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Gangs in the Military

ABSTRACT. Gang activity in the U.S. military is increasing. Gang members undermine good order and discipline in the armed services and pose a serious threat to military and civilian communities. Congress recently responded to this threat by directing the Secretary of Defense to promulgate regulations forbidding the active participation of service personnel in criminal street gangs. This Note reviews the threat posed by military gangs and analyzes existing military policies addressing gang affiliation. This Note concludes with recommendations for the military to consider when it drafts the new regulations demanded by Congress.

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INTRODUCTION

In October 2007, a soldier from Baltimore was arrested by Army authorities in Oklahoma for the gang-related shooting of five people. Police believed the soldier was a member of the Bloods street gang. Three of his five alleged victims had ties to a rival gang known as the Young Gorilla Family. The soldier allegedly joined the Bloods prior to joining the Army. He enlisted eight days after being charged with a trespass violation. The Army was never informed that the soldier had been arrested or involved with a criminal street gang.¹

The above events are unfortunately part of a larger trend: gang activity in the U.S. military is on the rise. In the Army alone, there were seventy-nine suspected gang incidents reported in 2007.² These incidents included acts of homicide, aggravated assault, robbery, theft, and narcotics dealing.³ Junior enlisted men below the rank of sergeant committed most of these offenses, but a growing number of civilians and military dependents have been suspects as well.⁴ The spread of gang culture within the ranks disrupts good order and discipline, threatens base security, and undermines the professionalism of the armed services.

Military-trained gang members pose an even greater threat to civilian communities. While on active duty, they may use their security privileges and military equipment to further gang activities. After discharge, they can pass their training on to other gang members and use their service connections to network between civilian and military gangs.⁵ The Federal Bureau of

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1. Gus G. Sentementes & Liz F. Kay, *Baltimore Soldier Accused in Gang Shootings*, BALT. SUN, Oct. 17, 2007, at A1. Prosecutors later dropped the case against the soldier for insufficient evidence, although the Baltimore police continued to believe that he was a Blood and labeled him a "person of interest" in the ongoing investigation. Gus G. Sentementes, *Shooting Case Dropped: Prosecutors Lack Evidence To Keep Soldier Jailed in Oklahoma*, BALT. SUN, Oct. 19, 2007, at B1.
 2. U.S. ARMY CRIMINAL INVESTIGATION COMMAND, DEP'T OF THE ARMY, SUMMARY REPORT: GANG ACTIVITY THREAT ASSESSMENT FISCAL YEAR 2007, at 5 (2007) [hereinafter CID REPORT 2007] (on file with author); see also U.S. ARMY CRIMINAL INVESTIGATION COMMAND, DEP'T OF THE ARMY, SUMMARY REPORT: GANG ACTIVITY THREAT ASSESSMENT FISCAL YEAR 2006, at 5 (2006) [hereinafter CID REPORT 2006] (on file with author) (comparing the number of suspected gang incidents in 2003 (twelve) with the number in 2006 (sixty-one)).
 3. See CID REPORT 2007, *supra* note 2, at 9.
 4. See *id.* at 10.
 5. See NAT'L GANG INTELLIGENCE CTR., GANG-RELATED ACTIVITY IN THE U.S. ARMED FORCES INCREASING 3 (2007) [hereinafter NGIC REPORT], http://militarytimes.com/static/projects/pages/ngic_gangs.pdf.

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Investigation (FBI) fears that access to weapons and combat training “could ultimately result in more organized, sophisticated, and deadly gangs, as well as an increase in deadly assaults on law enforcement officers.”⁶ Numerous media services and local agencies have echoed these concerns.⁷

Despite the widespread recognition that gang members pose a serious risk to military and civilian communities, the armed forces have had little success in reducing the number of serving gang members or preventing gang-related crime. This failure is partly attributable to difficulties in the recruitment process. Military recruiters are not always properly trained to recognize gang affiliation. Commanders eager to fill the ranks, moreover, often give “moral waivers” to even those recruits whose gang affiliations are detected.⁸ A lack of adequate preventative and disciplinary measures available to commanders seeking to protect their units against gang activity further exacerbates the shortcomings of recruitment practices.⁹

Responding to mounting criticism of the military’s failure to reduce gang activity in the armed services, Congress recently required the Secretary of Defense to prescribe regulations “to prohibit the active participation by members of the Armed Forces in a criminal street gang.”¹⁰ Congress’s order provides the military with an opportunity to adopt a new approach to confronting the criminal gang threat.

This Note encourages the military to capitalize on the opportunity provided by Congress. Part I reviews the extent of the criminal gang threat to military and civilian communities. Part II assesses the effectiveness of the armed services’ existing anti-gang measures. Part III recommends specific ideas for the military to consider when it drafts the new required regulations.

