democratic Russia has also just demonstrated in authoritarian Chechnya its lack of the capability to pose a military threat.<sup>162</sup>

In addressing NATO's need to expand its role into areas such as the PFP, the Bosnian conflict, and the standoff with Iraq, Professor Anderson further observes that "[t]he historical record contradicts assertions that

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<sup>161</sup> *Id.*

<sup>162</sup> Richard D. Anderson Jr., *On the Wisdom of Enlarging NATO*, 2 UCLA J. INT'L L. & FOR. AFF. 1, 9-11 (Spring/Summer 1997). Professor Anderson's optimism is not shared by Richard Pipes, who states the following cautionary note: "It is impossible at this time to foresee which path Russia will choose, pro-Western or anti-Western. The country's political structures are too fragile and the mood of its people too volatile for predictions. . . . Is Russia still an enemy? It is not and it ought not to be. But it might become one . . . once again." Pipes, *supra* note 5, at 65. Professor Perlmutter and Ted Carpenter are equally pessimistic, noting that "Russia's political future is uncertain." Amos Perlmutter & Ted Galen Carpenter, *NATO's Expensive Trip East: The Folly of Enlargement*, FOREIGN AFFAIRS, Jan./Feb. 1997, at 2, 5.

NATO prevents threats from arising, that NATO sustains democracy in its member states, that European democracies need membership in NATO to remain democratic, that NATO can deter regional leaders bent on violence, or that there is any need to deter violent encounters between states that elect their leaders."<sup>163</sup>

Given this state of affairs, argues Professor Anderson, expansion of NATO "is just a diplomatic farce," stemming from "a standard Democratic Party foreign policy of liberal internationalism that replicates in world affairs its liberal interventionism in domestic policy."<sup>164</sup> Thus, though he sees NATO expansion as holding little prospect of harm over the short-term, even if it will result in no real gain, he concludes that "[a]fter NATO enlarges, the U.S. should start to dismantle it."<sup>165</sup>

Professor Jane Stromseth shares a similar, though more moderate view. She tends to discount the relevance of NATO over the long run, but also takes into account the short-term threat that Russia may not turn out as many in the West hope:

The urgency of the Alliance's original military purpose—to deter Soviet aggression against Western Europe and to defend NATO territory in the event of an attack—has receded dramatically with the demise of the Warsaw Pact and the diminishing Soviet military presence in Eastern Europe. Even as NATO is attempting to modify and pare down its military objectives in light of changed circumstances, it is struggling to define a meaningful political role for itself. . . . To say that NATO is less relevant to the problems of European security, however, is not to say that it is irrelevant . . . . In light of the Soviet Union's uncertain political evolution, the transatlantic security link

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<sup>163</sup> Anderson, *supra* note 162, at 11.

<sup>164</sup> *Id.* at 17, 22. Professor Anderson attributes the same enthusiasm for NATO expansion in other nations as also politically motivated: "[F]oreign policies are not motivated by their international results. . . . When a leader offers a vision of social order, the leader can attract additional supporters and provide additional reasons for support by incorporating into the vision a grand strategy in world affairs. . . . In short, politicians in many countries make an issue of NATO enlargement, even though it has no bearing on the real interests of their citizens, because NATO enlargement is suitable for symbolic utterances that identify the politicians with their citizens' common experience." *Id.* at 15, 21.

<sup>165</sup> *Id.* at 2, 23.



provided by the Alliance will be important for many years to come.<sup>166</sup>

Both Anderson and Stromseth agree that NATO must eventually become extinct. The timing of this extinction will depend on the threat posed by Russia. Defining the continuing threat from Russia, however, is still a difficult problem and is a troubling variable in both the push to expand NATO and the argument that NATO is now obsolete.

## 2. NATO Expansion Will Alienate Russia

Even if NATO still serves a purpose, the issue of expansion faces a serious roadblock: the tenuous and still developing relationship between the United States and Russia. The rhetoric of both nations suggests friendly terms between NATO and Russia today. For example, the military doctrine adopted by Russia in 1993 declares that it "does not regard any state to be its adversary."<sup>167</sup> Moreover, President Clinton in 1997 declared that "[t]he enlargement of NATO is not directed against any state; NATO does not see any nation as its enemy."<sup>168</sup> Despite these hospitable words, the expansion of NATO has clearly created problems in the relationship between Russia and the member states. Russian leaders uniformly view NATO as an anti-Russian military alliance and have protested the "growing threat" from NATO's enlargement.<sup>169</sup> The Deputy Minister of Foreign Affairs of Russia publicly stated in 1997 that "[p]lans to expand NATO presented Russia with serious problems" and chastised NATO for "ignoring the concerns of Russia and of other nations."<sup>170</sup> Russia has especially criticized the admission of specific states to NATO, calling admission of the Baltic States completely unacceptable and threatening "a rupture with the West if it happens."<sup>171</sup> The Russians have found sympathetic voices in the United States, with one commentator arguing that "[b]y renegeing on our implicit promise to

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<sup>166</sup> Stromseth, *supra* note 128, at 501-02.

<sup>167</sup> Pipes, *supra* note 5, at 65.

<sup>168</sup> Letter from President Bill Clinton to the Chairmen of the Senate Committees on Foreign Relations and Armed Services and the House Committees on International Relations and National Security, *supra* note 154.

<sup>169</sup> Stephen Blank, *Russia, NATO Enlargement, and the Baltic States*, 160 *WORLD AFF.* 115, 120 (1998). Blank adds this chilling note on the Russian fears: "On January 22, 1997, the Russian government released a letter from generals and admirals urging the retargeting of European capitols with nuclear weapons should NATO expand." *Id.* at 124 n.61.

<sup>170</sup> Nikolai Afanasievskii, *On the NATO-Russia Founding Act*, 43 *INT'L AFF.* 158, 158-59 (Issue 4, 1997).

<sup>171</sup> Blank, *supra* note 169, at 115. To be fair, the West also discourages inviting the Baltic States to join NATO. See *supra* note 157 and accompanying text.

stay clear of Russia's frontiers, we have discredited the Russian reformers who are trying to build a democratic, market-oriented society, and have strengthened the nationalists who are embittered by the Soviets' loss of superpower status."<sup>172</sup>

Attempting to alleviate these fears, NATO and Russia took a dramatic step in 1997. On May 27, 1997, a formal ceremony took place in the Palais Elysee for the signing of the Founding Act on Mutual Relations, Cooperation, and Security between Russia and NATO.<sup>173</sup> Present at the ceremony were Russian President Yeltsin, the heads of state of NATO countries, and the Secretary General of NATO.<sup>174</sup> Echoing the pre-Founding Act rhetoric of both sides, the document includes a statement that Russia and NATO will no longer view each other as enemies.<sup>175</sup> More proactive language devotes "both sides to long-term and equal partnership and cooperation, the refusal to use force or the threat of force against one another, and respect for sovereignty, independence, territorial integrity, and the indelibility of borders."<sup>176</sup> Other clauses promise cooperation on nuclear safety issues, joint military operations, defense industry conversion, cooperative projects in defense-related economic, environmental and scientific fields, improved air traffic safety, and increased air traffic capacity.<sup>177</sup> Finally, the document states, "Provisions of this act do not provide NATO or Russia, in any way, with a right of veto over the actions of the other, nor do they infringe upon or restrict the rights of NATO or Russia to independent decision-making and action."<sup>178</sup>

Despite the lofty goals expressed in the Founding Act, it is actually a political agreement and not a legally binding treaty.<sup>179</sup> It does, however, provide for a Permanent Joint Council, made up of the NATO Secretary General, a NATO representative from one of the alliance's member states on a rotating basis, and a representative from Russia.<sup>180</sup> The Council

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<sup>172</sup> Burke, *supra* note 150.

<sup>173</sup> See Afanasievskii, *supra* note 170, at 158. The text of the Founding Act can be found at 36 I.L.M. 1006 (1997) (reproduced from U.N. Document A/52/161 S/1997/413, Appendix, May 30, 1997).

<sup>174</sup> See Afanasievskii, *supra* note 170, at 158.

<sup>175</sup> See *id.*

<sup>176</sup> *Id.*

<sup>177</sup> See Paul Mann, *Russia and NATO Agree to Cooperate*, AVIATION WK. & SPACE TECH., June 2, 1997, at 26.

