Judicial Review of the Manual for Courts-Martial

Gregory E. Maggs
George Washington University Law School, gmaggs@law.gwu.edu

Follow this and additional works at: https://scholarship.law.gwu.edu/faculty_publications

Part of the Law Commons

Recommended Citation

This Article is brought to you for free and open access by the Faculty Scholarship at Scholarly Commons. It has been accepted for inclusion in GW Law Faculty Publications & Other Works by an authorized administrator of Scholarly Commons. For more information, please contact spagel@law.gwu.edu.
Citation: 160 Mil. L. Rev. 96 (1999)

JUDICIAL REVIEW OF THE MANUAL FOR COURTS-MARTIAL

Captain Gregory E. Maggs

Opinions and conclusions in articles published in the Military Law Review are solely those of the authors. They do not necessarily reflect the views of the Judge Advocate General, the Department of the Army, or any other government agency.

I. Introduction

The Uniform Code of Military Justice (UCMJ) establishes the basic structure of the military justice system. It specifies the requirements for convening courts-martial, defines the jurisdiction of courts-martial, and identifies the offenses that courts-martial may punish. Congress, however, did not intend the UCMJ to stand-alone. On the contrary, it specifically directed the President to promulgate procedural, evidentiary, and other rules to govern the military justice system. The President has complied with this directive by issuing a series of executive orders, which make up the Manual for Courts-Martial (Manual).

1 Judge Advocate General’s Corps, United States Army Reserve. Presently assigned as an individual mobilization augmentee with duty in the Criminal Law Division, Office of the Judge Advocate General. The author is an associate professor of law at the George Washington University Law School. I thank Associate Dean John S. Jenkins (Rear Admiral, U.S. Navy, retired), Professor Richard J. Pierce, Jr., Professor Jonathan R. Siegel, Major Denise Lind, and the faculty of The Judge Advocate General’s School, U.S. Army, for their helpful comments. John Nargiso, J.D. 1999, greatly assisted with the research. Dean Michael K. Young and the George Washington University Law School provided generous support.


3 See id. § 822 (identifying the officers and government officials who may convene a court-martial).

4 See id. § 817 (defining jurisdiction).

5 See id. §§ 881-934 (stating offenses).

6 See infra Part II.A (describing the President’s authority to make rules).

7 MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998) [hereinafter MCM]. Footnotes in this article will refer to all editions of the Manual from 1984 until the present as “MCM,” unless context otherwise requires. See id. at A25-1 through 34 (listing amendments to the Manual during this period). The 1984 version of the Manual replaced and substantially changed the MANUAL FOR
JUDICIAL REVIEW OF THE MANUAL FOR COURTS-MARTIAL

The Manual consists of five parts. Part I is the “Preamble,” which explains the Manual’s structure and authority. Part II contains the “Rules for Courts-Martial,” which govern pre-trial, trial, and post-trial procedures. Part III states the “Military Rules of Evidence,” which principally regulate the modes of proof at courts-martial. Part IV describes and explains the “Punitive Articles” of the UCMJ (that is, the crimes that the UCMJ makes punishable), listing their elements, identifying lesser-included offenses, establishing the maximum punishments, and providing sample specifications. Part V explains the “Nonjudicial Punishment Procedures” that commanders can impose under UCMJ Article 15 without a court-martial.

The U.S. Government Printing Office (GPO) publishes the Manual as part of a single volume book. Military attorneys often refer to the entire book as the Manual for Courts-Martial, but this practice is somewhat misleading. The volume published by the GPO contains not only what the President has promulgated through executive orders, but also a variety of supplementary materials. These materials include short discussion paragraphs accompanying the preamble, the Rules for Courts-Martial, the punitive articles; three treatise-like analyses of the Rules for Courts-Martial, the Military Rules of Evidence, the Punitive Articles; and miscellaneous additional appendices. Unlike Parts I through V, the President did not promulgate these materials by executive order, and therefore they are not actually part of the Manual.


8 See MCM, supra note 7, pmbl.
9 See id. R.C.M. 101-1306.
10 See id. MIL. R. EVID. 101-1103.
11 See id. at IV-1 through IV-123; UCMJ arts. 77-134.
12 See id. at V-1 through V-9.
13 See MCM, supra note 7, pmbl. discussion.
14 See id.
15 See id.
16 See id.
The Court of Military Appeals long ago described the Manual as the military lawyer’s “Bible.” Anyone familiar with the military justice system could agree with this characterization. Judge advocates constantly must turn to the Manual for direction. Indeed, attempting to conduct a court-martial without referring to the Manual’s numerous rules would be impossible. Yet, if the Manual has the attributes of a holy scripture, then the military courts have seen more than a few heretics. In well over a hundred-reported instances, defense and government counsel have asked courts to invalidate or ignore Manual provisions. The courts themselves have not entirely kept the faith; over the past few decades, they have refused to enforce the Manual in dozens of cases.

Litigants often have a strong motive for wanting to avoid applying a Manual provision. The rules stated in the Manual may determine the outcomes of criminal trials or the length of sentences imposed upon conviction. In capital cases, the rules of the Manual may make the difference between life and death.

The judiciary, therefore, gives serious attention to challenges to the Manual. Indeed, the United States Supreme Court recently reviewed two cases that contested the validity of rules in the Manual. In United States v. Scheffer, the accused contested the validity of Military Rule of Evidence

---

18 This article uses the term “military courts” to refer to courts-martial, the United States Army, Navy-Marine Corps, Air Force, and Coast Guard Courts of Criminal Appeals (and their predecessors, the Courts of Military Review and the Boards of Review), and the United States Court of Appeals for the Armed Forces (and its predecessor, the Court of Military Appeals). On 5 October 1994, the National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2663 (1994), changed the names of the United States courts of Military Review and the United States Court of Military Appeals. The new names are the United States Army Court of Criminal Appeals, the United States Air Force Court of Criminal Appeals, the United States Navy-Marine Corps Court of Criminal Appeals, the United States Coast Guard Court of Criminal Appeals, and the United States Court of Appeals for the Armed Forces.
19 See infra Part IV (discussing challenges and leading cases).
20 See id.
4 Judicial Review of the Manual for Courts-Martial

707(a), which bars the admission of polygraph results. In Loving v. United States, a capital defendant asked the Supreme Court to strike down Rule for Courts-Martial 1004(c), which specifies the aggravating factors that may justify imposing the death penalty.

Oddly, despite the frequency and importance of litigation over the validity of the rules of the Manual, the topic has received little attention outside of the courts. A few law review articles have addressed the President’s authority to promulgate Manual provisions. Yet, no work has comprehensively studied the numerous grounds upon which courts have invalidated portions of the Manual. This article seeks to perform this task.

Part II of this article describes the President’s authority for promulgating the Manual, the ways in which challenges to the Manual arise, and the law governing these challenges. It explains that neither the Administrative Procedure Act (APA) nor any other statute, specifies the grounds upon which courts may invalidate portions of the Manual. Military tribunals, consequently, have needed to devise their own doctrines for reviewing Manual provisions.

Part III proposes three principles to guide courts in developing rules for reviewing challenges to the Manual. First, courts should follow general

---

22 See MCM, supra note 7, MIL. R. EVID. 707(a) (“Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence.”).


24 See MCM, supra note 7, R.C.M. 1004(c) (identifying eleven aggravating factors, such as committing an offense in way that would cause “substantial damage to national security” or committing murder “for the purpose of receiving money”).


principles of administrative law, such as those codified in the APA, unless military considerations require otherwise. Second, courts generally should defer to the Manual because the President promulgated it not only pursuant to statutory authority, but also in his capacity as Commander-in-Chief. Third, courts should strive for consistency in their treatment of challenges to the Manual.

Part IV describes and analyzes the following nine arguments that litigants have advanced when asking courts to ignore or invalidate Manual provisions:

1. The Manual provision is merely precatory.
2. The Manual provision conflicts with the UCMJ.
5. The President lacked authority to promulgate the Manual provision.
6. The Manual provision is arbitrary and capricious.
7. The Manual provision interprets an ambiguous portion of the UCMJ and a better interpretation is possible.
8. The President promulgated the Manual pursuant to an improper delegation from Congress.
9. The Manual provision violates the accused’s constitutional rights.

II. Authority, Challenges, and Judicial Review

Before addressing how military judges should review Manual provisions, a few preliminary matters require discussion. The following sections document the President’s statutory and constitutional power to promulgate the Manual. They further explain how challenges to the provisions of the Manual usually arise. Finally, they describe how the military courts have devised legal doctrines for evaluating these challenges.

A. The President’s Power to Promulgate the Manual

The UCMJ contains three articles that grant the President power to promulgate the provisions of the Manual. Article 36 authorizes the President to create procedural and evidentiary rules, such as the Rules for Courts-Martial and the Military Rules of Evidence found in Parts II and III.
of the Manual. Articles 18 and 56 authorize the President to set limits on the punishment for violation of the punitive articles of the UCMJ, which he has done in specifying the maximum sentence for offenses in Part IV of Manual.

Even if the UCMJ did not contain these articles, the President may have inherent power to promulgate rules of evidence and procedure to govern courts-martial. His authority would come from the constitutional provision making him the Commander-in-Chief. Although the Constitution does not elaborate on the Commander-in-Chief’s powers, he always has had the power to issue orders to the military. As discussed more fully below, the President could use this authority to create rules for courts-martial. Indeed, during the previous century, the President directed the conduct of courts-martial without specific statutory authority.

In discussing the President’s authority for issuing the Manual, one important point deserves attention. As noted above, the President promulgated only Parts I through V of the Manual by executive order, and did not issue the supplementary materials that are printed with these parts. Instead, the Department of Defense and the Department of Treasury prepared the supplementary materials largely for informational purposes.

These provisions, as a result, do not purport to have the force of law.

---

27 See 10 U.S.C.A. § 836(a) (West 1998). Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

28 See id. § 818 (“[G]eneral courts-martial have jurisdiction to try persons subject to this chapter for any offense made punishable by this chapter and may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter, including the penalty of death when specifically authorized by this chapter.”); id. § 856(a) (“The punishment which a court-martial may direct for an offense may not exceed such limits as the President may prescribe for that offense.”).

29 See U.S. CONST. art. II, § 2, cl. 1.

30 See infra Part IV.E.2.

31 See Fidell, supra note 25, at 6050 & n. 11; Wiener, supra note 25, at 361.

32 See MCM, supra note 7, pmbl.

33 See id.

34 See id.

These supplementary materials do not constitute the official views of the
Thus, they raise no real issue about the President’s statutory or constitutional authority.

B. How Challenges to the Manual Arise

Most challenges to Manual provisions come from the accused. A defendant who disfavors applying a rule of evidence or procedure may look for grounds for invalidating it. For example, in Scheffer, the accused \textsuperscript{102} desired to present evidence from a polygraph test.\textsuperscript{35} He, therefore, asked the courts to invalidate the prohibition against polygraph evidence in Military Rule of Evidence 707(a).\textsuperscript{36} Similarly, in Loving, the accused asked the court to invalidate the capital sentencing procedures so that he would not receive the death penalty.\textsuperscript{37}

Government counsel rarely contest the validity of Manual provisions. Although individual prosecutors may not favor all of its procedural and evidentiary rules, the Manual states official policy. Attorneys for the government generally have no authority to question its requirements, even if these requirements sometimes make convicting the accused more difficult.

Occasions can arise, however, where prosecutors will challenge the Manual. Sometimes, a government counsel inadvertently will fail to follow one requirement of the Manual, and will seek to avoid the consequences of the error by contesting the enforceability of the provision. In United States v. Solnick,\textsuperscript{38} for example, the government violated Rule for Courts-Martial 1107 when the officer exercising general court-martial jurisdiction instead of the convening authority approved the sentences.\textsuperscript{39} \textsuperscript{103} When the

\textsuperscript{36} See id. at 1264.
\textsuperscript{38} 39 M.J. 930 (N.M.C.M.R. 1994).
\textsuperscript{39} See MCM, supra note 7, R.C.M. 1007. The convening authority shall take action on the sentence ... unless it is impracticable. If it is impracticable for the convening authority to act, the convening authority shall ... forward the case to an
accused sought reversal, the government counsel argued that the court could not enforce Rule 1107.\textsuperscript{40}

The accused and the government must act in a timely fashion if they wish to challenge \textit{Manual} provisions. Failure to raise arguments at the trial, or sometimes even during pre-trial proceedings, may waive the right to present them later.\textsuperscript{41} Counsel, accordingly, should object to \textit{Manual} provisions that they consider improper at the earliest possible opportunity, and thus preserve the right to appeal unfavorable rulings.


Although military courts often say that the \textit{Manual} has the force of law,\textsuperscript{42} they have recognized a number of exceptions to its enforceability. As described more fully below, the courts have refused to enforce \textit{Manual} provisions for a number of different reasons.\textsuperscript{43} For example, they have ignored or invalidated rules that conflict with the UCMJ, that the President promulgated without authority, that they have found arbitrary and capricious, and so forth.\textsuperscript{44}

Despite the willingness of the court to strike down \textit{Manual} provisions, the authority for judicial review of the \textit{Manual} remains surprisingly unclear. Nothing in the UCMJ or any other statute identifies the different grounds for striking \textit{Manual} provisions. Although the \textit{Manual} contains *104 rules that resemble administrative law, the APA does not apply to

---

\textsuperscript{40} See \textit{Solnick}, 39 M.J. at 934. See also United States v. Morlan, 24 C.M.R. 390, 394 (A.B.R. 1957) (involving a government challenge to the 1951 \textit{Manual}, paragraph 126d, which precluded warrant officers from receiving bad conduct discharges).

\textsuperscript{41} See MCM, \textit{supra} note 7, R.C.M. 905(e). Failure by a party to raise defenses or objections to make motions or requests which must be made before pleas are entered under subsection (b) of this rule \textit{i.e.}, pretrial motions shall constitute waiver. The military judge for good cause shown may grant relief from the waiver. Other motions, requests, defenses, or objections, except lack of jurisdiction or failure of a charge to allege an offense, must be raised before the court-martial is adjourned for that case and unless otherwise provided in this Manual, failure to do so shall constitute waiver. \textit{Id}.