<sup>178</sup> *Id.*

<sup>179</sup> See *id.* Russia pressed for a full treaty ratified by all participating nations, but the United States refused. See *id.*

<sup>180</sup> See *id.*

provides a means of consultation, coordination, and joint decision-making in matters of common concern.<sup>181</sup> In addition, Russia will have a Mission at NATO Headquarters headed by an ambassador.<sup>182</sup> All of these arrangements have attempted to give Russia a sense that it "will be recognized as an equal force in global and European politics."<sup>183</sup>

The Founding Act, though ambitious and carefully negotiated, apparently has not quieted the critics in Russia and NATO. On the Russian side, that nation's Deputy Minister of Foreign Affairs was critical of the Founding Act's history, complaining that "[j]ust as the Russian side from the very beginning formed its vision of the goals and content of the agreements and their binding nature, the NATO negotiators strayed far from concrete talk. . . . In response, we received a draft that was a blend of pompous statements . . . ."<sup>184</sup> Even worse, Russia's ambassador to London griped that the Founding Act was "simply a choice between bad and very bad outcomes."<sup>185</sup> Some critics in the United States tended to agree with these Russian sentiments and continued to argue against NATO expansion in light of the continuing Russian fears.<sup>186</sup> On the other hand, quite a few American observers have been less than complimentary of the Russians and of the Founding Act in recent months for quite different reasons. For instance, Anderson argues that complaints such as those of Deputy Minister Afanasievskii illustrate "Russian diplomacy is accomplishing the very isolation which Russian officials say NATO expansion threatens" and argues that the Russians have no strategic fears from new states joining the NATO alliance.<sup>187</sup> Professor Stephen Blank gives an even more blistering critique of Russian diplomacy efforts regarding the expansion of NATO and the Founding Act:

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<sup>181</sup> See Afanasievskii, *supra* note 170, at 161.

<sup>182</sup> See Mann, *supra* note 177.

<sup>183</sup> Afanasievskii, *supra* note 170, at 160.

<sup>184</sup> *Id.*

<sup>185</sup> Jensen, *supra* note 10.

<sup>186</sup> See, e.g., Pipes, *supra* note 5, at 65 ("Western leaders . . . should consider whether extending NATO to Eastern Europe to forestall a putative military threat to the region is worth alienating the majority of politically active Russians, who see the move as permanently excluding their country from Europe and giving it no alternative but to seek allies in the east."). Another commentator, after acknowledging the Russian fears over NATO expansion, notes "[t]hat's why they're cozying up to the Chinese - which is hardly in the U.S. interest." Jensen, *supra* note 10.

<sup>187</sup> Anderson, *supra* note 162, at 13-15. Indeed, Anderson argues that "[n]uclear weapons protect Russia against the contingency, utterly implausible anyway, of a military threat from NATO." *Id.* at 15.

Much of this failure stems from Russian elites' inability or refusal to accept European realities. They still insist that Russia is a super or great power that must have global equality with the United States and demand an exceptional place at the "presidium table" of European security. Russia seeks status in Europe, not responsibility, and refuses to participate except on its own terms. . . . Russia prefers to demilitarize Central Europe, preserve it as a buffer outside any viable European security system pending its revival, and neutralize NATO as an effective security provider. Russian officials insist that NATO must confine itself to regional peace operations under UN . . . auspices, giving Russia a veto over its activities. And the new Founding Act with NATO unfortunately goes a long way toward realizing those objectives and limiting the West's ability to influence developments in [Russia].<sup>188</sup>

Thus, NATO expansion has not been an easy sell diplomatically and has garnered criticism from many corners. In addition to the formidable diplomatic hurdles that must be crossed in pursuit of the goal of allowing new member states into the alliance, the U.S. must address the economic concern of who will subsidize the expanded role of NATO.

### 3. NATO Expansion Is Prohibitively Expensive

American officials' argument in support of NATO expansion is that the project will be inexpensive and therefore worth the modest outlay.<sup>189</sup> An Assistant Secretary of Defense has stated that the costs of NATO expansion "are in the neighborhood of 1% and less of the overall defense spending that is anticipated for this time period."<sup>190</sup> But as one pundit notes, "[w]hen Washington can make a compelling case for a policy, it does not tell the public that the policy comes cheap."<sup>191</sup> Furthermore, several independent studies tend to dispute the government's claims that NATO expansion will be inexpensive.<sup>192</sup> And regrettably, the American taxpayer will bear the burden of subsidizing the expansion of NATO's role regardless of the cost of this effort.<sup>193</sup> The countries

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<sup>188</sup> Blank, *supra* note 169, at 116-17. Even Richard Pipes, who is generally sympathetic toward Russian fears over NATO expansion, *see supra* note 186, acknowledges that "[n]o special favors should be granted [to Russia]. They only whet the appetites of nationalists who interpret undeserved concessions to mean that the world is so anxious to bring Russia into the international community that it is prepared to show boundless tolerance for its behavior." Pipes, *supra* note 5, at 65.

currently applying for NATO membership claim they cannot afford the cost of joining the alliance and Western European governments have adamantly refused to pay the bill.<sup>194</sup> As a former senior defense planner for the German government has put it, "So who will pick up the tab? I think it will have to be the United States."<sup>195</sup>

What is the tab for NATO expansion that the American taxpayer will have to pick up? Realistic estimates range as low as \$27 billion in a study formulated by the Pentagon to as high as \$125 billion in a Congressional Budget Office report.<sup>196</sup> Even these reports might be optimistic, however, as they were heavily influenced by political considerations and flawed assumptions.<sup>197</sup> One of the flawed assumptions is that NATO is an alliance without an enemy,<sup>198</sup> which prompts one article to ask with sarcasm, "If there is no credible threat, either short-term or long-term, to the security of the Central and Eastern European nations, why expand NATO?"<sup>199</sup> Another flawed assumption is that very little will have to be spent to bring former Soviet-bloc armies up to NATO standards.<sup>200</sup> Much of this assumption rests on the prospect that the mutual defense obligations of Article 5 in the NATO treaty will never have to be honored.<sup>201</sup> But such a "paper declaration" poses big problems, for it rests on the "irresponsible bluff" that neither NATO nor Russia will engage in hostile actions against each other.<sup>202</sup> This again begs the question: If NATO expansion rests on the assumption that Russia is not a threat, then why expand?

Realistically, NATO expansion should be viewed as a counter to any Russian threat. This view will require the deployment of capable forces

<sup>189</sup> See Anderson, *supra* note 162, at 8.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> See generally Perlmutter & Carpenter, *supra* note 162.

<sup>193</sup> See Burke, *supra* note 150; see also Perlmutter & Carpenter, *supra* note 162, at 3.

<sup>194</sup> See Burke, *supra* note 150.

<sup>195</sup> Perlmutter & Carpenter, *supra* note 162, at 6.

<sup>196</sup> See *id.* at 3-4. A separate NATO study places the estimate at a mere \$1.3 billion to \$2 billion, but critics have assailed this estimate as unreliable and even ludicrous. See *id.* at 2; Burke, *supra* note 150.

<sup>197</sup> See Perlmutter & Carpenter, *supra* note 162, at 2, 4.

<sup>198</sup> *Id.* at 3. The Pentagon report is so upbeat in its predictions that it proclaims that NATO "enlargement will yield benefits for the United States, NATO and Europe" and indeed "will benefit Russian security and the security of other former Soviet states." *Id.* at 3.

<sup>199</sup> *Id.* at 4.

<sup>200</sup> See *id.* at 5.

<sup>201</sup> See *id.* at 6.

<sup>202</sup> *Id.*

in the new and vulnerable front-line NATO states.<sup>203</sup> Such deployments would not be easy or inexpensive. Most of the nations desiring NATO membership are woefully remiss in achieving NATO requirements.<sup>204</sup> Poland, for example, faces a critical shortage of modern weaponry, and the weapons it presently owns do not meet NATO standards.<sup>205</sup> Given these realities, a recent analysis surmises that even the Congressional Budget Office estimate for NATO expansion would have to be doubled to \$250 billion to credibly provide the technology necessary for new member states to meet Western standards.<sup>206</sup> One article further concludes that NATO expansion "is not a strategy, but a worrisome case of self-delusion that may end up costing the United States more than dollars and cents."<sup>207</sup>

Critics forewarn American taxpayers about the potential difficulties involved in bankrolling NATO expansion:

As far as the United States is concerned, we get a bigger, more expensive, more unwieldy alliance that commits us to defend Eastern and Central Europe—from what we're not sure, since Russia is no longer deemed a threat—but also will require so much consultation and consensus-seeking it may be effectively paralyzed.<sup>208</sup>

Unfortunately, the expansion of U.S. obligations under NATO is not our only concern; the rest of the world has come calling as well.

### *B. The Expansion of U.S. Obligations to the United Nations*

In 1945, the drafters of the United Nations (U.N.) Charter sought to prevent the recurrence of a World War II-like disaster by limiting the unilateral use of force and by creating mechanisms for multilateral peacekeeping efforts.<sup>209</sup> Article 43 of the Charter specifically required that "[a]ll Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces assistance, and facilities,

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<sup>203</sup> See *id.*

<sup>204</sup> See *id.* at 4.

<sup>205</sup> See Hubert M. Krolkowski, *Poland Battles "Hollow Forces" Syndrome*, JANE'S INT'L DEFENSE REV., June 1997, at 12.

<sup>206</sup> See Perlmutter & Carpenter, *supra* note 162, at 4.

<sup>207</sup> *Id.* at 6.

<sup>208</sup> Jensen, *supra* note 10.

<sup>209</sup> See DYCUS ET AL., *supra* note 15, at 292.

including rights of passage, necessary for the purpose of maintaining international peace and security."<sup>210</sup>

Shortly after Congress ratified the U.N. Charter, it sought to further delineate the role of U.S. forces in U.N. operations by passing the United Nations Participation Act.<sup>211</sup> Over the ensuing years, Congress has enacted many more, sometimes confusing, statutes authorizing use of the armed forces for humanitarian assistance under U.N. auspices.<sup>212</sup> Despite these authorizations, in the fifty years after ratification of the U.N. Charter, the United States never seriously attempted to enter into an Article 43 agreement.<sup>213</sup> However, that precedent changed with the end of the Cold War.

In the 1990's, the U.N. has played an increasing role in maintaining international peace.<sup>214</sup> This increasing role has involved operations in nations such as Somalia, Haiti, Bosnia-Herzegovina, and Macedonia.<sup>215</sup> These operations have, in the words of one observer, resulted "in greater responsibility for the U.N. and less sovereignty for the participating nations, including the United States."<sup>216</sup> U.S. forces have seen their participation in these U.N. efforts increase dramatically over the past few years.<sup>217</sup> By the end of 1993, approximately 72,000 U.S. personnel were participating in eighteen separate U.N. peacekeeping missions around the world.<sup>218</sup> By the end of 1997, this role had expanded so much that the U.S. Navy had established through its International Programs Office a course "designed to provide [U.N.] students with fundamentals of

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<sup>210</sup> *Id.* at 294 (quoting Charter of the United Nations, June 26, 1945, 59 Stat. 1031). In a move that foretold congressional ambivalence about Article 43 many decades later, several Senators urged that a reservation be adopted that would allow Congress to approve or disapprove every use of U.S. military forces under any Article 43 agreement. But a majority in the Senate were convinced to reject this proposal, using arguments that Congress would be able to approve any Article 43 agreement beforehand, that these agreements would only be used in "police actions" short of war, and the United States would be able to veto any objectionable Article 43 agreements as a permanent member of the U.N. Security Council. *Id.* at 298.

<sup>211</sup> See 22 U.S.C. § 287 (1994); see also DYCUS ET AL., *supra* note 15, at 294.

<sup>212</sup> See DYCUS ET AL., *supra* note 15, at 376.

<sup>213</sup> See *id.* at 295.

<sup>214</sup> See Robert S. Winner, *Spc. Michael New v. William Perry, Secretary of Defense: The Constitutionality of U.S. Forces Serving Under U.N. Command*, 3 DEPAUL DIG. INT'L L. 30 (1997). Terms such as "peacekeeping" and "peacemaking" are a bit misleading, for troops participating in such efforts may encounter armed resistance or outright hostilities. See DYCUS ET AL., *supra* note 15, at 376.

<sup>215</sup> See Winner, *supra* note 214, at 30; DYCUS ET AL., *supra* note 15, at 375-76.

<sup>216</sup> Winner, *supra* note 214.

<sup>217</sup> See DYCUS ET AL., *supra* note 15, at 375.

<sup>218</sup> See *id.*

international and humanitarian law that impact on military operations and, specifically, peace operations."<sup>219</sup> Widespread media coverage of catastrophes around the world has pressured the United States to participate in these types of foreign affairs. For example, many observers credit the media's coverage of starving children with the deployment of U.S. troops to Somalia; they also attribute the withdrawal of troops to the coverage of American troops being killed and desecrated.<sup>220</sup> Whatever the causes, these deployments soon caused friction when it became obvious that the United States would not always control and command the operations in which its troops participated.<sup>221</sup>

The debacle in Somalia provides a clear illustration of the friction caused by increased American participation in U.N. operations. In 1991, Somalia fell into a seemingly endless cycle of civil war and famine caused largely by fighting between rival clans.<sup>222</sup> U.S. forces soon began helping with U.N. relief efforts; in August 1992, U.S. warplanes helped airlift humanitarian supplies into the country.<sup>223</sup> The clans continued fighting, however, and the U.N. shortly called for the deployment of U.N. personnel to provide security and humanitarian relief.<sup>224</sup> President Bush responded in December 1992 by ordering the United States' forces to provide a secure environment for the relief efforts, and within a month over 28,000 military personnel were deployed to the area.<sup>225</sup> Until May, 1993, these forces remained under the command and control of the United States.<sup>226</sup> In that month, with the Clinton Administration now in the White House, the United States relinquished command of its remaining troops to the U.N. Operation in Somalia (UNOSOM II).<sup>227</sup> This act proved to be a watershed event. No United States troops had been placed under foreign command since World War II, and never had they been placed under U.N. command using Article 43.<sup>228</sup> Apparently

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<sup>219</sup>International Students Study Peacekeeping Law (visited Nov. 5, 1997) <<http://www.navy.mil>> (an Internet story in the Navy News Service, story NNS4704). "The course is designed to increase the students' understanding of the peacekeeping process, from the United Nations to the checkpoint, and the significance of the legal aspects of international coalition peace operations." *Id.* Appendix I provides a detailed list of some of the many U.N. obligations that the United States has participated in over the past few years.

<sup>220</sup> See Dunlap, *supra* note 6, at 383.

<sup>221</sup> See Winner, *supra* note 214, at 30.

<sup>222</sup> See *DYCUS ET AL.*, *supra* note 15, at 377.

<sup>223</sup> See *id.* at 377-78.

<sup>224</sup> See *id.* at 378.

<sup>225</sup> See *id.*

<sup>226</sup> See *id.* at 385.

<sup>227</sup> See *id.* at 385, 389.

<sup>228</sup> See *id.* at 390.



nervous with this new precedent, Congress soon placed a twelve-month limit on the authorization of troops in Somalia.<sup>229</sup>

In June, 1993, disaster struck the now U.N.-led American troops in Somalia. On June 5, Somali clan forces ambushed a U.N. convoy killing twenty-four Pakistani troops and injuring three American soldiers. In response, U.S. forces were ordered to conduct a raid on the Headquarters of Mohammed Farah Hassan Aidid, the leader of the clan responsible for the ambush.<sup>230</sup> Pinned down in the ensuing fight, outgunned by the clan troops, and unable to obtain assistance from other U.N. troops, seventeen American soldiers were killed and eighty-four were wounded.<sup>231</sup> The raid caused an uproar in the United States, with many speculating that the Clinton Administration had left the United States troops under-equipped for their mission.<sup>232</sup> In the wake of the disaster, President Clinton reported to Congress that he would withdraw all U.S. troops from Somalia by March 31, 1994,<sup>233</sup> and Secretary of Defense Les Aspin resigned his post. Apparently not satisfied with these measures, Congress soon passed legislation mandating a withdrawal by the same March 31 cutoff and requiring all American forces remaining in Somalia to be placed under U.S. command and control.<sup>234</sup> On February 26, 1994, all American troops were withdrawn from Somalia.<sup>235</sup> America's brief foray into the reach of Article 43 had apparently come to an end.

The Clinton Administration did not give up on Article 43-type commitments, however. After the Somalia disaster, the President issued Presidential Decision Directive, Number 25 (PDD-25), in which he stated the following: "On a case by case basis, the President will consider placing appropriate U.S. forces under the operational control of a competent U.N. commander for specific U.N. operations authorized by the Security Council."<sup>236</sup> Specifically using the end of the Cold War as the justification for greater use of multilateral action, PDD-25 drastically reforms the military relationship between the United States and the U.N.

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<sup>229</sup> See *id.* at 385 (citing S.J. Res. 45 of May 25, 1993).

<sup>230</sup> See DYCUS ET AL., *supra* note 15, at 386.

<sup>231</sup> See *id.*

<sup>232</sup> See *id.*

<sup>233</sup> See *id.*

<sup>234</sup> See *id.*

<sup>235</sup> See *id.* at 387.

<sup>236</sup> Winner, *supra* note 214, at 36. Winner notes that PDD-25 was not publicly released because of its confidential nature, but analyses of it have been published. See *id.* at 31 n.4; see also DYCUS ET AL., *supra* note 15, at 389 (citing The Clinton Administration's Policy on Reforming Multilateral Peace Operations 9 (May 1994) (summarizing key elements of PDD-25)).

concerning American troops.<sup>237</sup> Using PDD-25 as a basis, Clinton subsequently deployed United States troops to Macedonia in support of U.N. operations.<sup>238</sup> In the process, he unwittingly gave opponents of his new policy a poster child in the personage of Army Specialist Michael New.<sup>239</sup>

On August 21, 1995, the military informed Specialist New that his division would be going to Macedonia in October as part of U.N. peacekeeping forces.<sup>240</sup> He would serve under non-American U.N. commanders and wear U.N. insignia.<sup>241</sup> Believing the deployment orders to be unconstitutional (among other claims), New refused to follow them and was subsequently court-martialed for violating Article 92 of the Uniform Code of Military Justice by disobeying a direct order.<sup>242</sup> He received a bad conduct discharge in the wake of his conviction.<sup>243</sup> Displeased with this outcome, New sought relief in federal civilian courts, with his lawyer claiming his orders were akin to a "badge of slavery; Michael New has been ordered to join a foreign military."<sup>244</sup> Unfortunately for New, a U.S. district court rejected his petition for writ of habeas corpus, and a court of appeals affirmed this decision saying that he must exhaust his appeals in the military justice system before seeking redress in civilian court.<sup>245</sup> New ended up a hero among conservative politicians, however.<sup>246</sup> Representative Helen Chenoweth (R-Idaho) even hosted a rally for New and introduced a non-binding resolution in Congress that ". . . condemns the deployment of United States military personnel in the service of the United Nations in the former Yugoslav Republic of Macedonia as a violation of both the Constitution and the laws of the United States."<sup>247</sup> Political supporters of both parties eventually defended New, and one legal scholar wrote that "New's argument regarding the deployment to Macedonia is

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<sup>237</sup> See Winner, *supra* note 214, at 31-32, 36-37.