\textsuperscript{43} See \textit{infra} Parts IV.A.-I.

\textsuperscript{44} See \textit{id}. 

officer exercising general court-martial jurisdiction who may take action under this rule \textit{Id}. 

officer exercising general court-martial jurisdiction who may take action under this rule \textit{Id}. 

executive orders. The APA, consequently, does not establish bases for invalidating the Manual, as it does for striking down federal regulations.

The military courts, however, have not let the absence of explicit statutory authority impede judicial review. Instead, as shown later in this article, they simply have developed their own doctrines for review on a case-by-case basis. In evaluating challenges to the Manual, the courts now rely on numerous precedents that have established a variety of grounds for striking Manual provisions.

Judicially created doctrines for reviewing the Manual seem almost inevitable. Although Congress could have given the courts express authority to evaluate the legality of the Rules for Courts-Martial, the Military Rules of Evidence, and the rest of the Manual, it did not. Given the serious consequences of criminal trials, however, the courts could not be expected to ignore challenges to the Manual. They, therefore, created their own rules for addressing them.

In fact, review of the Manual through court-made doctrines has become so thoroughly established that questioning their legality would serve little purpose. The military courts are not prepared to stop striking down provisions that they find improper under their precedents. This article, accordingly, does not attempt to address whether the military courts should

---

45 See Franklin v. Massachusetts, 505 U.S. 788, 800-01 (1992) (holding that the APA prescribes rules only for agencies, and the President is not an agency).

46 The APA authorizes courts to “hold unlawful and set aside agency action, findings, and conclusions” if they find them:

- (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
- (B) contrary to constitutional right, power, privilege, or immunity;
- (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
- (D) without observance of procedure required by law;
- (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
- (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.


47 See infra Part IV.
have developed doctrines for adjudicating the validity of *Manual* provisions. Instead, it merely seeks to examine the doctrines that the courts have created, and to suggest ways that they might improve them.

III. General Principles for Judicial Review

The military courts have developed a number of principles to govern interpreting *Manual* provisions. The cases, for example, explain that courts should attempt to follow the intent of the President in promulgating the *Manual*. They indicate that courts should construe the rules of evidence and procedure liberally so that the accused may present all valid defenses. They state that courts generally should not apply new rules retroactively. They assert that, where possible, courts should interpret the rules of the *Manual* to prevent conflict with the UCMJ. They also declare that courts should follow the rule of leniency, construing ambiguities in the *Manual* against the government.

In creating doctrines for reviewing the legality of *Manual* provisions, however, the military courts have acted in a largely ad hoc manner. As the following part of this article will show, they have handled challenges to *Manual* provisions on a case-by-case basis. They generally have not attempted to harmonize their approaches to different kinds of problems with the *Manual*. They also have not articulated general principles to govern judicial review.

Several factors make the piecemeal approach of the military courts understandable. In the absence of explicit authority to review *Manual* provisions, the courts have had little external guidance. Consequently, they may have hesitated to take broad steps. Gradually fashioning doctrines

---


52 See United States v. White, 39 M.J. 796, 802 (N.M.C.M.R. 1994).

53 See infra Part IV (describing the development of different doctrines for reviewing the nine most common types of challenges).

54 See supra Part II.C. (explaining the lack of explicit authority).
for reviewing challenges to the *Manual*, moreover, has allowed them to learn *106 from experience. On the whole, they have not produced many controversial results.

The following discussion, however, suggests and defends three general principles that the military courts should strive to follow when reviewing *Manual* provisions. First, the military courts should look to ordinary administrative law doctrines for guidance in reviewing *Manual* provisions, even if these doctrines do not bind them. Second, the military courts should accord great deference to policy choices that the President has expressed in the *Manual*. Third, the military courts should strive for consistency as they develop doctrines for reviewing challenges to the *Manual*.

These principles will not eliminate the need for courts to make difficult decisions when determining the validity of the Military Rules of Evidence, Rules for Courts-Martial, and other parts of the *Manual*. For reasons explained below, however, the principles should improve the decisions of the courts. Part IV of this article, consequently, will refer repeatedly to each of these principles when analyzing the leading cases on the various types of challenges to *Manual* provisions.

A. Reliance on General Principles of Administrative Law

Although no legislation directly addresses judicial review of the *Manual*, the military courts do not have to start fresh when deciding how to evaluate contested provisions. On the contrary, they can and should look to external legal sources for guidance. In particular, the courts can learn from the experience of the federal courts in reviewing administrative materials.

Challenges to regulations issued by federal administrative agencies often resemble challenges to *Manual* provisions. The federal courts, for example, have considered whether agencies have authority to promulgate regulations, whether regulations conflict with statutes, whether

---

55 *See, e.g.*, Ramah Navajo School Bd., Inc. v. Babbitt, 87 F.3d 1338, 1349 (D.C. Cir. 1996) (holding that an agency exceeded its statutory authority in promulgating fund allocation rules); Health Ins. Ass’n of America, Inc. v. Shalala, 23 F.3d 412, 418-20 (D.C. Cir. 1994) (holding that an agency exceeded its statutory authority in promulgating regulations concerning Medicare payment recovery).

12 Judicial Review of the Manual for Courts-martial

regulations\*107 are arbitrary and capricious,\*57 and so forth. Their experience in assessing these challenges may aid the military courts as they evaluate similar challenges to the Military Rules of Evidence, the Rules for Courts-Martial, and other portions of the Manual.

The Supreme Court itself has recently relied on administrative law decisions when reviewing portions of the Manual. In Loving v. United States, the Court upheld Rule for Courts-Martial 1004(c) under the non-delegation and intelligible principle doctrines.\*58 To support its decision, the Court cited numerous cases concerning the validity of regulations promulgated by administrative agencies.\*59

Despite the Supreme Court's example in Loving, the military courts generally have not looked to non-military cases and doctrines for guidance. Conversely, they appear to have seen little connection between the Manual and other forms of administrative law. In their numerous decisions reviewing Manual provisions, they have not cited the APA, the Chevron doctrine,\*60 or other fundamentals of administrative law. Overlooking these non-binding, but potentially persuasive sources has made their work more difficult. In addition, as Part IV will show, it occasionally may have caused the courts to err.

B. Deference to the President

Administrative agencies enjoy a substantial legal advantage in litigation: namely, in cases of doubt, the federal courts tend to defer to them. *108


59 In support of its ruling on the non-delegation doctrine, the Supreme Court cited: United States v. Grimaud, 220 U.S. 506 (1911); Touby v. United States, 500 U.S. 160 (1991); M. Kraus & Bros., Inc. v. United States, 327 U.S. 614 (1946); and other decisions. See Loving, 517 U.S. at 768. In addressing the intelligible principle doctrine, the Supreme Court cited: A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); National Broadcasting Co. v. United States, 319 U.S. 190 (1943), and other cases. See Loving, 517 U.S. at 771.


In an influential article, Justice Antonin Scalia identified three arguments for judicial deference to administrative agencies.\footnote{63 \textit{Id.} at 515-16.\footnote{64 \textit{Id.} at 516-17.\footnote{65 \textit{Id.} at 514.}} First, the separation of powers principle generally requires courts to cede questions of policy to the other branches of government.\footnote{66 See Robinson O. Everett, \textit{Some Comments on the Role of Discretion in Military Justice}, 37 LAW \& CONTEMP. PROBS. 173, 176-184 (1972) (discussing generally the President's discretion over the content of the rules governing courts-martial). Second, Congress expressly or implicitly may direct and often has directed courts to defer to agencies. Third, agencies have greater substantive expertise in many areas than the courts.\footnote{65 \textit{Id.} at 514.}

These reasons for deferring to administrative regulations, as the following discussion will show, also apply to the executive orders issued by the President. Indeed, in the case of executive orders to the military, they may produce an even stronger argument for deference.\footnote{66 \textit{Id.} at 515-16.} Courts, therefore, should hesitate before invalidating \textit{Manual} provisions.

\textit{1. Separation of Powers}

Some commentators have argued that courts should defer to administrative agencies because of the separation of powers principle. They have reasoned that the executive branch, rather than the judiciary, should settle questions of policy when statutes do not make them clear. Judges, therefore, should not substitute their judgment for those of the executive officers controlling the agencies.

This separation of powers concern is heightened in the case of executive orders. Overruling an agency encroaches on the President’s policy-making authority, but only indirectly. The President has only limited control over the regulations issued by administrative agencies. He usually has *109 the
power to hire and to fire the head of the agency, but generally cannot
direct its day-to-day operations. For this reason, regulations promulgated
by an agency—although they emanate from the executive branch of
government—may not fully reflect the President’s views or policy choices.

The same caveat holds less true for executive orders. The President has
complete control over the content of executive orders because he alone
signs them. Executive orders, therefore, necessarily embody policy choices
that the President personally has made or approved. Therefore, when a
court invalidates an executive order, it directly challenges the President’s
decisions. Respect for the head of the executive branch, for this reason,
requires that courts take this step only with justification. Although they
may strike down Military Rules of Evidence and Rules of Courts-Martial
Procedure for a variety of reasons (described in Part IV), they should defer
to the President’s lawful policy choices.

2. Delegation of Policy-Making Authority

All legislation contains some gaps or open issues. Accordingly, when
Congress requires an agency to administer a statute, commentators have
argued that courts should infer that Congress implicitly has delegated to the
agency the authority to make policy choices. Courts must recognize
and uphold this implicit delegation, just as they would follow any other
express or implied command in a statute.

---

See Myers v. United States, 272 U.S. 52 (1926) (President may discharge
executive officers). But see Humphrey’s Executor v. United States, 295 U.S. 602
(1935) (Congress may limit the power of the President to discharge a member of an
independent agency who exercises quasi-legislative power).

One author would disagree somewhat with this argument. Eugene R. Fidell
asserts:

[I]t is error to leave the impression that the role of the President is more
than perfunctory in the adoption of Manual provisions. True, a presidential
signature appears, and the President’s attorneys may have a part in the
review process, but the undeniable fact is that the essential work in this
regard is performed by the Joint Service Committee on Military Justice.

Fidell, supra note 25, at 6055. Nevertheless, while the President may delegate the
work of putting together the Manual as he delegates most work, by statute he retains
ultimate responsibility for its content.

See Scalia, supra note 62, at 516 (finding this rationale most persuasive).
Some courts have accepted this reasoning. See, e.g., Process Gas Consumers Group
v. United States Dep’t of Agric., 694 F.2d 778, 791 (D.C. Cir. 1982) (en banc),
cert. denied 461 U.S. 905 (1983); Constance v. Secretary of Health & Human Serv.,
672 F.2d 990, 995 (1st Cir. 1982).
The same reasoning applies to the executive orders that establish the UCMJ, only with more force. The UCMJ assigns to the President the task of creating rules, and therefore naturally invests some discretion in him. That is not all. The Constitution also designates the President as the Commander-in-Chief. In this role, he has broad discretion in military matters. Courts, therefore, again should not upset his decisions lightly.

3. Expertise

As administrative agencies have expertise in the areas that they regulate, the President and his advisers have special knowledge about the needs and concerns of the military. This expertise extends not only to strategic and operational matters, but also to matters of discipline. Military necessity requires that the President have discretion to employ his expertise. As Professor William F. Fratcher explained nearly forty years ago:

Good order, morale, and discipline in the armed forces are necessary to victory in war; their absence ensure defeat. The President, as Commander-in-Chief, is primarily responsible for the maintenance of order, morale and discipline in the armed forces and the system of military justice is one of the principal means of maintaining them. It is essential to national safety that the President have sufficient power to make the system of military justice work effectively under the conditions which actually exist in the forces ....

Professor Fratcher added that, in recognition of these principals, it “is to be hoped that” the military courts “will exercise greater judicial restraint in the exercise of its power to determine that regulations of the President are invalid.”

C. Consistency

In reviewing Manual provisions, the courts also should strive to act consistently and to explain any apparent inconsistencies in their decisions. Yet, they have not always treated the same types of challenges in a similar manner.

---


71 U.S. CONST. art. II, § 2, cl. 1.


74 Id. at 860.
manner. For example, in two cases, defendants sought to have *Manual provisions invalidated on grounds that they conflicted with Army regulations. In one decision, the Court of Military Appeals ruled that *Manual provisions preempt service regulations when they conflict. In the other case, however, the Court of Military Appeals struck down the *Manual provision and upheld the regulation. The court made no effort to reconcile these cases, leaving future litigants, and the lower courts with ambiguous guidance.

The military courts appear to have rendered most of their conflicting decisions inadvertently. The way to avoid problems of inconsistency, in this author’s view, lies in enabling the military courts to recognize that they regularly perform judicial review of the *Manual, and that challenges to rules of evidence and procedure tend to fall into a small set of discernible categories. Once the military courts see the similarities among the cases, they can harmonize their decisions. The following part of this article seeks to aid them in this endeavor.


In preparing this article, the author has attempted to conduct an exhaustive survey of the challenges to the *Manual since the UCMJ was enacted in 1950. This research has revealed that litigants have asked the military courts to invalidate *Manual provisions on nine principal grounds. The courts have accepted these challenges in many instances, but rejected them in others. The following discussion addresses each of these nine grounds, summarizing the leading cases, and then presenting the author’s own comments and analysis.

A. The *Manual Provision is Merely Precatory

Litigants in many cases have asked the military courts not to follow *Manual provisions or passages in the supplementary materials on grounds that the President did not intend them to have a binding effect. In these cases, the litigants have characterized the disputed language as “precatory,”

---

75 See United States v. Kelson, 3 M.J. 139, 140 (C.M.A. 1977) (invalidating rule promulgated by the Secretary of the Army as inconsistent with the *Manual).

meaning that it only provides guidance and does not have the force of law.\textsuperscript{77}

The courts have accepted this challenge in a number of instances.

1. Leading Cases

The cases indicate that two factors determine whether the military courts will characterize a Manual provision as precatory and thus feel free not to follow it. The first factor is the provision’s location within the Manual. The second is the wording of the provision.