<sup>238</sup> See *id.* at 31.

<sup>239</sup> See generally Rowan Scarborough, *New Wants a Civilian Court to Settle His U.N. Insignia Case*, WASH. TIMES, Sept. 27, 1997, at A3.

<sup>240</sup> See Winner, *supra* note 214, at 30.

<sup>241</sup> See *id.*

<sup>242</sup> See *id.* at 30-31.

<sup>243</sup> See *id.*

<sup>244</sup> Scarborough, *supra* note 239.

<sup>245</sup> See *New v. Cohen*, 129 F.3d 639 (D.C. Cir. 1997); see also Scarborough, *supra* note 239. New's case was still on appeal in the military court system as this article was written. 129 F.3d at 641.

<sup>246</sup> See Scarborough, *supra* note 239.

<sup>247</sup> *Id.*

legitimate and should be fully reviewed.”<sup>248</sup> The scholar also asked, “[h]ow can the President remain as Commander-in-Chief if (s)he no longer commands the U.S. troops?”<sup>249</sup> Another recent observer suggested that:

. . . the plight of Spc. New, sad though it may be, is less of a problem than the more profound issue which has bedeviled the United States for half a century. Is it fair, is it honorable or is it legal to send an American into battle under colors not his own? And over his objection? Does anyone have the authority to abrogate a soldier’s solemn oath and commit him to combat under another sovereign? This is a basic matter, involving the lives and welfare of American soldiers. It needs to be addressed and solved, once and for all.<sup>250</sup>

All of these political conflicts over the growing U.N. role of American troops point to the serious problems that such commitments foster. U.S. forces find themselves doing more around the globe at the same time their domestic role is growing. Yet ironically, their size and resources are shrinking drastically.<sup>251</sup> Many servicemembers now feel like a “meals on wheels” program for the U.N. and jokingly claim to be a branch of the Peace Corps instead of the Department of Defense. The use of U.S. troops in U.N. operations has grown drastically since the end of the Cold War, and the placement of American forces under U.N. command is unprecedented. American troops are being asked to fundamentally change their international roles, as the sad case of Michael New illustrates. These modifications by themselves would be enough to strain the military. Unfortunately, other changes are being thrust on the armed forces, exacerbating these modifications.

#### IV. KEEPING UP WITH AMERICAN SOCIAL CHANGES

*This Court has long recognized that the military is, by necessity, a specialized society separate from civilian society. . . . The differences between the military and civilian communities result from the fact*

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<sup>248</sup> Winner, *supra* note 214, at 44.

<sup>249</sup> *Id.* at 36.

<sup>250</sup> V. H. Krulak, *U.S. Forces in U.N. Uniforms?*, SAN DIEGO UNION-TRIB., Apr. 21, 1998, at B6.

<sup>251</sup> For example, in the past ten years, the Navy has seen its fleet reduced from almost 600 ships to less than 350. See Webb, *supra* note 7. The Air Force has plummeted in the same time from 607,000 members to 371,000, a cut of about 40%. See Susan M. Schafer, *Air Force Seeks to Revamp U.S. Bases, Support Units*, MARIETTA DAILY J., May 3, 1998, at 3A.

that "it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise." . . . "[T]he rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty." . . . While members of the military community enjoy many of the same rights and bear many of the same burdens as do members of the civilian community, within the military community there is simply not the same autonomy as there is in the larger civilian community. . . . [T]he different character of the military community and of the military mission requires a different application of those protections. The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it. . . . In the armed forces some restrictions exist for reasons that have no counterpart in the civilian community.<sup>252</sup>

During the Cold War, both the executive and judicial branches of government were content to recognize the principles articulated in *Parker v. Levy* and largely left the military and Congress to decide who could join the armed forces. With the end of the Cold War and with social attitudes apparently changing in the 90's, however, this long tradition of deference suddenly came to a halt. In 1993 with a more sympathetic President now in power, feminists and homosexual activists had an ally in their quest to open up the military demographically. Regrettably, as the previous sections have revealed, "President Clinton's support for placing women in combat roles and his desire to end the homosexual exclusion policy could not have been more ill-timed as these views assault the ethos of an organization already obsessively anxious about its future in the post-Cold War world."<sup>253</sup> The following sections examine how these fundamental changes in the personnel policies of the armed forces originated.

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<sup>252</sup> *Parker v. Levy*, 417 U.S. 733, 743-44, 751, 758-59 (1974)

<sup>253</sup> Dunlap, *supra* note 6, at 372-73. Demographic issues involving the military have become extremely volatile, and anyone who expresses opinions on these issues unfortunately runs the risk of being needlessly yet strongly attacked. Thus, at the outset, a cautionary note should be made regarding Part IV of this paper. It is not the author's intent to demean the valuable military contributions made by women or homosexuals in any way. Nor is it the author's intention to imply that demographic decisions should be made by anyone other than the civilian leaders of the military, as Part II of this paper should illustrate by way of analogy. The purpose of Part IV is simply to demonstrate that these decisions are sometimes made for purely emotional or political reasons rather than for practical purposes giving due regard to military necessity and the principles outlined in *Parker v. Levy*.

A. *Women in Combat*

The military has long been a male-oriented institution.<sup>254</sup> Despite this description, as long ago as the Revolutionary War, and in all subsequent military campaigns, women have served honorably in the armed forces.<sup>255</sup> This fact notwithstanding, prior to 1948 no women could officially enlist in the military.<sup>256</sup> But, the end of the Cold War ushered in a dramatic change in the role of women in the military. In the 1990's, with the military relying solely on volunteers and with society insisting on greater opportunities for women, the armed services now have a combined force that is more than 13% female.<sup>257</sup> Thus, the United States today has more women in its armed forces than any other nation in the world.<sup>258</sup>

Although the services vary widely in the scope of jobs open to women, until very recently all excluded women from combat positions. Prior to 1993, the Department of Defense defined combat positions based on a "risk rule," which stated that ". . . risks of direct combat, exposure to hostile fire, or capture are proper criteria for closing positions or units to women." Under this rule, women could not serve in positions that presented risks ". . . equal to, or greater than, risks for direct combat units or positions with which they are normally in close proximity."<sup>259</sup> In the early 90's, the military reexamined this policy. With the risks of the Cold War gone and with women having served with distinction in Desert Storm, President Bush appointed a commission to investigate the possibility of opening combat slots to women.<sup>260</sup> The commission ultimately recommended only moderate increases in the number of combat positions in which women should be allowed to serve.<sup>261</sup>

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<sup>254</sup> See Lucinda J. Peach, *Women at War: The Ethics of Women in Combat*, 15 HAMLINE J. PUB. L. & POL'Y 199, 201 (1994).

<sup>255</sup> See *id.*

<sup>256</sup> See *id.* In that year, Congress passed the Women's Armed Services Integration Act, which allowed the enlistment of women in the armed forces. See *id.* Prior to this, women were only allowed in separate "auxiliary" forces. See *id.*

<sup>257</sup> See Congressman Lee Hamilton, *Women in the Military* (visited April 26, 1998) <<http://www.house.gov/hamilton/women.html>. This is an increase from less than 2% in the early 1970's. See *id.*

<sup>258</sup> See Peach, *supra* note 254, at 199.

<sup>259</sup> *Id.* at 204.

<sup>260</sup> See *id.* at 206.

<sup>261</sup> See *id.* Specifically, the commission recommended that Navy combat ships be opened to women. See *id.* Just prior to the commission's report, Congress lifted a longstanding ban on women flying combat aircraft. See *id.*

Despite the Presidential commission's recommendation, national events pushed the issue of women in combat to the forefront. In September 1991, the Navy found itself embroiled in a nasty scandal called Tailhook which involved allegations of sexual abuse of women by Navy and Marine Corps pilots at a convention in Las Vegas.<sup>262</sup> Apparently unable to defend itself through traditional public relations efforts, the Navy began looking for ways to improve its image by opening more positions to women.<sup>263</sup> Shortly thereafter, a newly elected President Clinton expressed a goal of placing more women in combat positions.<sup>264</sup> The die had been cast for rolling back the "risk rule." Pushed by feminist activists such as Representative Patricia Schroeder (D-Colo.), the Clinton Administration took advantage of the atmosphere created by Tailhook.<sup>265</sup> On April 28, 1993, Secretary of Defense Les Aspin announced that:

[A]s we downsize the military to meet the conditions of the post-Cold War world, we must ensure that we have the most ready and effective force possible. In order to maintain readiness and effectiveness, we need to draw from the largest available talent pool and select the most qualified individual for each military job.<sup>266</sup>

Accordingly, he directed the armed services to do the following: 1) permit women to compete for assignments in aircraft, including combat aircraft; 2) open as many additional Navy ships to women as possible; and 3) study opportunities for opening additional Army and Marine Corps ground forces to women.<sup>267</sup> On January 13, 1994, Secretary Aspin went even further by rescinding the "risk rule."<sup>268</sup> In its place, he established the following rule:

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<sup>262</sup> See Dunlap, *supra* note 6, at 354 & n.91.

<sup>263</sup> For an excellent overview of the Tailhook scandal, see *FRONTLINE* show #1502, *supra* note 6.

<sup>264</sup> See Dunlap, *supra* note 6, at 372-73.

<sup>265</sup> See Christopher Corbett, *Who Killed Kara Hultgreen?* (visited Apr. 26, 1998) <<http://www.usaradio.com/pov/articles/art4795.fcr.html>>.

<sup>266</sup> Memorandum from Secretary of Defense Les Aspin to the Secretaries of the Army, Navy, and Air Force, the Chairman of the Joint Chiefs of Staff, the Assistant Secretaries of Defense for Personnel and Readiness and for Reserve Affairs (Apr. 28, 1993) (available at <<http://www.chinfo.navy.mil/navpalib/people/women/memo1993.txt>>).

<sup>267</sup> See *id.*

<sup>268</sup> See Memorandum from Secretary of Defense Les Aspin to the Secretaries of the Army, Navy, and Air Force, the Chairman of the Joint Chiefs of Staff, the Assistant Secretaries of Defense for Personnel and Readiness and for Reserve Affairs (Jan. 13, 1994) (available at <<http://www.chinfo.navy.mil/navpalib/people/women/memo0113.txt>>).

Service members are eligible to be assigned to all positions for which they are qualified, except that women shall be excluded from assignment to units below the brigade level whose primary mission is to engage in direct combat on the ground.<sup>269</sup>

In the wake of these new guidelines, the Department of Defense opened more than 80,000 combat-related jobs to women.<sup>270</sup> As a result, more than 92% of the career fields and approximately 80% of the total jobs in the armed services were open to women.<sup>271</sup> At the same time, the armed forces, with the notable exception of the Marine Corps, stepped up the integration of men and women in basic training courses.<sup>272</sup>

Shortly after these dramatic changes unfolded, critics expressed some concern. This time, unlike past examples, the poster child for their concerns would prove to be a posthumous one. Shortly after the Navy began to integrate women into combat aviation units, Lieutenant Kara Hultgreen was assigned to an F-14 squadron aboard the aircraft carrier USS ABRAHAM LINCOLN (CVN 72) as one of the first women combat pilots.<sup>273</sup> In October 1994, Lieutenant Hultgreen was killed while trying to land on the carrier off the coast of California. Opponents of women in combat suspected that she had been rushed into her new role and promoted above her level of skill simply because she was a woman. Navy investigators at first discounted this possibility, blaming the crash on engine failure. However, a secret copy of the actual Mishap Investigation Report, in which the crash was blamed on pilot error, was eventually leaked to the public. Some of Lieutenant Hultgreen's fellow pilots risked their careers by publicly questioning the Navy's decision to rush her and other women into combat units. Suddenly, the Navy had another scandal that focused on the treatment of women. The civilian critics of women in the military quickly blamed Lieutenant Hultgreen's death on political correctness and on a race to correct past ills.

In recent months, the role of women in the military has once again come to the forefront with the case of Air Force Lieutenant Kelly Flinn,

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<sup>269</sup> *Id.*

<sup>270</sup> See Hamilton, *supra* note 257.

<sup>271</sup> See *id.*

<sup>272</sup> See Adam G. Mersereau, *The Military Should Fight Wars, Not Sexism*, WALL ST. J., Mar. 17, 1998, at A18.

<sup>273</sup> The following discussion of the Kara Hultgreen tragedy is drawn from *60 Minutes* (CBS television broadcast, April 19, 1998) and Corbett, *supra* note 265. Additional details are drawn from the memory of the author of this paper, who served aboard USS ABRAHAM LINCOLN (CVN 72) in 1992-1994.

who was dismissed from the service for adultery, fraternization, lying, and disobeying orders, and with charges of sexual harassment in the Army.<sup>274</sup> These many incidents have raised concerns that the rapidly expanding role of women in the military may have been ill-advised or at least too hasty. Voicing those concerns, Congressman Lee Hamilton (D-Ind.) stated that “[t]he military . . . continues to face difficult questions on the role of women in the armed forces” and urges that further changes “should occur incrementally and with extensive consultation with military leaders.”<sup>275</sup> Others have made less moderate remarks. For example, one observer argued rather bluntly that “the expansion of women’s military roles into physically demanding combat and combat-support units has been a mistake. . . . [R]e-evaluation is urgently needed.”<sup>276</sup>

Several independent studies support the criticisms of women’s rapid integration into the armed forces. In 1994, Lucinda Peach compiled an in-depth report focusing on women in combat.<sup>277</sup> In her findings, she indicated that many proponents of women in combat fail to grasp some basic problems, among them the following:

- There are some combat positions which most women are unable to perform because they lack the requisite physical strength. “[M]ost women do not have the same degree of upper body and cardiovascular strength as men.”<sup>278</sup>
- Pregnancy presents a genuine problem to fully integrating women into combat roles and is a legitimate reason to exclude women from actually engaging in some forms of combat.<sup>279</sup>
- “Attrition and reenlistment data for women indicate that motherhood is a primary reason why women leave the military.” Women also comprise a “larger percentage of single parents in the military.” Thus, “family obligations may . . . present practical problems for women’s ability to carry out combat assignments.”<sup>280</sup>

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<sup>274</sup> See Hamilton, *supra* note 257.

<sup>275</sup> *Id.*

<sup>276</sup> Mersereau, *supra* note 272.

<sup>277</sup> See Peach, *supra* note 254.

<sup>278</sup> *Id.* at 217.

<sup>279</sup> See *id.* at 219.

<sup>280</sup> *Id.* at 220-21.



- The "likely impact of a reversal of the combat exclusion would be to make women available to be drafted." Thus, the goals of women's "liberation" might ironically be infringed upon; wholesale removal of the exclusion "risks imposing further restrictions on women's autonomy than currently exist under the combat exclusion."<sup>281</sup>

Ultimately, Peach chides her fellow feminists for "gloss[ing] over these difficulties"<sup>282</sup> and argues merely that "all assignments for which women are qualified and capable should be made available to them."<sup>283</sup> In addition to the practical concerns, she notes that "little consideration has been given specifically to the moral and ethical dimensions of the issue" by proponents of greater roles for women in the military.<sup>284</sup>

Critics' concerns have also found support in another highly influential study. On behalf of Congress and the Department of Defense in 1997, a civilian panel led by former Senator Nancy Kassebaum-Baker studied sex-integrated training and related gender issues in the military.<sup>285</sup> The panel recommended that basic training for all of the armed services be resegregated.<sup>286</sup> At least one observer has even urged that the panel's recommendations "do not go far enough in reversing the expansion of women's military roles."<sup>287</sup> Some military leaders have expressed similar recommendations, echoing the words of retired U.S. Army Brigadier General Andrew Gatsis:

No woman, even as a volunteer, should have the right to go into combat simply because she desires to do so. . . . It is a matter of jeopardizing the lives of soldiers, who depend on all members of a team to do their full share,

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<sup>281</sup> *Id.* at 238.

<sup>282</sup> *Id.* at 231. For a more poignant description of the dangers posed by the physical limitations of women in combat, see Adam. G. Mersereau, 'Diversity' May Prove Deadly on the Battlefield, WALL ST. J., Nov. 14, 1996, at A22.

<sup>283</sup> Peach, *supra* note 254, at 240 (emphasis added). Peach finds a kindred voice in Congressman Hamilton, who states, "I believe women deserve the opportunity to serve in certain combat positions if they meet service requirements and qualifications for those assignments and if doing so is in the best interest of national security." Hamilton, *supra* note 257 (emphasis added).

<sup>284</sup> Peach, *supra* note 254, at 200.

<sup>285</sup> See Mersereau, *supra* note 272.

<sup>286</sup> See *id.*

<sup>287</sup> *Id.*

and of the right of every American citizen to have the strongest national defense possible.<sup>288</sup>

### B. *The Continuing Controversy Over Homosexuals in the Military*

The role of women is not the only demographic issue facing the military in the post-Cold War era. For many years, military regulations have stated that homosexuality is "incompatible with military service."<sup>289</sup> Prior to the demise of the Cold War, federal courts rejected arguments that either equal protection or First Amendment rights protected homosexuals from dismissal from the armed forces.<sup>290</sup> The general deference to military regulations was backed by the Supreme Court in such cases as *Parker v. Levy*. Even the more liberal members of the Court were mindful that "[a] number of serviceman's individual rights must necessarily be subordinated to the overriding military mission, and . . . the military may constitutionally prohibit conduct that is quite permissible in civilian life . . . ."<sup>291</sup> Thus, courts have almost uniformly deferred to the military's claim that the presence of homosexuals in the ranks would be detrimental to the forces.<sup>292</sup>

Homosexuality in the military became a hotly debated issue when President Clinton took office in 1993.<sup>293</sup> Keeping his campaign promises, Clinton quickly announced his intentions to lift the ban on homosexuals serving in the armed forces.<sup>294</sup> His announcement created a firestorm of controversy,<sup>295</sup> and he was forced to delay any action "for six months while the Secretary of Defense worked with the Joint Chiefs to come up with a proposal for changing [the existing] policy."<sup>296</sup> After six months

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<sup>288</sup> Corbett, *supra* note 265.