The published volume containing the Manual, includes two very important supplementary materials: the “discussion” accompanying the Rules for Courts-Martial and Military Rules of Evidence, and the “analyses” of these Rules and the Punitive Articles.\textsuperscript{78} Military courts frequently cite and follow these supplementary materials, and judge advocates constantly rely on them for guidance. Nonetheless, the courts have characterized everything appearing in these supplementary materials as precatory, and often have refused to follow what they say.\textsuperscript{79}

Actual Manual provisions--the Rules for Courts-Martial, the Military Rules of Evidence, and the Punitive Articles-have received different treatment. Unlike the discussion and analysis, the courts have assumed that the President generally intended these provisions to be binding unless

\textsuperscript{77} See BLACK’S LAW DICTIONARY 1176 (6th ed. 1990) (defining “precatory” to mean “conveying or embodying a recommendation or advice or the expression or a wish, but not a positive command or direction”).

\textsuperscript{78} See MCM, supra note 7, pmbl. discussion (describing these supplementary materials).

\textsuperscript{79} For cases refusing to following the discussion, see, e.g., United States v. Fisher, 37 M.J. 812, 818 (N.M.C.M.R. 1993) (refusing to follow discussion of R.C.M. 305(h)), affirmed 40 M.J. 293 (C.M.A. 1994); United States v. Robertson, 27 M.J. 741, 743 n. 1 (A.C.M.R. 1988) (refusing to follow discussion of R.C.M. 1003(3)). For cases refusing to follow the analysis, see, e.g., United States v. Rexroat, 38 M.J. 292, 298 (C.M.A. 1993) (analysis not followed), cert. denied 510 U.S. 1192 (1994); United States v. Mixrie, 39 M.J. 993, 997 (A.F.C.M.R. 1994) (refusing to follow statement in analysis indicating that R.C.M. 405(g)(1)(A) created a per se rule), aff’d 43 M.J. 35 (1995). See also United States v. Mance, 26 M.J. 244, 252 (C.M.A.), cert. denied 488 U.S. 942 (1988) (stating that the analysis is not binding); United States v. White, 39 M.J. 796 (N.M.C.M.R. 1994) (stating that the analysis is not binding); United States v. Ferguson, 40 M.J. 823, 827 (N.M.C.M.R. 1994) (stating that the analysis is not binding); United States v. Perillo, 6 M.J. 678, 679 n.2 (A.C.M.R. 1978) (appendix 8 to the Manual does not have the force of law).
otherwise*113 indicated. The military courts, accordingly, have followed them except when their language reveals that they merely provide guidance.

Most of the Manual provisions that courts have characterized as precatory have contained the word “should.” This auxiliary verb often creates an ambiguity. If a rule says that someone “should” take a particular action, does the rule mandate that action, or only recommend it? This question unfortunately has no universal answer.

The characterization of “should” as permissive or mandatory depends on context. 80 In some cases, courts have held that rules containing the word “should” are precatory. 31 In other cases, they have found them to be binding. 82 In still other cases, the courts have raised the issue without deciding it. 83 To present a persuasive argument, litigants must be prepared *114 to compare these numerous precedents to the particular provision that they are challenging as precatory.

80 See United States v. Voorhees, 16 C.M.R. 83, 101 (C.M.A. 1954) (holding that while the word “should” is “normally construed as permissive,” context may indicate that it has a “mandatory” meaning). Cf. United States v. Merritt, 1 C.M.R. 56, 61 (1951) (“While the word ‘shall’ is generally construed to mean imperative and mandatory, it may be interpreted to be permissive and directory.”).

81 See, e.g., United States v. Howard, 17 C.M.R. 186, 194 (1954) (holding that MCM 1951, supra note 7, P 150b was precatory when it stated “the court should advise an apparently uninformed witness of his right to decline to make any answer which might tend to incriminate him”); United States v. Hartley, 14 M.J. 890, 898 (N.M.C.M.R. 1982) (holding that MCM 1969, supra note 7, at A6-A4 was precatory when it stated: “A person on active duty belonging to a reserve component ... should be described as such ....”).

82 See, e.g., United States v. Lalla, 17 M.J. 622, 625 (N.M.C.M.R. 1983) (holding that MCM 1969, supra note 7, P 76b(1) was not precatory when it stated: “If an additional punishment is authorized because of the provisions of 127c, Section B, ... the military judge ... should advise the court of the basis of the increased permissible punishment.”); United States v. Warner, 25 M.J. 64, 67 (C.M.A. 1987) (rejecting the argument that R.C.M. 1107(d)(2) was precatory when it stated: “When an accused is not serving confinement, the accused should not be deprived of more than two-thirds pay for any month as a result of one or more sentences by court-martial ... unless requested by the accused.”).

83 See, e.g., United States v. Francis, 15 M.J. 424, 428 (C.M.A. 1983) (questioning whether MCM 1969, supra note 7, P 33h was mandatory or precatory in stating that all known charges “should” be tried at a single trial); United States v. Hoxsey, 17 M.J. 964, 965 (A.F.C.M.R. 1984) (suggesting that MCM 1969, supra note 7, P 168 might be precatory when it stated that “[i]n general it is considered objectionable to hold one accountable under [art. 89] for what was said or done by him in a purely private conversation”).
Although most cases in which courts have found Manual provisions precatory have involved rules employing the word “should,” some have not. For example, in United States v. Jeffress, the Court of Military Appeals concluded that it did not have a duty to follow a portion of the punitive articles that explained the elements of kidnapping. Although the punitive articles generally have a binding effect, the court characterized this particular explanation as non-binding “discussion.”

Another example of a challenge to a rule that did not use the word “should” appears in United States v. Solnick. In that case, the government argued against enforcing Rule for Courts-Martial 1107, which directs the convening authority to act on a sentence unless “it is impracticable.” The government contended that the court should not enforce the provision or its impracticability requirement on grounds they “are essentially ‘housekeeping’ rules ‘serving no purpose other than to provide guidance to commanders through the post-trial process and assist them in taking action on results of courts-martial ....’” Although the court ultimately rejected the argument, it seriously considered the government’s position.

*115

2. Analysis and Comment

At first glance, some observers might think that the military courts improperly are failing to defer to the President when they refuse to follow the discussion or analysis printed along with the Manual. In reality, however, they are not. The President played no role in preparing these

85 See id. (upholding UCMJ art. 92(c)(2) (West 1998)). For a similar case, see United States v. Turner, 42 M.J. 689, 691 (Army Ct. Crim. App. 1995). In Turner, the court upheld the definition of “dangerous weapon” in UCMJ art. 54c(4)(a)(ii), but did not appear to feel bound by the Manual provision. Instead, it simply agreed that the definition was logical. See id. The dissent described the definition in the Manual as “a nonbinding comment on the law.” Id. at 694 (Mogridge, J., dissenting).
86 39 M.J. 930 (N.M.C.M.R. 1994).
87 MCM, supra note 7, R.C.M. 1107.
88 See Solnick, 39 M.J. at 933.
89 See id. For another precatory language challenge not involving the word “should,” see United States v. Latimer, 30 M.J. 554, 562 (A.C.M.R. 1990) (suggesting that R.C.M. 911 was precatory in stating that “[w]hen the trial is by a court-martial with members, the court-martial is ordinarily assembled immediately after the members are sworn”).
90 See supra Part III.B. (arguing that courts should defer to the President).
supplementary materials, and he did not promulgate them by executive order; on the contrary, these materials represent only the beliefs of staff personnel who worked on the Manual.\textsuperscript{91} The courts, therefore, do not violate the principle of deference to the President when they disagree with them.

The discussion accompanying the preamble explains the development and role of these supplementary sources as follows:

The Department of Defense, in conjunction with the Department of Transportation, has published supplementary materials to accompany the Manual for Courts-Martial. These materials consist of a Discussion (accompanying the Preamble, the Rules for Courts-Martial, and the Punitive Articles), an Analysis and various appendices. These supplementary materials do not constitute the official views of the Department of Defense, the Department of Transportation, the Department of Justice, the military departments, the United States Courts of Appeals for the Armed Forces, or any other authority of the Government of the United States, and they do not constitute rules.\textsuperscript{92}

The analysis of the Rules for Courts-Martial confirms this view of both the discussion and analysis:

The Discussion is intended by the drafters to serve as a treatise.... The Discussion itself, however, does not have the force of law.... The Analysis sets forth the nonbinding views of the drafters, as well as the intent of the drafters, particularly with respect to the purpose of substantial changes in present law.... \textsuperscript{[I]}t is important to remember that the analysis solely represents the views of staff personnel who worked on the project, and does not necessarily reflect the view of the President in approving it, or of the officials who formally recommended approval to the President.\textsuperscript{93}

The military courts also correctly have presumed that they generally must follow actual Manual provisions, unless their language suggests otherwise. Rule for Courts-Martial 101 declares: “These rules govern the procedures and punishments in all courts-martial ....”\textsuperscript{94} Military Rule of Evidence 101 similarly states that the rules of evidence “are applicable in

\textsuperscript{91} See MCM, supra note 7, pmbl.
\textsuperscript{92} Id.
\textsuperscript{93} Id. at A21-3.
\textsuperscript{94} Id. R.C.M. 101.
courts-martial, including summary courts-martial ...." These provisions reveal that the President generally intended actual Manual provisions to have the force of law, absent some other indication.

In deciding future cases, however, courts should take care not to dismiss the supplementary materials as irrelevant. Despite their precatory status, the courts should not simply ignore them. On the contrary, they generally should follow the “discussion” and “analysis” for three reasons.

First, the staff who prepared the supplementary material had significant expertise in the field of military law. They drafted many of the rules in the Manual, and they attempted to explain the rules as thoroughly as they could. In cases of doubt, courts generally should assume that the drafters understand the implications of their statements, and follow their nonbinding guidance.

Second, judge advocates by necessity often must rely on the supplementary materials although they know (or should know) that they are not binding. In the field, trial and defense counsel often must give quick advice without having the opportunity to conduct extensive research. Naturally, they first turn to the Manual and the material printed with it. Consequently,* even if courts have no duty to follow precatory parts of the Manual, disregarding them may have negative practical consequences.

Third, following the precatory language would accord with the longstanding judicial practice of deferring to an agency’s interpretation of the statutes that it enforces. This doctrine strictly does not apply to the armed forces, but there is no pressing need for the military courts to have a different policy. Although the frequency of job rotations prevents many judge advocates from becoming truly expert in any one legal subject, the officers who prepared the “analysis” and “discussion” had long-term

---

95 Id. MIL. R.EVID. 101.
96 See id. pmbl. & A21-1.
97 See United States v. Smith, 32 C.M.R. 105, 119 (1962). It must be remembered that in many instances facilities of legal research are not readily available, so it is wholly understandable--perhaps even desirable--that the Manual, a handy compendium on military justice, include statements concerning substantive principles of law.Id.
experience in military criminal law. They thus resembled the staff of administrative agencies in terms of expertise.

With respect to actual Manual provisions, the courts have done well in trying to determine what the President intended. When the President promulgates rules containing words like “should,” he may or may not want courts to enforce them. Indeed, the President could aid the courts significantly by eliminating the word “should” from future versions of the Manual.

B. The Manual Provision Conflicts with the UCMJ

Outside the military context, the APA permits courts to invalidate administrative rules and regulations that are “not in accordance with law.” This provision insures that legislation takes precedence over administratively promulgated materials. Under the APA, courts regularly strike down federal regulations that conflict with federal statutes. Although the APA does not apply to the Manual, the military courts occasionally have invalidated Manual provisions on the ground that they conflict with the UCMJ.

1. Leading Cases

The Court of Military Appeals began to invalidate Manual provisions that conflicted with the UCMJ shortly after the code went into effect. In United States v. Wappler, the court refused to uphold a Manual...
provision that indicated a court-martial could confine to bread and water a person not attached to or embarked on a vessel.\textsuperscript{105} The court found this provision to conflict with Article 55’s prohibition on cruel or unusual punishments.\textsuperscript{106} The court subsequently invalidated a number of other provisions in the 1951 Manual because the provisions conflicted with Article 27’s requirement of certified counsel,\textsuperscript{107} Article 31’s prohibition on self-incrimination,\textsuperscript{108} Article 37’s rules on unlawful command influence,\textsuperscript{109} *119 Article 51’s rules on voting by the panel,\textsuperscript{110} Article 66’s rules on

\textsuperscript{105} MCM 1951, supra note 7, P 127b.
\textsuperscript{106} 10 U.S.C.A. § 855 (West 1998). Noting that Article 55 affords greater protection than the Eighth Amendment, the court held that the statute prohibits confinements to bread and water except as authorized in Article 15. See Wappler, 9 C.M.R. at 26. Because Article 15 authorized confinements to bread and water only for persons attached to or embarked on vessels, see 10 U.S.C.A. § 15(b)(2)(A), the Manual provision violated Article 55. See id.
\textsuperscript{107} United States v. Drain, 16 C.M.R. 220 (1954) (invalidating MCM 1951, supra note 7, P 117a, which said that officers taking depositions need not be certified counsel, as contrary to article 27(a)).
\textsuperscript{108} See United States v. Rosato, 11 C.M.R. 143, 145 (1953) (invalidating MCM 1951, supra note 7, P 150, which said that a person can be required to make a handwriting sample, as contrary to Article 31); United States v. Eggers, 11 C.M.R. 191, 194 (1953) (same); United States v. Greer, 13 C.M.R. 132, 134 (1953) (invalidating a statement in MCM 1951, supra note 7, P 150(b) indicating that courts may compel an accused to utter words for the purpose of voice identification as contrary to Article 31); United States v. Kelley, 23 C.M.R. 48, 52 (1957) (apparently invalidating an unspecified Manual provision on admission of exculpatory statements as contrary to Article 31); United States v. Price, 23 C.M.R. 54, 56 (1957) (invalidating MCM 1951, supra note 7, P 140(a), which said that evidence of a false statement was admissible even if no preliminary warning had been given, as contrary to Article 31); United States v. Haynes, 27 C.M.R. 60, 64 (1958) (invalidating MCM 1951, supra note 7, P 140a, which said that evidence found by means of inadmissible confession was itself admissible, as contrary to Article 31).
\textsuperscript{109} See United States v. Littrice, 13 C.M.R. 43, 50 (1958) (limiting the use of MCM 1951, supra note 7, P 38, which denounces theft as a crime of moral turpitude, so as not to violate Article 37 on unlawful command influence).
\textsuperscript{110} See United States v. Jones, 22 C.M.R. 73 (1956) (invalidating a statement in MCM 1951, supra note 7, P 8a’s “guide to trial procedure,” which said that the law officer may excuse a challenged person, as contrary to Articles 41 and 51); United States v. Johnpier, 30 C.M.R. 90, 94 (1961) (invalidating a provision in MCM 1951, supra note 7, P 55 that specified a procedure for suspending trial in order to obtain the views of the convening authority).
appeal, Article 72’s rules regarding suspension of sentences, Article 83’s rules on fraudulent enlistments, Article 85’s rules on desertion, and Article 92’s rules on disobeying orders.

The conflicts that these cases addressed arose mostly because of a fundamental problem with the 1951 Manual. That version of the Manual strived to serve two competing functions. It sought to act not only as a list of rules but also as a handy treatise to aid judge advocates. The treatise-like aspects of the Manual simply went too far in many instances.

A substantial revision of the Manual occurred in 1969. Although this revision made the Manual more compatible with the UCMJ, the Court of Military Appeals continued to strike down its provisions.

In particular, it invalidated paragraphs as inconsistent with Article 38’s rules with respect to representation of defense counsel, Article 39’s

---

111 See United States v. Varnadore, 26 C.M.R. 251, 256 (1958) (invalidating MCM 1951, supra note 7, P 127b, which limited confinement to six months in the absence of a punitive discharge, as contrary to Articles 66).
112 See United States v. Cecil, 27 C.M.R. 445, 446 (1959) (invalidating MCM 1951, supra note 7, P 88e(2)(b), which allowed the convening authority to suspend a sentence without giving the accused probationary status as contrary to Article 72).
113 See United States v. Jenkins, 22 C.M.R. 51 (1956) (invalidating MCM 1951, supra note 7, P162’s definition of enlistment to include “induction” as contrary to Article 83).
114 See United States v. Cothern, 23 C.M.R. 382 (1957) (invalidating MCM 1951, supra note 7, P 164a’s inference of an intent to remain absent as contrary to Article 85).
115 See United States v. Curtin, 26 C.M.R. 207, 211-12 (1958) (invalidating MCM 1951, supra note 7, P 171b, which authorized conviction upon a finding of “constructive” knowledge, as contrary to Article 92(2)’s requirement of actual knowledge).
116 See Robert Emmet Quinn, Courts-Martial Practice: A View from the Top, 22 HASTINGS L.J. 201, 206 (1971) (explaining that many provisions of the Manual were struck down “because the Manual was both deficient and inefficient in effectuation of its purpose” and that the Manual’s “principal fault was that it tried to be an encyclopedia of military law, rather than a rule book of practice.”).
117 See supra note 7.
118 See United States v. McFadden, 42 C.M.R. 14, 15-16 (1970) (invalidating a provision in MCM 1969, supra note 7, P 47 that limited participation of uncertified assistant counsel as contrary to Article 38(e)).
provisions about what may take place at court sessions, and Article 54’s rules with respect to records of trial.

The 1984 revision, which gave the Manual its present format, largely succeeded in eliminating existing conflicts. It did not, however, eliminate them all. For example, in United States v. Davis, the Court of Military Appeals struck down a Rule for Court-Martial purporting to limit matters that the accused could submit to the convening authority when seeking clemency. In others instances, the courts have suggested that Manual provisions might conflict with the UCMJ, but ultimately have avoided making that determination.

Ironically, despite the large number of cases in which the military courts have struck down Manual provisions since the inception of the UCMJ, they actually have hesitated to find conflicts. In a series of cases, the courts have interpreted Manual provisions to avoid conflicts even when their interpretations do not comport with the most natural reading of their text. The courts’ practice in these cases resembles the familiar “rule of avoidance” that requires courts to interpret statutes in ways such that they do not violate the Constitution.

---

110 United States v. McIver, 4 M.J. 900, 903-04 (N.M.C.M.R. 1978) (invalidating a provision in MCM 1969, supra note 7, P 152 that prevented judges from ruling on motions to suppress evidence during a pre-arraignment session as contrary to Article 39).

120 See United States v. Douglas, 1 M.J. 354, 355 (C.M.A. 1976) (invalidating portions of MCM 1969, supra note 7, P 145b, which relaxed the rule on admission of non-verbatim transcripts, as conflicting with Article 54).

121 33 M.J. 13, 15 (C.M.A. 1991) (invalidating R.C.M. 1105 as conflicting with Article 60(b)(1)).


Instead, the Supreme Court has made clear that federal courts must invalidate regulations that conflict with statutes. See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842 (1984). In some cases, the courts do interpret ambiguous regulations to avoid conflicts with statutes. See Joy Technologies, Inc. v. Secretary of Labor, 99 F.3d 991, 994 (10th Cir. 1996). The military courts, however, seem to have gone farther, and have extended this practice
An early example of interpreting the Manual to avoid conflicts comes from the 1952 case of United States v. Clark.124 A provision in the Manual *121 specified that the law officer “may advise” a court-martial of lesser included offenses.125 The Court of Military Appeals interpreted this provision to mean “must advise” the court, because a contrary interpretation would conflict with Article 51.126 Subsequent cases have continued this effort to avoid conflicts even when it requires the court to adopt an unnatural or strained reading of a Manual provision.127

2. Analysis and Comment

The Constitution grants Congress the power “[t]o make [r]ules for the [government and [r]egulation of the land and naval forces.”128 Congress effectively would lack that power if the President could use executive orders to contradict legislation. The military courts have acted properly in allowing parties to challenge Manual provisions that conflict with the UCMJ.129 The courts similarly might invalidate Manual provisions that conflict with federal legislation other than the UCMJ.

Statutory support for the courts’ practice of striking down Manual provisions that conflict with the UCMJ comes from Article 36,130 Article 36 specifies that the President may prescribe rules of procedure and evidence for courts-martial.131 The article, however, insists that the rules prescribed “shall not be contrary to or inconsistent with this code.”132 Courts thus have an implicit statutory basis for striking down procedural and evidentiary provisions in the Manual if they conflict with the UCMJ.

125 MCM 1951, supra note 7, P 73c.
126 See Clark, 2 C.M.R. at 109-110.
129 Other commentators also agree that statutory provisions take precedence over the Manual. See STEPHEN A. SALTZBURG ET AL., MILITARY RULES OF EVIDENCE MANUAL X (2d ed. 1986) (stating that Manual provisions must fall if they conflict with a statute); EDWARD M. BRYNE, MILITARY LAW 12 (3d ed. 1981) (stating that Manual provisions must fall if they conflict with a statute); Fratcher, supra note 25, at 866 (discussing in depth the question of when presidential orders and congressional statutes take precedence over each other).
131 See id.
132 Id.
The military courts, however, do not stand on as firm ground when they interpret Manual provisions to avoid conflicts with statutes. Although courts traditionally have interpreted federal statutes in ways to avoid constitutional questions, they generally have not sought to avoid conflicts between regulations and statutes. Courts avoid striking down statutes because Congress passes laws only after great effort and because legislation generally reflects democratic choices. The same concern has less force in the area of administrative law. The President, unilaterally, issues the Manual by executive order. If its provisions conflict with the acts of Congress, they should fall. Invalidating Manual provisions does not create a substantial problem because the President easily can replace the stricken portions with new provisions that do not conflict with the statute. The military courts, accordingly, should reconsider their practice of adopting unnatural or strained interpretations of the Manual to prevent conflicts from arising with the UCMJ.


The Manual contains hundreds of pages of rules. Not surprisingly, a few of these rules have come into conflict with each other. In these situations, the military courts have to decide what to apply and what to ignore.

1. Leading Cases

The Court of Military Appeals recognized early that one Manual provision might clash with another. In a frequently cited passage, the court suggested that such a conflict might require the military courts to choose not to enforce one of the two provisions. Subsequent lower-court cases have announced two rules for determining which Manual provision should prevail.

First, in United States v. Morlan, the Army Board of Review ruled that when a specific provision in the Manual conflicts with a general provision, the “specific terminology controls and imparts meaning to [the] Manual Provision should prevail.”

---

133 See supra note 123.

134 This conclusion applies only to cases where courts adopt interpretations that are contrary to the ordinary meaning of Manual provisions. In cases of ambiguity, the courts may decide that an interpretation that avoids a conflict is best because the President most likely intended to comport with the statute.

135 See United States v. Villasenor, 19 C.M.R. 129, 133 (1955) (“[W] here a Manual provision does not lie outside the scope of the authority of the President, offend against the Uniform Code, conflict with another well-recognized principle of military law, or clash with other Manual provisions, we are duty bound to accord it full weight.” (emphasis added)).
Applying this rule, the Board of Review decided that a court-martial had improperly sentenced a warrant officer to a bad-conduct discharge. Although paragraph 127c of the 1951 Manual said generally that a “bad conduct discharge may be given in any case where a dishonorable discharge is given,” paragraph 126d said more specifically that “separation from the service of a warrant officer by sentence of court-martial is effected by dishonorable discharge.”

Second, in United States v. Valente, the Coast Guard Board of Review held that when Manual provisions clash, “the pertinent paragraphs should be read together and, if possible, the conflict resolved in accord with the overall intent of the Manual.” The Board used this standard in a case in which a court-martial had sentenced an accused to a bad-conduct discharge and confinement at hard labor for one year, but the convening authority conditionally had remitted the bad-conduct discharge. In reviewing the legality of the convening authority’s action, the Board had to consider three conflicting provisions in the 1951 Manual.

Paragraph 88c(2)(b) appeared to authorize what the convening authority had done by stating that the convening authority “may suspend the execution of a punitive discharge.” Paragraph 88c, however, said that the convening authority could remit part of a sentence only if a court-martial could have imposed the remaining punishment. A court-martial could not have imposed a sentence of confinement at hard labor for one year without a punitive discharge because paragraph 127b barred a court-martial from ordering confinement at hard labor for more than six months absent a punitive discharge.

Although the Board of Review did not fully explain its reasoning, it concluded that the Manual prohibited the sentence. The Board ruled that the overall intent of the Manual was to prohibit confinement with hard

---

137 See Morlan, 24 C.M.R. at 392.
138 See id. (quoting MCM 1951, supra note 7, PP 126d, 127).
140 See id. at 476.
141 See id.
142 MCM 1951, supra note 7, P 88(e)(2)(b).
143 See id. P 88c.
144 See id. P 127b.
145 See Valente, 6 C.M.R. at 476.
labor for more than six months without a punitive discharge. It, therefore, remitted the portion of the accused’s confinement in excess of six months, while retaining the conditionally remitted bad-conduct discharge. Few other cases have identified conflicts within the Manual.

2. Analysis and Comment

The two rules in Valente and Morlan for resolving conflicts between Manual provisions comport with the first two of the general principles for judicial review discussed above. The court in Valente adopted a general canon of construction that both military and nonmilitary courts have applied in the context of conflicting laws. The court in Morlan, moreover, afforded respect to the President by striving foremost to determine the overall intent of the Manual when reconciling disagreeing provisions.

On the other hand, the two decisions appear slightly inconsistent. In particular, the Coast Guard Board of Review might have reached a different result in Valente if it had considered the canon that the Army Board of Review applied in Morlan. The Coast Guard Board of Review might have seen paragraph 88e(2) as the most specific provision, and thus held that it trumped paragraphs 127b and 88c. If the Board had reached this conclusion, it would have upheld the convening authority’s action.

To reduce inconsistency, the military courts might prioritize their rules for addressing conflicts within the Manual. For example, they could decide first to apply the canon in Morlan, determining whether one Manual provision is more specific than another. Usually, they will have little difficulty with this issue. If, however, the Morlan canon does not resolve

---

*124 See id.
146 See id.
147 See id.
149 See supra Part III.A., B.
the case, the courts then could pursue the Valente case’s inquiry into the more difficult issue of the “general intent” of the Manual. Although this *125 example shows one possible way to prioritize, the courts probably should wait until they review more cases before deciding the best order for applying rules that address internal Manual conflicts. Although prioritizing will not eliminate all inconsistency in decisions, it should alleviate the problem.

D. The Manual Provision Conflicts with a Regulation

A great deal of administrative law outside of the Manual affects service members. The secretaries of the Departments of Defense and Transportation have statutory authority to pass a variety of regulations that affect the Armed Forces,151 The secretaries of the Army, Navy, and Air Force, moreover, have authority under both statutes and the Manual to pass rules and regulations.152 In addition, the judge advocate generals of the various services and the Court of Appeals of the Armed Forces also have power under the Manual to prescribe rules.153

Sometimes the Manual may conflict with other regulations. In these instances, the military courts have had to determine whether the Manual or the regulations should prevail. This question, unfortunately, has no easy or universal answer.

1. Leading Cases

In United States v. Kelson, the Court of Military Appeals upheld a Manual provision that clashed with an Army regulation. In that case, the accused had moved to dismiss a specification as multiplicitious. 155 The military trial judge refused to entertain the motion because the accused had

---


152 See, e.g., id. § 2102(b)(3) (statutory delegation of the authority to the service secretaries); MCM, supra note 7, R.C.M. 106 (Manual delegation of authority to service secretaries). The Secretary of Transportation sometimes acts with respect to the Coast Guard in a capacity equivalent to the service secretaries. See 10 U.S.C.A. § 101(a)(9)(D) (defining “secretary concerned” to include the service secretaries and Secretary of Transportation).

153 See, e.g., MCM, supra note 7, R.C.M. 109(a) (delegation to the Judge Advocate Generals), R.C.M. 1204(a) (delegation to the Court of Appeals for the Armed Forces).