<sup>289</sup> SHANOR & HOGUE, *supra* note 37, at 47. For an informative look at the historical exclusion of homosexuals from U.S. military service, see David M. Bessho, Note, *The Military Ban on Homosexuals: Suspect, Constitutional, or Both?* 12 GA. ST. U. L. REV. 845 (1996).

<sup>290</sup> See SHANOR & HOGUE, *supra* note 37, at 47.

<sup>291</sup> *Parker v. Levy*, 417 U.S. 733, 787 (1974) (Stewart, J., dissenting; Justice Stewart was joined by Justices Douglas and Brennan in his dissent).

<sup>292</sup> See SHANOR & HOGUE, *supra* note 37, at 47.

<sup>293</sup> See *id.*

<sup>294</sup> See *id.* Some activists likened the existing policy on homosexuals to the military's past discrimination against blacks. Many African-American military leaders bristled at this comparison, however. See Lynne Duke, *Drawing Parallels--Gays and Blacks; Linking Military Ban to Integration Fight Stirs Outrage, Sympathy*, WASH. POST, Feb. 13., 1993, at A1. For example, General Colin Powell, in disputing the analogy between homosexuality and race when discussing military discrimination, said, "Homosexuality is not a benign . . . characteristic such as skin color . . . . It goes to one of the most fundamental aspects of human behavior." *Id.*

<sup>295</sup> See SHANOR & HOGUE, *supra* note 37, at 47-48.

<sup>296</sup> President Bill Clinton, *Remarks by the President at National Defense University*, (July 19,

of often rancorous debate on the issue, the President announced the guidelines for his new policy in a speech at National Defense University.<sup>297</sup> While acknowledging that “the American people are deeply divided on this issue,” that “our military is a conservative institution,” and that “most military people [are] opposed to lifting the ban because of the feared impact on unit cohesion . . . and the fear of invasion of privacy,” the President outlined what he called “an honorable compromise.”<sup>298</sup> In contrast to the Supreme Court’s reasoning in *Parker*, President Clinton viewed the homosexuality issue in terms of individual rights.<sup>299</sup> His announcement delineated four principles governing homosexuals in the military:

One, servicemen and women will be judged based on their conduct, not their sexual orientation.

Two, therefore, the practice, now six months old, of not asking about sexual orientation in the enlistment procedure will continue.

Three, an open statement by a service member that he or she is a homosexual will create a rebuttable presumption that he or she intends to engage [in] prohibited conduct, but the service member will be given an opportunity to refute that presumption; in other words, to demonstrate that he or she intends to live by the rules of conduct that apply in the military service.

And four, all provisions of the Uniform [Code of] Military Justice will be enforced in an even-handed manner as regards both heterosexuals and homosexuals. And, . . . there will be a decent regard to the legitimate

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1993) <<http://www.chinfo.navy.mil/navpalib/people/homosexu/clint0719.txt>>. The President did, however, direct that military recruiters should immediately stop asking the sexual orientation of applicants. *See id.*

<sup>297</sup> *See id.* The extended debate on the issue of homosexuals in the military involved Congress as well. For example, Senator Sam Nunn (D-Ga.), chairman of the Armed Services Committee, who harbored reservations about Clinton’s plan to lift the ban on homosexuals, said in a floor speech, “We are not talking about civilian life. We are talking about military life, and there are fundamental differences that our military people know well but too many times those of us in civilian life do not keep in mind.” John Lancaster, *Why the Military Supports the Ban on Gays; Arguments Ranging From Privacy to AIDS Offered Against Clinton’s Rights Pledge*, WASH. POST, Jan. 28, 1993, at A8. Ultimately, President Clinton and Congress worked out a compromise, which was both codified by Congress at 10 U.S.C. § 654 (1994) and announced by the Clinton Administration in various memoranda and directives to be discussed later.

<sup>298</sup> Clinton, *supra* note 296.

<sup>299</sup> *Id.*

privacy and associational rights of all service members.<sup>300</sup>

Secretary of Defense Aspin quickly followed President Clinton's speech with a memorandum directing the armed forces to implement the new policy and adding additional guidance for the services.<sup>301</sup> He also trotted out the members of the Joint Chiefs of Staff to publicly support the new policy.<sup>302</sup> Five months later on December 22, 1993, he codified the new policy in Department of Defense regulations that spelled out the new guidelines in excruciating detail. The regulations covered five areas of the armed forces: accessions, separations, criminal investigation, personnel security, and military training.<sup>303</sup>

President Clinton's new policy quickly became known as "Don't Ask, Don't Tell."<sup>304</sup> Despite all of the attempts to clarify the new policy, however, it almost immediately became a source of trouble for the military as a whole and individual homosexual servicemembers. Several members discharged under the new policy filed suit in federal court using such claims as First Amendment rights and Equal Protection.<sup>305</sup>

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<sup>300</sup> *Id.*

<sup>301</sup> See Les Aspin, *Memorandum for the Secretary of the Army, Secretary of the Navy, Secretary of the Air Force, Chairman, Joint Chiefs of Staff* (July 19, 1993) <<http://www.chinfo.navy.mil/navpalib/people/homosexu/aspi0719.txt>>. For example, Secretary Aspin's memorandum contained some very clear guidance such as, "Servicemembers will be separated for homosexual conduct." *Id.* However, it also contained rather confusing standards for conducting investigations of alleged homosexual conduct:

Commanders and investigating agencies will not initiate inquiries or investigations solely to determine a member's sexual orientation. Servicemembers will not be asked or required to reveal their sexual orientation. However, commanders will continue to initiate inquiries or investigations, as appropriate, when there is credible information that a basis for discharge or disciplinary action exists.

*Id.* Figuring out the nuances of this language would prove to be troublesome over the next few years, as this article will shortly discuss.

<sup>302</sup> See Les Aspin, *Remarks at Fort McNair* (July 19, 1993) <http://www.chinfo.navy.mil/navpalib/people/homosexu/powe0719.txt> (includes public comments by members of the Joint Chiefs of Staff).

<sup>303</sup> See Press Release, *Secretary Aspin Releases New Regulations on Homosexual Conduct in the Armed Forces* (Dec. 22, 1993) <<http://www.chinfo.navy.mil/navpalib.people/homosexu/hmsxregs.txt>>.

<sup>304</sup> SHANOR & HOGUE, *supra* note 37, at 48.

<sup>305</sup> See *id.* at 48, 309. Examples of such cases include *Meinhold v. United States Dept. of Defense*, 34 F.3d 1469 (9th Cir. 1994); *Steffan v. Perry*, 41 F.3d 677 (D.C. Cir. 1994); *Able v. United States*, 880 F. Supp. 968 (E.D.N.Y. 1995); *Watson v. Perry*, 918 F. Supp. 1403 (W.D.

The diversity of opinions governing these suits in the lower courts prompted many observers to note that the legality of the "Don't Ask, Don't Tell" policy is ripe for Supreme Court review, and judicial chaos over the new policy will likely reign until the Court renders a decision on this controversy.<sup>306</sup> More ominous signs that the policy is confusing have arisen in the past few years, however. In 1994, the military discharged 617 servicemembers for homosexual conduct. By 1997, this number had risen to 997.<sup>307</sup> Finding these statistics alarming, the Department of Defense formed a review panel to investigate this matter.<sup>308</sup> On April 24, 1998, the Department announced the panel's recommendations, all of which became a part of the military's official policy on homosexuality:

- Commanders should check with higher headquarters legal officials before investigating whether a service member is homosexual.
- The department should issue more guidance on pretrial agreements. The agreements are sometimes used to obtain information on consensual sexual conduct as part of criminal investigations.
- In so-called "coming out" cases, the commander's decision to conduct an investigation should not be made without careful review.
- DOD should provide more training for commanders, attorneys and particularly for investigators who review the facts of alleged policy violations.

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Wash. 1996); *Philips v. Perry*, 883 F. Supp. 539 (W.D. Wash. 1995); *Richenberg v. Perry*, 909 F. Supp. 1303 (D. Neb. 1995); *Thomasson v. Perry*, 895 F. Supp. 820 (E.D. Va. 1995); *Cammermeyer v. Aspin*, 850 F. Supp. 910 (W.D. Wash. 1994); and *Dahl v. Secretary of the United States Navy*, 830 F. Supp. 1319 (E.D. Cal. 1993).