155 See Kelson, 3 M.J. at 139-40.
not put it in writing before the Article 39(a) session as Army Regulation 27-10 then required.\textsuperscript{156} The Court of Military Appeals reversed, concluding *126 that the regulation conflicted with paragraph 66b of the 1969 Manual,\textsuperscript{157} which said that failure to assert a motion to dismiss in a timely manner did not waive the accused’s rights.\textsuperscript{158} Similarly, in Keaton v. Marsh, the Army Court of Criminal Appeals invalidated a provision of Army Regulation 27-10 that conflicted with Rule for Courts-Martial 305(l).\textsuperscript{159}

In another case, however, the Court of Military Appeals refused to follow a Manual provision that conflicted with a regulation. In United States v. Johnson, a soldier accused of desertion defended his absence on grounds that he had possessed a valid pass.\textsuperscript{160} Relying on paragraph 164a of the 1951 Manual, the government argued that the accused had abandoned his pass by his conduct, and thus was absent without authority.\textsuperscript{161} The court sided with the accused. Examining the Army regulation governing passes, the court concluded that a soldier had no power to alter or abandon his pass.\textsuperscript{162} It thus rejected the Manual’s statement that a soldier could abandon a pass.\textsuperscript{163} One dissenting judge would have upheld the Manual.\textsuperscript{164}

2. Analysis and Comment

It is tempting to think that the Manual always should prevail over other rules and regulations because the Manual emanates from a higher authority. After all, the President issues the Manual, while subordinate secretaries and officers issue all other rules regulations. At least one military judge appears to have adopted this hierarchical theory, stating: “When a regulation promulgated by one of the Armed Forces directly conflicts with a Manual

\begin{itemize}
  \item \textsuperscript{156} See id.
  \item \textsuperscript{157} See id. at 141; U.S. DEP’T OF ARMY, REG. 27-10, LEGAL SERVICES: MILITARY JUSTICE (8 Aug. 1994) [hereinafter AR 27-10].
  \item \textsuperscript{158} See Kelso, 3 M.J. at 141.
  \item \textsuperscript{159} See Keaton v. Marsh, 43 M.J. 757, 760 (Army Ct. Crim. App. 1996) (holding that Army Regulation 27-10 conflicted with R.C.M. 395(l) in purporting to authorize reconfinement in the absence of new evidence or misconduct).
  \item \textsuperscript{160} United States v. Johnson, 22 C.M.R. 278, 282 (1957).
  \item \textsuperscript{161} See id. at 282.
  \item \textsuperscript{162} See id. at 283 (citing Army Regulation 630-10).
  \item \textsuperscript{163} See id.
  \item \textsuperscript{164} See id. at 286 (Latimer, J., dissenting).
\end{itemize}
provision implemented by Executive Order, the conflicting provisions of that regulation are invalid.  \(^{165}\)

The relationship of the Manual to other regulations, however, requires a more sophisticated analysis. In particular, in cases of conflict, \(^{127}\) whether the Manual or regulation should prevail depends on the authority for the Manual provision and the authority for the regulation. As the following discussion will explain, Manual provisions generally should prevail over regulations promulgated by executive officers pursuant to authority delegated by the President. Whether the Manual should prevail over regulations promulgated by executive branch officers pursuant to statutory delegations depends on the relationship of the statutes to the UCMJ. Regulations, nevertheless, always should prevail over the precatory portions of the Manual.a. Regulations Passed by Executive Branch Officers under Authority Delegated by the President

The President has delegated some of his authority under the UCMJ to subordinates. In various provisions in the Manual, he has instructed the service secretaries and the judge advocate generals to pass rules and regulations. \(^{166}\) When a conflict arises between the Manual and these rules and regulations, the Manual should prevail. Courts should presume that the President did not grant subordinates authority to negate the Manual provisions that he has issued by executive order.

The Kelson and Keaton cases provide excellent examples. The Secretary of the Army passed Army Regulation 27-10 under authority granted by the President in the Manual. \(^{167}\) Accordingly, when portions of the regulation conflict with the Manual, the regulation must fall. The President would not have delegated authority to the Secretary of the Army to prescribe rules for implementing the Manual that contradict the Manual. b. Regulations Passed by Executive Branch Officers Pursuant to Statutory Authority

The Secretaries of Defense and Transportation and the various service secretaries prescribe some regulations pursuant to authority conferred \(^{128}\) directly by statute, instead of delegated by the President. In these instances, no simple rule can determine whether the regulations or the Manual should


\(^{166}\) See 10 U.S.C.A. § 940 (West 1998) (authorizing this delegation from the President); supra notes 151-52 (providing examples of delegations).

\(^{167}\) See AR 27-10, supra note 157, para. 1.1.
prevail in cases in conflict. Instead, courts must determine what Congress intended. They must compare the UCMJ to the other statutes in question. They must ask whether Congress would have wanted regulations passed by the President under the UCMJ to prevail or vice versa.

Under this standard, the Court of Military Appeals probably reached the correct result in Johnson. Although the Court did not use this reasoning, the court could have determined that Congress did not intend the UCMJ to serve as the primary law on the validity of soldiers’ passes. Passes, in general, have nothing to do with military justice. Accordingly, the court properly could have decided that the Army regulation on passes (issued pursuant to another statute) should take precedence over a Manual provision.

c. Supplementary Materials

While regulations may or may not trump Manual provisions, they always should prevail over the supplementary materials in the Manual. The President, as noted above, did not promulgate the “discussion” or “analyses” accompanying the Manual, and the courts properly have characterized them as merely precatory. Accordingly, this supplementary material must fall to regulations that do have the force of law.

E. The President Lacked Authority to Promulgate the Manual Provision

The APA allows courts to strike down federal regulations promulgated “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.” Outside of the military context, litigants frequently invoke this provision to challenge administrative law. They argue that Congress never delegated authority to an agency to make the rules or regulations, and therefore seek to have them invalidated. Although the APA does not apply to executive orders, litigants often challenge Manual provisions on essentially the same grounds.

1. Leading Cases

An early example of the argument that the President lacked authority to promulgate a Manual provision appears in United States ex. rel. Flannery

---

168 See supra Part IV.A.
170 See, e.g., MCI Telecomm. Corp. v. American Tel. & Tel. Co., 512 U.S. 218, 233 (1994) (holding that the FCC did not have authority to promulgate a regulation eliminating a rate filing requirement).
171 See Fidell, supra note 25, at 6050-54 (discussing what falls within the scope of article 36).
v. Commanding General, Second Service Command. In that case, the President declared in a pre-UCMJ version of the Manual that discharges obtained by fraud could be canceled. A federal district court invalidated the provision on the grounds that the President lacked authority to promulgate it. The Articles of War, according to the court, “authorize[d] the President not to declare substantive law but only to prescribe rules of procedure.”

The military courts more recently have invalidated a variety of Manual provisions on grounds that the President exceeded his authority under the UCMJ. Many of the cases have involved idiosyncratic issues. Two principles of general application, however, have emerged with respect to the President’s authority.

First, the cases have indicated that the President does not have power to redefine the elements of punitive articles and thus change substantive criminal law. For example, in United States v. Johnson, the accused was

---

173 See id. at 663.
174 See id.
175 Id.
176 See, e.g., United States v. Simpson, 27 C.M.R. 303, 305 (1959) (invalidating MCM 1951, supra note 7, P 126e which called for automatic reduction in grade following conviction of certain offenses); United States v. Rapolla, 34 M.J. 1268 (A.F.C.M.R. 1992) (invalidating MCM, supra note 7, pt. IV, P 46c(1)(b), which stated that larceny by wrongful withholding may arise “whether the person withholding the property acquired it lawfully or unlawfully” on grounds that the president lacked authority to define substantive crimes); United States v. Douglas, 1 M.J. 354 (C.M.A. 1976) (invalidating MCM 1969, supra note 7, P 145b, which relaxed the rules on admission of non-verbatim transcripts on grounds that it exceeded the authority granted in article 36).
177 See United States v. Omick, 30 M.J. 1122 (N.M.C.M.R. 1989) (ignoring the definition of “distribute” in MCM, supra note 7, P 37c(3), and stating that the “meaning and effect of this additional phrase need not be determined because in areas of substantive criminal law, the President has no authority to prescribe binding rules”); United States v. Everett, 41 M.J. 847, 852 (A.F.C.M.R. 1994) (stating that the President does not have authority to establish substantive rules of criminal law, but may establish a sentencing hierarchy); United States v. Sullivan, 36 M.J. 574, 577 & n.3 (A.C.M.R. 1992), overruled by United States v. Turner, 42 M.J. 689 (Army Ct. Crim. App. 1995) (invalidating the last sentence of MCM, supra note, pt. IV, P 54e(4)(a)(ii), which states that a dangerous weapon does not include an unloaded pistol on grounds that President’s authority is limited to matters of procedure and evidence and “does not include the power to exclude form the definition of ‘dangerous weapon’ those unloaded pistols used as firearms”). See
charged with conspiracy in violation of Article 81. In reviewing the case, the Navy-Marine Corps Court of Military Review decided that it did not have to follow Part IV, paragraph 5(c), which stated a rule for conspirators who join on-going conspiracies. The court explained that “[w]hether an accused may be held criminally liable for the overt act alleged is a substantive issue. Therefore, we are not bound to follow the statement set forth in paragraph 5(c) ....”

Second, the courts have held that the President cannot use his power to specify offenses under Article 134 (the general punitive article) to reach conduct covered by the more specific articles. For example, in United States v. McCormick, the accused assaulted a twelve-year-old boy. The United States charged him with violation of Article 134, instead of Article 128, which prohibits assaults. The court ruled that the Article 134 charge was improper, stating: “Congress has acted fully with respect to this offense by passage of ... Article 128. Hence, the statute is pre-emptive of the general article.”

Despite these contrary cases, most claims that the President lacked authority to pass Manual provisions fail. The principal reason for the lack of success is that the UCMJ grants the President broad authority. Article 36, as noted above, authorizes the President to create procedural and evidentiary rules. Articles 18 and 56

also United States v. Jones, 19 C.M.R. 961, 968 n.12 (A.C.M.R. 1955) (expressing doubt that the President as commander in chief has authority to prescribe “substantive rules”); United States v. Perry, 22 M.J. 669, 670 n.2 (A.C.M.R. 1986) (expressing doubt that the President as commander in chief has authority to prescribe “substantive rules” in connection with MCM 1969, supra note 7, P 199a’s discussion of the elements of the crime of rape).


See id.

See id.

See 10 U.S.C.A. § 934 (West 1998). Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.Id.


Id.


Pretrial, trial, and post-trial procedures, including modes of proof, for
further authorize the President to set the limits on punishments for violating
the punitive articles of the UCMJ. 185 Nearly everything in the Manual falls
within one of these categories. 186

A good example of this principle appears in Loving v. United States. 187
In that case, the accused challenged the procedures by which he *132
received the death penalty. 188 He argued in part that the President lacked
statutory authority to promulgate a rule specifying the aggravating
circumstances justifying capital punishment. 189 The Supreme Court

cases arising under this chapter triable in courts-martial, military comis-
sions and other military tribunals, and procedures for courts of inquiry, may
be prescribed by the President by regulations which shall, so far as he
considers practicable, apply the principles of law and the rules of evidence
generally recognized in the trial of criminal cases in the United States
district courts, but which may not be contrary to or inconsistent with this
chapter. Id.

See generally United States v. Smith, 32 C.M.R. 105, 114 (1962) (discussing
the history of Article 36 and its predecessors under the Articles of War).
185 See 10 U.S.C.A. § 818 (“[G]eneral courts-martial have jurisdiction to try
persons subject to this chapter for any offense made punishable by this chapter and
may, under such limitations as the President may prescribe, adjudge any punishment
not forbidden by this chapter, including the penalty of death when specifically
authorized by this chapter.”); id. § 856(a) (“The punishment which a court-martial
may direct for an offense may not exceed such limits as the President may prescribe
for that offense.”).
186 See, e.g., United States v. Newcomb, 5 M.J. 4, 7 (C.M.A. 1978) (Cook, J.,
concurring) (“When Congress defines military crimes and provides for their
prosecution by courts-martial, but does not particularize all procedures necessary
to achieve its purpose, the President, or his subordinates in the military departments,
must formulate rules”); United States v. Lucas, 1 C.M.R. 19, 21 (1951) (upholding
UCMJ 1951, supra note 7, P 73(b), which required the law officer to give the charge
where a guilty plea has been entered, even though the Code does not impose such a
requirement); United States v. Morlan, 24 C.M.R. 390, 394 (A.B.R. 1957)
(upholding 1951 UCMJ, supra note 7, P 126d which precluded warrant officers
from receiving bad conduct discharges, as not in excess of the President’s powers
under Article 56).
188 See id. at 769-771.
189 See id.
rejected this argument, finding authority for the rule in Articles 18, 36, and 56.  

Challenges to the President’s authority also fail because, even in the absence of statutory authority, the President may have inherent power as Commander-in-Chief to issue orders that affect courts-martial. In Swaim v. United States, a former Judge Advocate General of the Army sued the United States for his pay after a court-martial suspended him. He argued, among other things, that the President had convened the court-martial without statutory authority. The Court, however, held that “it is within the power of the president of the United States, as commander in chief, to validly convene a general court-martial” even though the Articles of War did not grant such power.

The Court in Swaim did not indicate what limits, if any, exist on the President’s power to act with respect to courts-martial absent statutory authority. This issue remains unresolved. In Reid v. Covert, a plurality of the Supreme Court subsequently stated: “[I]t has not yet been definitely established to what extent the President, as Commander-in-Chief of the armed forces, or his delegates, can promulgate, supplement or change substantive military law as well as the procedures of the military courts in time of peace, or in time of war.”

190 Id. at 770. Two years later in United States v. Scheffer, Justice Stevens asserted in dissent that the President lacked power to under Article 36 to promulgate Military Rule of Evidence 707 banning admission of polygraph evidence. See United States v. Scheffer, 118 S. Ct. 1261, 1271 (1998) (Stevens, J., dissenting).


192 Swaim, 165 U.S. at 555-56. The Articles of War allowed the President to convene a court-martial in situations in which the ordinary convening authority was disqualified because he was the accuser or prosecutor. See id. In Swaim, the ordinary convening authority--General Sheridan-- could have convened the court-martial. See id. at 556.

193 See id. at 558.

194 Reid v. Covert, 354 U.S. 1, 38 (1957). The Court saw difficulties with allowing the President to make substantive rules. The Court said: If the President can provide rules of substantive law as well as procedure, then he and his military subordinates exercise legislative, executive and judicial powers with respect to those subject to military trials. Such blending of functions in one branch of the Government is the objectionable thing which the draftsmen of the Constitution
A more recent recognition of the President’s inherent authority appears in *United States v. Ezell*. The defendant argued that no provision of the UCMJ authorized this paragraph, because it dealt with neither court-martial procedures nor evidence. The Court of Military Appeals stated:

While there may be doubt that paragraph 152 of the *Manual for Courts-Martial* represents a proper exercise of the President’s Article 36 powers, we shall consider the lawfulness of paragraph 152 as an exercise of the powers conferred upon the President by Article II of the Constitution of the United States as Commander-in-Chief of the Armed Forces.

The court, therefore, upheld the rule as properly promulgated. Other cases have expressed similar views about the President’s inherent power.

2. Analysis and Comment

The military courts have properly recognized that the President has broad power to pass procedural and sentencing rules. Articles 18, 36, and 56, by their express terms, confer this authority. Nearly everything in the present version of the *Manual* falls within these categories: Part II includes the Military Rules of Evidence, Part III contains the Rules for Courts-Martial, Part IV specifies the sentences for the punitive articles, and Part V describes non-judicial punishment. For this reason, it should come as little surprise if courts can reject most claims that the President lacked authority to promulgate a *Manual* provision. Although these articles may not allow the President to make substantive criminal law or redefine the elements of crimes, he rarely has attempted to do that.
The scope of the President’s power to create rules without UCMJ authority remains contested. Most scholars believe that the President, as Commander-in-Chief, has very broad power to make rules governing military justice. Professor Frederick B. Wiener, for example, has asserted that the President did not need UCMJ authority to promulgate the Manual. He has stated:

[Articles 36 and 56] do not involve any delegation by Congress; to the contrary, they constitute recognition that the President is Commander-in-Chief of the armed forces through direct and explicit constitutional grant.... [T]he President would have power to prescribe much of what is now in the manual even without the present express authorizations in the code ....

Professors Edward S. Corwin, William F. Fratcher, and Clinton Rossiter have expressed the same view.

Not everyone agrees, however, that the President has authority to pass rules beyond what the UCMJ authorizes. Professor Ziegel W. Neff, for example, has written a thoughtful essay expressing the contrary view. He asserts that the Framers of the Constitution never intended for the President to have plenary power over military justice, that Presidents have not exercised such power, and that such power runs contrary to the intent of Congress in enacting the UCMJ.

---

201 Wiener, supra note 25, at 361.
202 See Edward S. Corwin, The President, Office and Powers 316 (3d ed. 1948) (“Also, in the absence of conflicting legislation [the President] has powers of his own” to promulgate rules and regulations for the internal government of the land and naval forces.”); Clinton Rossiter, The Supreme Court and the Commander in Chief 109 (1951) (stating that Swain stands for the proposition that “the exercise of discretion by the President as the fountainhead of military justice is not to be questioned in courts of the United States”); Fratcher, supra note 25, at 862-63. [U]nless restricted by express statute, the President has power, under the Constitution alone, without statutory authorization, to issue regulations defining offenses within the armed forces, prescribing the punishments for them, constituting tribunals to try for such offenses, and fixing the mode of procedure and methods of review of the proceedings of such tribunals. Id.
204 See id. at 6-11.
205 See id. at 12.
206 See id. at 12-13.
Were it not for the Supreme Court’s decision in Swaim, Professor Neff’s argument might “carry the day.” The Constitution grants Congress the power to regulate the land and naval forces. Congress exercised this power in the UCMJ. By specifying in Articles 18, 36, and 56 the kinds of military justice rules that the President can promulgate, ordinary statutory analysis would suggest that Congress preempted any inherent presidential power to issue other rules. The Swaim decision, however, rejected the idea of preemption, and held that the President had authority beyond that conferred by Congress. Accordingly, until the Supreme Court limits or overrules Swaim, the military courts must consider the possibility that the President has power to pass rules in excess of what the UCMJ expressly grants.

F. The Manual Provision is Arbitrary or Capricious

Litigants occasionally have challenged Manual provisions for being arbitrary or capricious. Their claims resemble those of litigants contesting federal regulations on the same grounds under the APA. The cases considering this type of challenge fall into two categories. Some decisions suggest that the arbitrariness or capriciousness of a Manual provision does not matter. Others, however, indicate that the courts will not enforce arbitrary or capricious Manual provisions.*136

1. Leading Cases

The Court of Military Appeals upheld an admittedly arbitrary rule in United States v. Lucas. In that case, although the accused had pleaded guilty to an offense stemming from an unexcused absence, he sought reversal of his conviction. He argued that the law officer had not instructed the court-martial about the burden of proof as required by paragraph 73(b) of the 1951 Manual. This instruction would have served little purpose given the accused’s guilty plea. The Court of Military Appeals, however, reversed the conviction. It explained: “While we may be unable to ascertain any virtue in the [Manual’s] requirement, we cannot

---

208 See 5 U.S.C.A. § 706 (West 1998) (authorizing courts to set aside regulations that are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”).
209 1 C.M.R. 19, 22 (1951).
210 See id. at 21-22.
211 See id. at 22.
212 See id. at 25.
ignore the plain language used."213 Other decisions have shown a similar reluctance to review Manual provisions for arbitrariness or capriciousness.214

The Supreme Court, however, considered the substance of a Manual provision in United States v. Scheffer.215 In that case, the accused asked the Supreme Court to strike down Military Rule of Evidence 707(a) on grounds that it arbitrarily banned polygraph evidence.216 Citing non-military precedents, the Court declared that an evidence rule cannot arbitrarily "infringe[] upon a weighty interest of the accused."217 Ultimately, however, the Court upheld the rule.218 It explained that the government has a legitimate interest in excluding unreliable evidence and that "there is simply no consensus that polygraph evidence is reliable."219 Other decisions*137 similarly have reviewed Manual provisions for arbitrariness or capriciousness.220

213 Id. at 22.
214 See, e.g., United States v. Kunak, 17 C.M.R. 346, 355 (1954) (upholding the 1951 Manual provisions on insanity); United States v. Smith, 32 C.M.R. 105, 119-120 (1962) (upholding MCM 1951, supra note 7, P 140a, which prohibited convictions based on uncorroborated confessions but resting the "decision on the ground that regulations within a properly delegated legislative authority have the force of law" rather than the wisdom of the rule); United States v. Timmerman, 28 M.J. 531, 535 (A.F.C.M.R. 1987) (upholding R.C.M. 1102(d), which limited proceedings in revisions, even though the court said that the rule produced a result that was "most unfortunate, and a situation we are not sure was intended, or for that matter even considered when the present Manual was being drafted.").
216 See at 1265.
217 See id.
218 See id. at 1264.
219 Id.
220 See, e.g., United States v. Ettleson, 13 M.J. 348, 360 (C.M.A. 1982) (holding that the table of maximum punishment in MCM 1969, supra note 7, was not "arbitrary and capricious" in characterizing cocaine as a "habit-forming narcotic drug"); United States v. Prescott, 6 C.M.R. 122, 124-25 (1952) (upholding MCM 1951, supra note 7, P 127, which required increased sentences for prior offenders, as not being "an unreasonable or arbitrary exercise of executive power" because the provision was "not new or foreign to the customs and traditions of the several military departments"); United States v. Firth, 37 C.M.R. 596, 600 (A.B.R. 1966) (upholding MCM 1951, supra note 7, P 126k, which limited confinement at hard labor to three months, on grounds that it "is not arbitrary or capricious, but is based on reasonable considerations and is in keeping with established precedent and the administrative needs of the Armed Forces").
2. Analysis and Comment

The general principles for judicial review of the Manual, which were discussed in Part III above, provide conflicting guidance on the issue whether military courts should invalidate arbitrary or capricious Manual provisions. On one hand, the idea that administrative law rules found in the APA and elsewhere should guide the military court support this type of review. On the other hand, the principle of deference to the President suggests that the military courts should hesitate to second-guess the wisdom or merit of Manual provisions.221

The following rule might reconcile these competing ideas and eliminate the apparent inconsistencies in the cases described above: Military courts may review Manual provisions for arbitrariness or capriciousness, but only if they prejudice “a weighty interest” of the accused. This rule affords deference to the President, except where the deference might run afoul of the Fifth Amendment’s requirement of Due Process. Although the rule may not square with all military justice precedents, it does accord with the leading cases described above. In Lucas, the Court refused to second-guess a Manual provision that imposed a burden only on the government. In Scheffer, by contrast, the Court reviewed the substance of a rule that prejudiced the accused.

*138 G. The Manual Provision Interprets an Ambiguous Portion of the UCMJ and a Better Interpretation is Possible

Like other complex statutes, the UCMJ contains some ambiguities. The Manual interprets many of these ambiguities, but litigants often ask the military courts to ignore the Manual interpretations. They argue that, whenever the UCMJ contains an ambiguity, the court has the power to adopt its own interpretation.

1. Leading Cases

The leading cases reveal three trends. First, the courts generally have not deferred to the Manual’s interpretation of the punitive articles other than Article 134.222 Second, they have deferred to the Manual’s interpretation of Article 134.223 Third, they have not deferred to the President’s views about the meaning of the non-punitive articles in UCMJ.224 The

---

221 See supra Part II.B.
223 See id. § 934.
224 See id. §§ 801-870, 935-36.
following discussion describes these categories of cases. a. Punitive Articles Other than Article 134

When interpreting ambiguous portions of the punitive articles of the UCMJ, the courts have concluded that they do not have an absolute duty to follow the Manual. For example, in United States v. Mance, a court-martial convicted the accused of wrongful use of marijuana in violation of Article 112a based on urinalysis results. On appeal, the accused argued that the government had not shown that he had the requisite knowledge to sustain the conviction. This argument presented difficulty because Article 112a did not make clear the state of knowledge required of the accused.

In Part IV of the Manual, the President had interpreted Article 112a’s requirement of wrongfulness to imply that lack of knowledge of the true nature of a substance constituted an affirmative defense. The Court of Military Appeals, however, stated in Mance that it did not have to follow the interpretation of the Manual. The court explained: “Of course, while the views of ... the President in promulgating [the Manual] are important, they are not binding on this Court in fulfilling our responsibility to interpret the elements of substantive offenses--at least, those substantive crimes specifically delineated by Congress in Articles 77 through 132 of the Code.”

Although courts have concluded that they do not have a duty to follow the President’s interpretation of ambiguous portions of the punitive articles, they do not automatically reject them. Sometimes courts accept the President’s interpretations, and sometimes they do not. The outcome

225 26 M.J. 244 (C.M.A.).
226 See id. at 246.
227 See id. at 248-51.
228 See id. at 249.
229 See MCM, supra note 7, pt. IV, PP 37(c)(2) & (5).
230 Mance, 26 M.J. at 252.
232 See, e.g., United States v. Jenkins, 22 C.M.R. 51, 52 (1956) (refusing to follow MCM 1951, supra note 7, P 162, which interpreted “enlistment” to include induction, as an unreasonable interpretation of article 83); United States v. Rushlow, 10 C.M.R. 139, 142 (1953) (refusing to follow MCM 1951, supra note 7, P 164a, which said that a contingent purpose to return may be considered as intent to remain away permanently for the purpose of Article 85).
simply depends on whether the courts think that the President has adopted the best reading of the ambiguous language. Only in a few cases have the courts expressed conscious deference to the Manual’s interpretation of the punitive articles other than Article 134.\textsuperscript{233}b. Article 134

Courts have treated the Manual’s interpretation of Article 134 differently. Article 134 authorizes courts-martial to try any person subject to their jurisdiction for “all disorders and neglects to the prejudice of the good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital.”\textsuperscript{234} The President has included in Part IV of the Manual a non-exclusive list of fifty-three different specifications of disorders and conduct that he believes would fall within the open-ended language of Article 134.\textsuperscript{235} These include everything from fraternization\textsuperscript{236} and gambling\textsuperscript{237} to involuntary manslaughter\textsuperscript{238} and kidnapping\textsuperscript{239}

The courts generally have deferred to the President’s specifications when reviewing Article 134 cases. For example, in United States\textsuperscript{v}. Caver,\textsuperscript{240} a court-martial convicted the accused of violating the Manual’s specification of “indecent language” under Article 134 when he called a soldier a derogatory name.\textsuperscript{241} The accused challenged the specification and argued that his words did not violate Article 134.\textsuperscript{242} Rejecting this argument, the Navy-Marine Corps Court of Criminal Appeals stated:

Great deference is accorded the determinations of Congress and the President relating to the rights of servicemembers.... Accordingly, we are of the view that as long as language uttered by a service-member is “indecent,” as defined by the President in the Manual for Court-Martial, and is “of a nature to bring discredit upon the

\begin{itemize}
\item \textsuperscript{233}See, e.g., United States\textsuperscript{v}. Margelony, 33 C.M.R. 267, 269-70 (1963) (stating that the Manual’s interpretation of article 123a is entitled to great weight).
\item \textsuperscript{234}10 U.S.C.A. § 934 (West 1998).
\item \textsuperscript{235}See MCM, supra note 7, pt. IV, P 61-113.
\item \textsuperscript{236}See id. P 83.
\item \textsuperscript{237}See id. P 84.
\item \textsuperscript{238}See id. P 85.
\item \textsuperscript{239}See id. P 92.
\item \textsuperscript{240}41 M.J. 556 (N.M. Ct. Crim. App.. 1994).
\item \textsuperscript{241}See MCM, supra note 7, pt. IV, P 89.
\item \textsuperscript{242}See Caver, 41 M.J. at 561 n.4.
\end{itemize}
army, as proscribed by Congress in Article 134, it may be
the basis for disciplinary action under the Code ....