<sup>306</sup> See SHANOR & HOGUE, *supra* note 37, at 310 ("Until the Supreme Court resolves the divisions among the lower courts, litigation will continue."); Dunlap, *supra* note 6, at 369-70 ("Another issue, not yet before the Court but almost certain to reach it, is the constitutionality of the 'don't ask don't tell' policy relating to gays in the military. . . . It remains to be seen, however, if the judiciary will depart from the traditional view when faced with the highly controversial issue . . ."). The suits appear to stand little chance of ultimate success given the Supreme Court's historical deference to military policies, even under a strict scrutiny analysis. See Bessho, *supra* note 291.

<sup>307</sup> See Staff Sergeant Alicia K. Borlik, *Cohen Accepts Revisions to Homosexual Policy*, AMERICAN FORCES PRESS SERVICE, Apr. 24, 1998.

<sup>308</sup> See *id.*

-- DOD should issue guidance that makes it clear that harassment of service members based on their alleged sexual orientation is unacceptable.<sup>309</sup>

The panel's recommendations and the statistics that prompted them indicate that serious problems fester inside of the "Don't Ask, Don't Tell" guidelines.

As troubling as these developments are for homosexual service members, developments in other areas have hurt the armed forces as a whole in the national quest to formulate a new policy on homosexuality. This harm results from the actions of gay rights advocates who have forgone working through the political process and have begun to directly attack the military in a manner reminiscent of the unfortunate politicalization of the armed forces that accompanied the Vietnam War.<sup>310</sup> For example, during the search for a replacement for General Colin Powell as Chairman of the Joint Chiefs of Staff, gay rights organizations capsized the candidacy of Marine Corps General Joseph Hoar.<sup>311</sup> Ignoring the fact that the military's homosexual policy is a matter ultimately decided not by military commanders but by civilian leaders, the organizations assailed General Hoar for enforcing the ban on gays during a tour as commander of the Marine Corps Recruit Depot.<sup>312</sup> Needless to say, he was not selected as Chairman.

Homosexual advocates have also created challenges to the already difficult job of military recruitment and education on many university campuses.<sup>313</sup> Blaming the military for congressional and executive policies, these advocates have attempted to ban recruiters and ROTC units in their zeal to oppose the "Don't Ask, Don't Tell" policy. These actions hurt the career choices of students and the legitimate efforts of recruiters who had nothing to do with formulating the policy.<sup>314</sup> Some law schools joined this cause by promptly banning military Judge Advocate General recruiters in the wake of encouragement by the

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<sup>309</sup> *Id.*

<sup>310</sup> See Dunlap, *supra* note 6, at 364.

<sup>311</sup> See *id.*

<sup>312</sup> See *id.* at 364-65.

<sup>313</sup> See *id.* at 364.

<sup>314</sup> THE GAZETTE, a newspaper in Cedars Rapids, Iowa, perhaps stated it most succinctly in its editorial of Oct. 11, 1997 regarding the ban on military recruiters at the University of Iowa College of Law: "Where we find the college's policy offensive . . . is that it enforced what it proclaimed undesirable: By protecting or defending the rights of one class of people, it deprived others of equal access to resources and opportunity." The full editorial may be found on the Internet at <<http://www.gazetteonline.com/educate/edu171.htm>>.

American Association of Law Schools (AALS).<sup>315</sup> Though a U.S. Court of Appeals had previously ruled that such bans were illegal under the Supremacy Clause of the U.S. Constitution,<sup>316</sup> the law schools that adopted the ban stood firm, creating a backlash in both state legislatures and the U.S. Congress. Representatives soon introduced bills in their state assemblies that would overturn the bans,<sup>317</sup> and U.S. Representative Gerald Solomon (R-N.Y.) succeeded in pushing legislation through the U.S. Congress that would cut off federal funding to schools that implemented such proscriptions.<sup>318</sup> In the wake of the so-called "Solomon Amendments" and other pressures, schools around the country were forced to rescind the ban, and the AALS modified its policy as well.<sup>319</sup>

Those who have made political attacks on the military concerning policies on homosexuality have made the same mistakes of protesters during the Vietnam War. As military analyst Harry Summers explained in 1982, "By attacking the executors of Vietnam policy rather than the makers of that policy, the protestors were striking at the very heart of our democratic system--civilian control of the military."<sup>320</sup> As another observer has noted, "By challenging the military itself, the critics induced public responses from the armed forces. The protestors thus legitimized military expression on partisan issues."<sup>321</sup> These same dangers are present today. Reluctantly thrust into the political debate over the "Don't Ask, Don't Tell" policy, the armed services have been forced to defend themselves publicly.<sup>322</sup> The public debates have politicized the

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<sup>315</sup> See Brett S. Martin, *Military Bans Cost Schools Federal Funds*, NAT'L JURIST, Oct. 1997, at 8.

<sup>316</sup> See *United States v. City of Philadelphia*, 798 F.2d 81 (3d Cir. 1986).

<sup>317</sup> See, e.g., H.R. 628 (N.C. 1997), H.R. 954, 144th Gen. Assem., (Ga. 1997).

<sup>318</sup> See Christina Cheakalos, *Military Gets Off Bias Hook: GSU Law School Fears for Funds*, ATLANTA J. & CONST., Sept. 20, 1997, at F2; see also Bob Norberg, *New Law Imperils SSU Funding: Military Recruiting Ban Sticking Point*, PRESS DEMOCRAT (Santa Rosa, Cal.), Dec. 14, 1996, at B1. For the language of Rep. Solomon's amendments, see Pub. L. No. 104-208, Div. A, Title I, § 101(e) [Title V, § 514], 110 Stat. 3009-270 (1996) (added as a note to 10 U.S.C. § 503).

<sup>319</sup> See Martin, *supra* note 315; Cheakalos, *supra* note 318; George Snyder, *Sonoma State Lifts Ban on Military Recruiters*, S.F. CHRON., Dec. 18, 1996, at A26; see also W. Kent Davis, *Military Service Should Be Respected, But It Isn't*, NAVY TIMES, May 18, 1998, at 31. The American Civil Liberties Union, in consultation with some of the law schools that originally upheld the ban on military recruiters, is apparently exploring the feasibility of challenging the Solomon Amendments on constitutional grounds. Terry Carter, *Costly Principles: Pentagon Forces Law Schools to Choose Between Federal Funding and Backing of Gay Rights*, ABA J., Dec. 1997, at 30, 31.

<sup>320</sup> Dunlap, *supra* note 6, at 364 & n.170.

<sup>321</sup> *Id.* at 364.

<sup>322</sup> See *id.*

military, an organization that is supposed to be nonpartisan in all respects.<sup>323</sup> In short, "[t]he misguided activists send the military community a troubling message. . . . The activists imply that military officers should condition their actions not on the lawful dictates of the civilian leadership, but on their own assessment of the present and future political climate."<sup>324</sup> Thus, the line between the military and civilian spheres has once again blurred. The ongoing erosion of civilian leadership of the armed forces has taken another step forward.

## V. CONCLUSION

*The post-Cold War military environment--institutional uncertainty (how deep will the cuts go?), burgeoning technological change (what is the face of modern warfare?), renewed interest in social experimentation (what is the role for women and gays?), combined with expanding expectations of what the military can and ought to do to make peace, succor the afflicted, and respond to disasters--fosters conditions where civil-military harmony should not be taken for granted. To foresee the potential for friction is a far cry from declaring it inevitable. . . . Yet ignoring the military distemper will only allow it to fester.*<sup>325</sup>

These are trying times for the military. The end of the Cold War allowed the nation to vigorously reevaluate the role of the armed forces and push for fundamental changes in the national military policy. Yet little attention has been paid to the dangers that these changes can bring. On the domestic front, the military has been pushed into a much larger role in law enforcement and a host of other duties that threaten to infringe on our longstanding tradition of civilian control of the military. Overseas, our forces are being asked to play markedly different roles under the auspices of NATO and the United Nations. At the same time, the American taxpayer is forced to bankroll the expansion of these international organizations so that an even greater role in the international arena can be carved for our armed forces in the future. Not content with changes in the domestic and foreign missions of the military, reformers have pushed hard for changes in the internal policies of the services as well, insisting on greater roles for women and homosexuals.

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<sup>323</sup> See *id.*

<sup>324</sup> *Id.* at 365.

<sup>325</sup> Quotation by A.J. Bacevich, Executive Director, the Foreign Policy Institute at the Paul H. Nitze School of Advanced International Studies. *Id.* at 387.



Ironically, the fundamental changes in national military policy come at the same time the military must drastically reduce its size and budget. As a result, many analysts worry about the readiness and morale of our troops. In a second irony, the push for fundamental reforms comes at a time when the public's approval rating of the military has reached a high. In 1993, despite the Tailhook scandal, the debate over the "Don't Ask, Don't Tell" policy, and a host of other worries, a Harris poll found that "[n]o other major institution, profession, or interest group comes close" to matching the popularity of the military among Americans.<sup>326</sup> Obviously, the public still respects and cares for its fighting forces. Yet both of these ironies prompt the question: With the public apparently satisfied with the traditional role of the military and the armed forces already having to undergo the stresses of downsizing and realignment, why is there such a push to thrust fundamental and questionable changes upon it? The only answer to that can be the political mileage that comes with championing new roles for the military. Regrettably, however, this is a dangerous turn of events. The military has always been—and always should be—apolitical.