Other cases interpreting Article 134 have shown similar deference to the
President’s specifications, although at least one decision has not.

c. Other UCMJ Articles

Courts have shown less deference to the President’s interpretation of the
non-punitive articles of the UCMJ. For example, in United States v. Ware, the Court of Military Appeals rejected the President’s interpretation of Article 62. Article 62 says that the convening authority may send a ruling back to the court-martial for reconsideration. The 1969 Manual interpreted Article 62 to imply that the military judge, upon reconsideration, had to do “accede” to the convening authority’s views. The court rejected this interpretation, concluding that “reconsider” does not mean “accede.” Other cases also have rejected the Manual’s interpretation of non-punitive UCMJ articles.

2. Analysis and Comment

The general principle that the military courts should defer to the
President supports the cases that have followed the Manual’s interpretation of Article 134. Article 134 contains such broad language that its enforcement inevitably raises policy questions. The courts have respected the separation of powers by not undertaking to answer these questions

---

243 Id.
244 See, e.g., United States v. Lowery, 21 M.J. 998, 1000 (A.C.M.R. 1986) (following specification of fraternization under Article 134), aff’d 24 M.J. 347 (C.M.A. 1987) (summary disposition); United States v. Love, 15 C.M.R. 260, 262 (1954) (following MCM 1951, supra note 7, P 209, which defined the term “structure” to include a “tent” for the purposes of the unlawful entry specification in Article 134).
246 United States v. Ware, 1 M.J. 282 (C.M.A. 1976).
248 See MCM 1969, supra note 7, P 67f.
249 See 1 M.J. at 285.
251 See supra Part III.B.
themselves. Instead, they have deferred to the President who, as Commander-in-Chief, has expertise in the area of military justice. Congress presumably intended this approach; the open-ended language of Article 134 exhibits a need for narrowing by the President.\footnote{See Parker v. Levy, 417 U.S. 733, 754 (1974) (upholding Article 134 against a vagueness challenge).}

Despite the general principle of deference, some arguments may support the position that the courts do not have to follow the President’s interpretation of the punitive articles other than Article 134. The federal courts generally do not defer to the Department of Justice when it advances interpretations of the United States Criminal Code.\footnote{See Babbitt v. Sweet Home Chapter of Communities, 515 U.S. 687, 703 n. 18 (1995) (discussing the application of Chevron in criminal cases); Dan M. Kahan, \textit{Is Chevron Relevant to Federal Criminal Law}, 110 HARV. L. REV. 469, 489 (1996) (noting that federal courts do not apply the Chevron rule in cases under Title 18 of the U.S.C., but presenting arguments against this position).} Moreover, an inference that Congress intended the military courts to defer seems less likely in the *142 case of the punitive articles other than Article 134.\footnote{See supra Part III.B.2.} The UCMJ defines the offenses covered by those articles much more specifically. Congress thus appears to have had less of an intent to delegate.

With respect to Manual interpretations of non-punitive articles of the UCMJ, the lack of deference comes as somewhat of a surprise. These articles establish the workings of the military justice system. To the extent that they contain ambiguities, the Commander-in-Chief should have the authority to settle their meaning because he has responsibility for administering the military justice system. Moreover, while the military courts do not defer to the Manual when interpreting these provisions, they do accord “great weight” to executive interpretations found in other sources.\footnote{See, e.g., United States v. Margelony, 33 C.M.R. 267, 269-70 (1965) (interpreting Article 123a); United States v. Robinson, 20 C.M.R. 63 (1955) (interpreting 10 U.S.C. § 608, which prohibits officers from using enlisted members as servants).} The military courts, accordingly, should rethink their position on this issue, and consider according greater deference to the Manual.\footnote{But see Fidell, supra note 25, at 6055 (arguing against deference to the President on matters of trial procedures on grounds that military courts “would certainly be closer to these questions than would a civilian Chief Executive who may or may not be an attorney, and who, even if legally trained, may be much further from trial experience than the judges of the reviewing court”).}
H. The President Promulgated the Manual Provisions Pursuant to an Improper Delegation

Two administrative law doctrines limit Congress’s ability to delegate lawmaking authority. The “non-delegation” doctrine states that Congress may not assign its legislative powers.257 The “intelligible principle” doctrine says that, when Congress provides the executive branch with discretion in fulfilling statutory commands, it must state an intelligible principle *143 to guide exercise of the discretion.258 Litigants in military cases have challenged Manual provisions under both doctrines.

1. Leading Cases

Two years ago, the Supreme Court decided the leading military case concerning whether these doctrine apply to the Manual. In Loving v. United States, a court-martial convicted the accused, Dwight J. Loving, of murder in violation of Article 118.259 Article 118 authorizes the death penalty for murder,260 but does not limit the class of offenders eligible for capital punishment as the Supreme Court has required since Furman v. Georgia.261

The President, accordingly, promulgated Rule for Court-Martial 1004(c), which provides that a court-martial may sentence an accused to death for murder only if it finds the existence of one or more “aggravating factors” listed in the Rule.262 In Loving, the court-martial found three of the aggravating factors listed in Rule 1004(c), and decreed that Loving should receive capital punishment.263 Loving challenged his sentence, arguing among other things that the President’s creation of the list of aggravating

---

257 See J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 406 (1928) (Taft, C.J.) ("[I]t is a breach of the National fundamental law if Congress gives up its legislative power and transfers it to the President, or to the Judicial branch, or if by law it attempts to invest itself or its members with either executive power or judicial power"); Peter H. Aranson et al., A Theory of Legislative Delegation, 68 CORNELL L. REV. 1, 7-17 (1982) (discussing the history of the non-delegation doctrine).


260 10 U.S.C.A. § 918 (West 1998) ("Any person subject to this chapter who, without justification or excuse, unlawfully kills a human being ... shall suffer death or imprisonment for life as a court-martial may direct.").

261 408 U.S. 238 (1972).

262 MCM, supra note 7, R.C.M. 1004(c).

263 See Loving, 517 U.S. at 751.
factors in Rule 1004(c) violated both the non-delegation doctrine and the intelligible principle doctrine.\footnote{See \textit{id.} at 759-69 (non-delegation); \textit{id.} at 771-73 (intelligible principle).}

\textit{a. Non-Delegation Doctrine}

Loving asserted that Congress could not authorize the President to establish the list of aggravating factors in Rule 1004(c) for two reasons. First, Loving contended that Article I, section 8, clause 14 of the Constitution gives Congress exclusive power to “make [r]ules for the [g]overnment \footnote{See \textit{id.} at 759.} and [r]egulation of the land and naval forces.”\footnote{See \textit{id.} at 760-68.} The Supreme Court, however, rejected this position based on an extensive examination of the history of courts-martial in this country and England.\footnote{\textit{Id.} at 767.} It concluded that “[u]nder Clause 14, Congress, like Parliament, exercises a power of precedence over, not exclusion of, Executive authority.”\footnote{See \textit{id.} at 768-69.} The President thus may formulate rules to govern military subjects not covered by statute.

Second, Loving argued that only Congress has the power to define criminal punishments.\footnote{See \textit{id.} at 768-69.} The Supreme Court rejected this position based on precedent. The Court said: “We have upheld delegations whereby the Executive or an independent agency defines by regulation what conduct will be criminal, so long as Congress makes the violation of regulations a criminal offense and fixes the punishment, and the regulations ‘confin[e] themselves within the field covered by the statute.’”\footnote{Id. at 768 (quoting United States v. Grimaud, 220 U.S. 506, 518 (1911)).} The Court accordingly concluded that Congress could leave implementation of the capital murder provisions in the UCMJ to the President.\footnote{See \textit{Loving}, 517 U.S. at 772.}

\textit{b. Intelligible Principle Doctrine}

The Supreme Court has held that, when Congress grants the President or an executive agency discretion, it must “lay down ... an intelligible principle to which the person ... authorized to [act] is directed to conform.”\footnote{J.W. Hampton Jr. \& Co. v. United States, 276 U.S. 394, 409 (1928).} Loving argued that Congress failed to satisfy this requirement when it directed the President to create Rules for Courts-Martial in the UCMJ.\footnote{See \textit{Loving}, 517 U.S. at 772.} Article 36, he contended, directed the president to make evidentiary and procedural rules, but did not specifically tell the President what principles should guide his discretion.\footnote{See \textit{id.}}
The Supreme Court also rejected this argument in Loving. It concluded that the intelligible principle doctrine required Congress to provide less guidance when it delegated authority to a person who already had considerable expertise and experience in the area, as the Commander-in-Chief has over the armed forces. The Court explained: “We think ... that the question to be asked is not whether there was any explicit principle telling the President how to select aggravating factors, but whether any such guidance was needed, given the nature of the delegation and the officer who is to exercise the delegated authority.” In this case, the Court noted that Congress had authorized the death penalty, and that the President’s role as Commander-in-Chief already made him responsible for superintending courts-martial.

2. Analysis and Comment

In Loving v. United States, the Supreme Court performed a valuable service in clarifying the applicability of non-delegation doctrine and intelligible principle doctrine to resolve the issue of the constitutionality of RCM 1004(c). Before Loving, the Court of Military Appeals and the Court of Appeals for the Armed Forces repeatedly had faced questions about the constitutionality of Rule 1004(c). Resolving Loving’s arguments had great importance to the military justice system.

Although Loving technically concerned only Rule 1004(c), its reasoning will have a greater impact. The Court’s ruling that Article I, section 8, clause 14 does not give Congress the exclusive power to make substantive rules concerning punishment for offenses will preclude nearly all challenges to Manual provisions under the delegation doctrine. The same conclusion holds true for claims under the intelligible principle doctrine. Articles 18, 36, and 56 all delegate authority to the President to pass rules, but none of them details the content of the Rules. Loving makes clear that this silence does not matter because of the President’s unique relationship to the military.

Loving also provides guidance to the military courts as they attempt to develop general principles for reviewing Manual provisions. In Loving, the
Supreme Court started with the assumption that ordinary administrative law doctrines--like the non-delegation doctrine and the intelligible principle doctrine--applied to the UCMJ and the Manual. The Court, however,"146 considered and gave great weight to the role of the President in conducting the special business of the armed forces. Absent other guidance, the military courts should rely on these principles in handling other challenges to the Manual.279

I. The Manual Provision Violates the Accused’s Constitutional Rights

Service members, like civilians, have constitutional rights. In some instances, the accused in courts-martial have argued that Manual provisions infringe these rights. The military courts have entertained these claims, but rarely have struck down any of the rules of evidence and procedure that the President has promulgated.

1. Leading Cases

In United States v. Jacoby, the Court of Military Appeals proclaimed that “the protections in the Bill of Rights, except those which are expressly or by necessary implication inapplicable, are available to the members of our armed forces.”280 The military courts, accordingly, have entertained challenges to Manual provisions under the First, Fourth, Fifth, Sixth, and Eighth Amendments. They also have considered claims that applying new Manual provisions would violate the ex post facto clause.

a. First Amendment

The First Amendment protects the freedom of speech and religion and other rights.281 In Goldman v. Weinberger, the Supreme Court held that, although service members enjoy the protections of the First Amendment, “review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regula-

279 See supra Part III.A. & B.
280 United States v. Jacoby, 29 C.M.R. 244, 246-47 (1960). See also United States v. Lopez, 35 M.J. 35, 41 (C.M.A. 1992); FRANCIS GILLIGAN & FREDRIC LEDERER, COURT-MARTIAL PROCEDURE §§ 1-52.00, 26 (1991) (noting that scholars disagree about the application of the Bill of Rights to the military). The Supreme Court has not determined the entire extent to which the Bill of Rights applies to the armed forces.
281 See U.S. CONST. amend. 1 ("Congress shall make no law respecting establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances.").
**b. Fourth Amendment**

The Fourth Amendment prohibits unreasonable searches and seizures and imposes limitations on the issuance of warrants. The Court of Military Appeals has held that the oath requirement in the Fourth Amendment does not apply to the military, but otherwise has said that “the Fourth Amendment applies with equal force within the military as it does in the civilian community.” Litigants rarely challenge Manual provisions under the Fourth Amendment because the Military Rules of Evidence implement most of the Amendment’s protections. The military courts, nevertheless, have considered some challenges to Manual provisions.

*148 c. Fifth Amendment*

---


284 See U.S. CONST. amend. 4.


The Fifth Amendment contains four clauses. The first clause requires indictment by a grand jury, but contains an express exception for the military. In view of this exception, no cases have held that Manual provisions violate the indictment requirement.

The second clause of the Fifth Amendment prohibits double jeopardy. The Supreme Court has held that this provision applies to courts-martial. In addition, Article 44 also prohibits trying the accused twice for the same crime. The Court of Military Appeals rejected at least one challenge to a Manual provision on double jeopardy grounds.

The third clause of the Fifth Amendment establishes the privilege against compelled self-incrimination. The Court of Military Appeals held that this provision applies to the military. Article 31, however, offers even broader protection against self-incrimination. Consequently, most litigants rely on Article 31 rather than the Fifth Amendment when

\[ \text{\footnotesize{\textsuperscript{289} See U.S. CONST. amend. 5.}} \]

\[ \text{\footnotesize{\textsuperscript{290} See Wade v. Hunter, 336 US 684, 688-89 (1949). See also United States v. Richardson, 44 C.M.R. 108, 111 (1971) (confirming that the Fifth Amendment applies to the military).}} \]

\[ \text{\footnotesize{\textsuperscript{291} See 10 U.S.C.A. § 844(a) (West 1998) ("No person may, without his consent, be tried a second time for the same offense.").}} \]

\[ \text{\footnotesize{\textsuperscript{292} United States v. Burroughs, 12 M.J. 380, 382 n.2 (C.M.A. 1982) (holding that MCM 1969, supra note 7, P 71a does not violate double jeopardy).}} \]

\[ \text{\footnotesize{\textsuperscript{293} See United States v. Kemp, 32 C.M.R. 89, 97 (1962) ("[P]ersons in the military service [have] the full protection against self-incrimination afforded by the Fifth Amendment to the Constitution of the United States.").}} \]

\[ \text{\footnotesize{\textsuperscript{294} See 10 U.S.C.A. § 831(a) ("No person subject to this chapter may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him.").}} \]
contesting*149 rules in the *Manual.*295 A few cases nonetheless have considered whether *Manual* provisions violate the privilege.296

The third clause of the Fifth Amendment prohibits depriving any person of life or liberty without due process of the law. The Supreme Court recently reviewed a due process challenge to a *Manual* provision in *United States v. Scheffer.*297 The military courts have considered numerous due process challenges, but usually have upheld the *Manual.*298

---

295 See, e.g., United States v. Musguire, 25 C.M.R. 329, 330 (1958) (“Article 31 is wider in scope than the Fifth Amendment.”).

296 See, e.g., United States v. Eggers, 11 C.M.R. 191, 194 (1953) (invalidating MCM 1951, supra note 7, P 150(b), which permitted the court to compel handwriting samples, as violative of the Article 31(a) and the Fifth Amendment); United States v. Greer, 13 C.M.R. 132, 134 (1953) (same). The military courts in recent years have adopted a less strict view of Article 31. See, e.g., United States v. Harden, 18 M.J. 81, 82 (C.M.A. 1984) (holding that Article 31 does not apply to handwriting exemplars).


The fourth clause of the Fifth Amendment—the takings clause—requires the government to pay just compensation when it takes private property for public use. The Court of Military Appeals suggested that this *150 clause protects service members.299 The military courts, however, have not considered any claims that Manual provisions violate the clause.

d. Sixth Amendment

The Sixth Amendment protects a variety of different rights applicable to criminal trials.300 The Amendment’s initial clause contains four very specific guarantees. First, the initial clause provides a right to a speedy trial. The Court of Military Appeals decided that service members enjoy this right.301 In addition, the accused also enjoys speedy trial protections under Articles 10 and 33 and Rule for Courts-Martial 707.302 Because these

---

299 United State v. Paige, 7 M.J. 480, 484 & n.8 (C.M.A. 1979) (citing Turney v. United States, 115 F. Supp. 457 (Ct. Cl. 1953)).
300 See U.S. CONST. amend. 6.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.Id.

301 See United States v. Mason, 45 C.M.R. 163, 167 (1972) (“The Sixth Amendment affords an accused the right to a speedy trial.”). MCM, supra note 7, R.C.M. 707(d) expressly recognizes this “constitutional right to a speedy trial.” Interesting, as recently as 1967, the government argued that the speedy trial guarantee of the Sixth Amendment did not apply to the military. See United States v. Lamphere, 37 C.M.R. 200, 202 (C.M.A. 1967) (noting government’s argument that “the speedy trial clause of the Sixth Amendment to the Constitution of the United States does not apply in trials by court-martial; only the “spirit” of this constitutional provision extends to the military by way of [UCMJ articles 10 and 33]”).

302 See 10 U.S.C.A. § 810 (West 1998) (“When any person subject to this chapter is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or to dismiss the charges and release him.”); id. § 833 (“When a person is held for trial by general court-martial the commanding officer shall, within eight days after the accused is ordered into arrest or confinement, if practicable, forward the charges, together with the investigation and allied papers, to the officer exercising general court-martial jurisdiction.”); MCM, supra note 7, R.C.M. 707 (“The accused shall be brought to trial within 120 days ....”).
articles and this rule provide greater protection than the Sixth Amendment, litigants generally have not claimed that Manual provisions violate the constitutional speedy trial guarantee.303

Second, the initial clause of the Sixth Amendment requires a public trial. The Court of Military Appeals held that this right extends to service members.304 (The accused also has a right to a public trial under Rule 806.305 ) In addition, the Court of Appeals for the Armed Forces has ruled that the Sixth Amendment entitles the accused to a public Article 32 investigative hearing.306 Litigants have not claimed that Manual provisions violate these rights.

Third, the initial clause of the Sixth Amendment provides a right to a jury trial. The military courts, however, have held that this protection does not extend to courts-martial.307 Accordingly, litigants have not challenged Manual provisions on this ground.

Fourth, the initial clause of the Sixth Amendment guarantees the right to trial in the place where the crime occurred. The military courts have not held that this guarantee applies to courts-martial.308 Accordingly, no

304 See United States v. Hershey, 20 M.J. 433, 435 (C.M.A. 1985) (“Without question, the sixth-amendment right to a public trial is applicable to courts-martial.”); United States v. Grunden, 2 M.J. 116, 120 (C.M.A. 1977) (“The right of an accused to a public trial is a substantial right secured by the Sixth Amendment to the Constitution of the United States.”). The Court of Military Appeals at one time took the contrary position. See United States v. Brown, 22 C.M.R. 41, 47 (C.M.A. 1956) (citing that older authorities indicating that the Sixth Amendment right to a public trial did not apply), overruled in part by United States v. Grunden, 2 M.J. 116, 120 n.3 (C.M.A. 1977).
305 See MCM, supra note 7, R.C.M. 806(a) (“Except as otherwise provided in this rule, courts-martial shall be open to the public.”).
306 See ABC, Inc. v. Powell, 47 M.J. 363, 365 (1997) (“Today we make it clear that, absent ‘cause shown that outweighs the value of openness,’ the military accused is likewise entitled to a public Article 32 investigative hearing.” (citations omitted)).
307 See United States v. Guilford, 8 M.J. 598, 601 (A.C.M.R. 1979) (“The right to a trial by jury as contemplated in the Sixth Amendment does not apply to military trials of members of the armed forces in active service.”); United States v. Ezell, 6 M.J. 307, 327 n.4 (C.M.A. 1979) (Fletcher, C. J., concurring).
308 See United States v. Culp, 33 C.M.R. 411, 418 (1963) (opinion of Kilday, J) (“I know of no contention, or decision, that trial by court-martial shall be in “the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law,” as is clearly required by the Amendment
military*152 courts have invalidated Manual provisions for violating this provision.

The second clause of the Sixth Amendment requires the accused to “be informed of the nature and causes of the accusation.”*309 The Court of Appeals for the Armed Forces has applied this provision to the service members.310 The military courts, however, have upheld Manual provisions against claims that they violate this constitutional requirement.311

The third clause of the sixth amendment—the “confrontation clause”—guarantees the accused the right to confront witnesses. The Court of Appeals for the Armed Forces has held that this protection applies to service members in courts-martial.312 Although the Confrontation Clause may limit introducing hearsay, the military courts have rejected challenges to the hearsay exceptions in the Manual.313

The fourth clause of the Sixth Amendment establishes the right to compulsory process for obtaining evidence. The Court of Appeals for the Armed Forces has held that service members enjoy this right in courts-martial.314 The Military Rules of Evidence and Rules for Courts-Martial

...”.


311 See, e.g., United States v. Leslie, 2 C.M.R. 622, 624 (C.G.B.R. 1951) (upholding MCM 1951, supra note 7, PP 74b(2) and (3)).


For cases questioning or limiting evidence rules, see United States v. Groves, 23 M.J. 374 (C.M.A. 1987) (holding that Military Rule of Evidence 804(b)(4)’a exception for statements of personal or family history is limited by the confrontation clause); United States v. Cordero, 22 M.J. 216, 220 (C.M.A. 1986) (opinion of Everett, J.) (questioning whether Military Rule of Evidence 804(b)(5) imposes restrictions necessary to satisfies the confrontation clause).

attempt to satisfy this rule. The military courts, nevertheless, have had to *153 consider whether Manual provisions violate the constitutional guarantee.315

The fifth and final clause of the Sixth Amendment establishes a right to counsel. The courts have held that this right applies to general and special courts-martial, but not to summary courts-martial.316 The accused has similar statutory protection under Article 27.317 The military courts have considered whether particular Manual provisions violate the right to assistance of counsel, but usually under Article 27 rather than the Sixth Amendment.318

e. Eighth Amendment

The Eighth Amendment bans excessive bail requirements, excessive fines, and cruel and unusual punishment.319 The UCMJ contains a similar provision; Article 55 provides that “[p]unishment by flogging, or by branding, marking, or tattooing on the body, or any other cruel or unusual punishment, may not be adjudged by a court-martial or inflicted upon any person subject to this chapter.”320 The military courts have never held that the excessive bail prohibition applies to courts-martial, and have not invalidated any Manual provision based upon it.321 The Court of Appeals for the Armed Forces has considered whether sentences impose “excessive

318 See United States v. Jones, 3 M.J. 677, 678 (C.G.C.M.R. 1977) (upholding MCM 1969, supra note 7, P 6d which said that it “desirable” for the accused to have as many counsel as the government, but not required); United States v. McFadden, 42 C.M.R. 14, 16 (1970) (limiting MCM 1969, supra note 7, P 47 so that it did not prohibit uncertified assist defense counsel).
319 See U.S. CONST. amend. 8 (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”).
*154 finés” in violation of the Eighth Amendment. The military courts, however, have not struck down any Manual provisions on this ground.

In Loving v. United States, the Supreme Court assumed, but did not hold, that the Eighth Amendment’s prohibition on cruel and unusual punishment limited capital punishment under the UCMJ. The Court, however, did not invalidate Rule for Court-Martial 1004(c), which specifies aggravating circumstances necessary for imposition of the death penalty. Separately, the military courts have adopted a limiting construction for Rule 1003, which authorizes confinement to bread and water, so that it does not violate the Eighth Amendment.

f. Ex Post Facto Clause

The Ex Post Facto clause bars retroactively applying new criminal legislation. The President from time to time has updated the Manual by adding new rules. The military courts, accordingly, have had to consider whether retroactively applying new Manual provisions in some way may violate this protection.

2. Analysis and Comment

---

324 See id. at 755-76.
325 See United States v. Yatchak, 35 M.J. 379, 308 (C.M.A. 1992) (holding that R.C.M. 1003(b)(9) does not permit confinement to bread and water while attached to a ship undergoing a major overall in dock).
326 See U.S. CONST. art. I, § 8, cl. 4 (“No Bill of Attainder or ex post facto Law shall be passed.”).
328 Cf. United States v. Worley, 42 C.M.R. 46, 47 (1970) (holding that the President may change rules within his powers under Article 36 even if the new rules upset existing case law).
The foregoing cases show that the military courts review the constitutionality of *Manual* provisions, but rarely strike them down. This observation should come as little surprise. The President does not stand above the Constitution and cannot transgress its commands by executive order. At the same time, however, the President would have little desire to create unconstitutional *Manual* provisions. Promulgating rules for the military justice system that violate the basic rights of service members would create dissension and hinder the President in his role as Commander-in-Chief.

Litigants challenging *Manual* provisions, accordingly, should not rely on the Constitution alone. As noted above, in most instances, the UCMJ creates protections similar to those in the Bill of Rights. Sometimes these protections address the same subject, but extend further than the Constitution.\(^{330}\) Thus, litigants may fare better arguing that *Manual* provisions conflict the UCMJ.\(^{331}\)

Questions about the meaning of the various clauses of the Bill of Rights and the Ex Post Facto clause lie outside of the scope of this article. The military courts, however, admirably have looked to the Supreme Court and other federal courts for guidance. They have not attempted to create their own doctrines, but instead have sought to harmonize their conclusions with those of non-military tribunals.

V. Conclusion

Congress, the President, and the military courts all play roles with respect to the *Manual*. Congress authorized its creation. The President acted upon this authorization. Through his executive orders, he has established the Rules for Court-Martial, the Military Rules of Evidence, and the other portions of the *Manual*. The military courts then have had the duty not merely to apply the *Manual*’s rules, but also to review their legality.

The military courts have taken their responsibility to review the *Manual* seriously. Since adopting the UCMJ almost five decades ago, the courts have considered a variety of challenges, and have struck down many *Manual* provisions on numerous different grounds. Sufficient precedents now have accumulated to permit a systematic examination of judicial review of the *Manual*.

\(^{330}\) See supra Part IV.I.c.

\(^{331}\) See supra Part IV.B.
This article has observed that challenges to *Manual* provisions tend to fall into nine categories. Litigants have argued that courts should not enforce *Manual* provisions on grounds that they are precatory, or that they are arbitrary and capricious, or that they do not adopt the best interpretation of the UCMJ. In addition, litigants have complained that *Manual* provisions conflict with federal statutes, service regulations, or other *Manual* provisions. They also have argued that the UCMJ provides no authority for the *Manual* provisions or that the Constitution does not permit Congress to delegate authority to the President. Finally, some service members have contended that *Manual* provisions violate their constitutional rights.

This article has described and analyzed each of these categories. In addition to making various minor criticisms, the article has advanced three recommendations:

First, in reviewing *Manual* provisions, courts should look to the APA and federal administrative law cases for guidance. Although these sources do not bind the courts, they often may provide persuasive guidance. Throughout this article, the author has identified comparable challenges that litigants have made when contesting federal regulations.

Second, although the military courts have both the authority and the duty to review the *Manual*, they should remember to show deference to the President. The President has responsibility for administering the military justice system under the UCMJ and by virtue of his status as Commander-in-Chief. The military courts, accordingly, must leave certain policy choices to the President, just as the federal courts defer to administrative agencies.

Third, the military courts should strive for consistency in their decisions. In the past, they may have had difficulty because no single source summarized the different types of challenges or identified the leading precedents. This article in large part has sought to remedy this deficiency by listing, describing, and analyzing the principal bases for challenging *Manual* provisions.

This article generally has supported the work of the military judges. On the whole, they carefully have considered the arguments of litigants, and have attempted to create proper rules for resolving challenges to the *Manual*. No one could fault the judges of these courts for lacking independence when deciding whether the President has erred. On the contrary, they have not shied from this sensitive task. Any criticism presented seeks only to improve future decisions, and therefore the military justice system.