Someone should step to the forefront and stop this dangerous trend. As many observers have noted, "[e]ach day brings America nearer to its next military conflict."<sup>327</sup> When that unfortunate but historically inevitable day comes, we will once again look to the call of the ancient prophets:

*Beat your plowshares into swords, and your pruninghooks into spears. Let the weak say, "I am strong."*<sup>328</sup>

America's armed forces have always responded to this call with vigor and have defended the nation with honor. Only next time, if the current trend continues, the military may be forced to respond by saying, "Sorry, but that's not my job anymore."

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<sup>326</sup> Dunlap, *supra* note 6, at 354.

<sup>327</sup> Mersereau, *supra* note 272.

<sup>328</sup> Joel 3:10

Appendix I: U.S. Military Operations in the 1990's<sup>329</sup>

May - June 1997

Operation Noble Obelisk: Noncombat evacuation in Sierra Leone.

March - June 1997

Operation Silver Wake: Embassy security and noncombatant evacuation in Albania.

January 1997 - present

Operation Northern Watch: Combined task force to enforce the no-fly zone in northern Iraq (above 36th parallel); follow-on to Operation Provide Comfort.

September 1996 - April 1997

Operation Pacific Haven: Humanitarian assistance to Kurdish evacuees in northern Iraq at Guam.

September 1996 - January 1997

Operation Desert Strike: Missile strikes in response to Iraq's aggression against the Kurds in northern Iraq and to facilitate expansion of the no-fly zone established under Operation Southern Watch.

August 1996 - present

Operation Desert Focus: Relocation of U.S. service personnel and Department of Defense civilians and force protection in Saudi Arabia.

Summer of 1996

Joint Task Force Atlanta/Olympic Security Support Group: Direct security and support for civilian police agencies during the 1996 Olympics in Atlanta.

May - August 1996

Operation Quick Response: Embassy security and noncombatant evacuation in Central African Republic.

April - August 1996

Operation Assured Response: Embassy security and noncombatant evacuation in Liberia.

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<sup>329</sup> Compiled almost exclusively from DEFENSE 97, Issue 5 (published by the American Forces Information Service for the Department of Defense). This list does not include operations after 1997.

April 1996- present

Operation Laser Strike: Counternarcotics surge operations in South America.

December 1995- present

Operation Joint Guard: Ground operations in Bosnia; NATO Stabilization Force operations; NATO Implementation Force operation. Follow-on to Operation Joint Endeavor.

December 1995- present

Operation Determined Guard: Combined maritime operation in support of Operation Joint Guard. Follow-on to Operation Decisive Enhancement.

October - December 1995

Operation Green Clover: Counternarcotics surge operations in South America.

August - September 1995

Operation Deliberate Force: NATO airstrikes against Bosnian Serb military targets in response to Serb shelling of Sarajevo and refusal to withdraw heavy weapons from a 20 kilometer radius of Sarajevo.

August 1995 - February 1997

Operation Vigilant Sentinel: U.S. strategic show of force operations in U.S. Central Command's area of operations to deter potential Iraqi aggression.

March 1995 - present

Operation Safe Border: U.S. participation in the six-nation Military Observer Mission Ecuador-Peru to monitor the border.

January - February 1995

Operation Safe Passage: Transfer of Cuban immigrants from Operation Safe Haven camps in Panama to Guantanamo, Cuba.

November 1994 - March 1995

Operation United Shield: Security support for withdrawal of U.N. forces from Somalia.

October - December 1994

Operation Vigilant Warrior: Defense of Kuwait against renewed Iraqi threat.

September 1994 - February 1995

Operation Safe Haven: Joint humanitarian Cuban migrant operations in Panama (U.S. forces temporarily housed 8,600 Cuban migrants in four camps to relieve pressure at Guantanamo, Cuba).

September 1994 - March 1995

Operation Uphold Democracy: Multinational operation to restore democratically elected government in Haiti (administratively, this operation is still open; in November 1994 a name change was announced calling it Operation Maintain Democracy, but the initial name was ultimately retained).

July - October 1994

Operation Support Hope: Humanitarian relief/relief support operations to assist Rwandan refugees.

May 1994 - February 1996

Operation Sea Signal: Joint task force operations to support Haitian and Cuban migrants in Guantanamo, Cuba.

April 1994

Operation Distant Runner: Evacuation of U.S. and Belgian noncombatants from Rwanda.

October 1993 - September 1994

Operation Support Democracy: Maritime intercept operations with allied navies to enforce U.S. Security Council sanctions against Haiti.

July 1993 - present

Operation Able Sentry: U.S. participation in the U.N. operation to observe the Serbian/Macedonian border.

May 1993 - March 1994

Operation Continue Hope: Conducted under U.N. auspices to continue humanitarian relief in Somalia.

April 1993 - present

Operation Deliberate Guard: Air operations over Bosnia in support of Operation Joint Guard. Follow-on to Operation Decisive Edge.

December 1992 - May 1993

Operation Restore Hope: Establish security to facilitate humanitarian relief in Somalia.

October 1992

Joint Task Force Liberia: Noncombatant evacuation in Liberia.

October 1992

Joint Task Force Tajikistan: Noncombatant evacuation in Tajikistan.

September - October 1992

Joint Task Force Hawaii: Disaster Relief on Kauai following Typhoon Iniki.

August - October 1992

Joint Task Force Andrew: Disaster Relief in south Florida following Hurricane Andrew.

August - September 1992

Joint Task Force Marianas: Disaster Relief on Guam following Typhoon Omar.

August 1992 - February 1993

Operation Provide Relief: Humanitarian airlift operations to airlift food supplies to Somalia and Somalian refugees in Kenya.

August 1992 - present

Operation Southern Watch: Coalition force enforcement of no-fly zone in southern Iraq for all Iraqi aircraft (below 32nd parallel until September 1996, below 33rd parallel thereafter).

July 1992 - February 1996

Operation Provide Promise: Multinational operation to support humanitarian relief activities in Bosnia- Hercegovina.

June 1992 - September 1996

Operation Sharp Guard: Enforcement of the U.N.-sanctioned embargo against the Former Republic of Yugoslavia and surveillance of cargo being transported through the Adriatic.

June 1992

Joint Task Force Sarajevo: Noncombatant evacuation on Sarajevo.

May 1992

Joint Task Force Los Angeles: Active forces integrated with California National Guard to support civilian authorities responding to incidents of rioting, looting, and violence in the wake of the Rodney King verdict.

May 1992

Noncombatant evacuation of non-essential personnel from Sierra Leone.

January 1992 - December 1994

Operation Provide Hope: Emergency humanitarian relief operations to airlift excess Department of Defense medical supplies and food stuffs to the Commonwealth of Independent States.

January 1992 - present

Joint Task Force Full Accounting: Operations to resolve the cases of Americans still unaccounted for from the Vietnam War and other conflicts.

May - June 1991

Operation Sea Angel: Humanitarian relief in Bangladesh.

April 1994 - December 1996

Operation Provide Comfort: Combined task force to enforce the no-fly zone over northern Iraq (above 36th parallel) and to support coalition humanitarian relief operations in northern Iraq.

January - March 1991

Operation Proven Force: Coalition combat operations in northern Iraq.

January - March 1991

Operation Desert Storm: Coalition combat operations to liberate Kuwait.

January 1991

Operation Eastern Exit: Noncombatant evacuation from Somalia.

August 1990 - January 1991

Operation Desert Shield: Defense of Saudi Arabia.

August 1990 - present

Arabian Gulf Maritime Intercept Operations: Enforcement of U.N. sanctions against Iraqi oil and other imports/exports.

July 1990 - present

Counterdrug operations: U.S. military operational support to the United States and participating nations' law enforcement agencies conducting counterdrug operations in the western hemisphere.

May 1990 - January 1991

Operation Sharp Edge: Noncombatant evacuation from Monrovia, Liberia.

December 1989 - January 1990

Operation Just Cause: Joint operation to protect U.S. citizens and property, restore democracy, safeguard the Panama Canal, and bring Manuel Noriega to justice.

April 1982 - present

Multinational Force and Observers Sinai: Monitoring provisions of the peace accord between Israel and Egypt.

**Note:** Adding to this impressive list of largely humanitarian, peacekeeping, and counterdrug operations, one reporter notes that U.S. forces have also participated in recovery/investigation/medical efforts following the crashes of flights TWA 800 off Long Island and KAL 801 on Guam, and have trained and supported federal law enforcement officials participating in the Waco and Ruby Ridge raids.<sup>330</sup> "And if all these noncombat duties were not enough, the Pentagon has come up with a proposal for another: protecting the environment in Latin America. In June [1997] it was announced at the Western Hemisphere Defense Environment Conference in Miami that soldiers from the U.S. Southern Command, which oversees American military operations in Central and South America, may soon begin training soldiers in protecting the rain forests and endangered species."<sup>331</sup> In response to this future role, the Undersecretary of State for Global Affairs said, "This is a legitimate military issue. This is not a bunch of trendy greenies."<sup>332</sup>

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<sup>330</sup> See Martz, *supra* note 2.

<sup>331</sup> *Id.*

<sup>332</sup> *Id.*