6. *Id.*

7. See, e.g., Timothy Egan, *Military Base Jarred by Specter of Gang Killings*, N.Y. TIMES, Feb. 3, 1993, at A10; Josh Gerstein, *Army Transfers Could Trigger a Gang War*, N.Y. SUN, Mar. 16, 2006, at 3; Charles Sheehan, *FBI Probes Military-Gang Ties*, CHI. TRIB., May 2, 2006, at A3; Zahira Torres, *FBI Monitors Soldiers New to Fort Bliss for Gang Involvement*, EL PASO TIMES, Mar. 16, 2006, at 1B; *Fox 11 News at Ten: Gangs in the Military* (KTTV Fox television broadcast May 8, 2006).

8. See Nick Turse, *U.S. Is Recruiting Misfits for Army: Felons, Racists, Gang Members Fill in the Ranks*, S.F. CHRON., Oct. 1, 2006, at F6; see also Josh White, *Army Off Target on Recruits: Percentage of High School Graduates Drops to New Low*, WASH. POST, Jan. 23, 2008, at A2.

9. See *infra* Section II.B (discussing existing anti-gang provisions and their shortcomings).

10. National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 544, 122 Stat. 3, 116.

I. THE CRIMINAL GANG THREAT

Crime rates in the United States have dropped dramatically over the last decade.¹¹ Violent crime has fallen 22.5% and property crime 22.7% from 1997 levels.¹² During the same period, criminal gang membership has increased and diversified.¹³ Gangs today are more sophisticated in their use of illegal tactics, and they are more resistant to crime-fighting methods.¹⁴ They remain the primary distributors of illegal drugs in the United States¹⁵ and often cooperate with traditional organized criminal entities.¹⁶

A. Gang Members in the United States Military

Although military communities are generally more stable and secure than their civilian counterparts, they are not immune from gang activity.¹⁷ Recent data suggest that the rise in gang activity has been more pronounced in the military than in the nation at large.¹⁸ This data is conveyed most succinctly in separate reports compiled by the National Gang Intelligence Center (NGIC), a division of the FBI, and the Criminal Investigation Command (CID) of the

11. See Bureau of Justice Statistics, U.S. Department of Justice, Crime and Victim Statistics, <http://www.ojp.gov/bjs/cvict.htm#summary> (last visited Dec. 3, 2008).

12. *Id.*

13. See National Youth Gang Center, National Youth Gang Survey Analysis, <http://www.iir.com/nygc/nygsa/default.htm> (last visited Dec. 3, 2008); see also NAT'L ALLIANCE OF GANG INVESTIGATORS ASS'NS & BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, 2005 NATIONAL GANG THREAT ASSESSMENT, at v-ix (2005), http://www.nagia.org/PDFs/2005_national_gang_threat_assessment.pdf [hereinafter NATIONAL GANG THREAT ASSESSMENT]. The National Youth Gang Center estimates that there are approximately 750,000 gang members involved in over 25,000 gangs within the United States. In many communities, law enforcement personnel have reported the threat from gangs as "[g]etting [w]orse." National Youth Gang Center, *supra*.

14. NATIONAL GANG THREAT ASSESSMENT, *supra* note 13, at vii-ix, 3-4.

15. See *id.* at 1.

16. See *id.* at vi, 2-3, 5. Such cooperative arrangements are common with Mexican, Asian, and Russian organized crime but rarely extend to domestic terrorist organizations. *Id.*

17. CID REPORT 2007, *supra* note 2, at 2-3; CID REPORT 2006, *supra* note 2, at 2.

18. Compare National Youth Gang Center, *supra* note 13 (showing that between 2003 and 2005 the number of suspected gang-related incidents nationwide rose approximately ten percent), with CID REPORT 2006, *supra* note 2, at 5-7 (showing a fifty percent increase in reported gang-related incidents in the Army).

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U.S. Army. These reports detail an increasing number of gang-related crimes involving military personnel.¹⁹

According to CID reports, a total of 183 suspected gang-related incidents and felony investigations were identified by military police between 2003 and 2007.²⁰ Reflecting the recent rise in military gang activity, more than three-quarters of these incidents and investigations were reported in 2006 and 2007.²¹ Among the individuals identified as gang offenders in the 2007 CID report, most were junior enlisted men or civilian dependents stationed in the United States; none was a commissioned officer or senior noncommissioned officer.²² The CID identified members of eleven known national gangs in 2007 but noted that the true number and variations of gangs in the Army is unclear.²³ Based on this information, the CID concluded that the threat to the Army from gangs will continue to create new challenges for military authorities.²⁴

The NGIC report is more alarming in its finding that “[m]embers of nearly every major street gang . . . are present in most branches and across all ranks of the military.”²⁵ The report notes that the FBI has identified over forty

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19. NGIC REPORT, *supra* note 5, at 5; CID REPORT 2006, *supra* note 2, at 2.
 20. CID REPORT 2007, *supra* note 2, at 5; CID REPORT 2006, *supra* note 2, at 4. It is important to note that the number of suspected gang-related incidents and felony investigations includes at least some occurrences in which the only military nexus was the assault of a soldier by a gang member. See Telephone Interview with Christopher Grey, Chief of Pub. Affairs, U.S. Army Criminal Investigation Command (Aug. 18, 2008) [hereinafter Grey Interview] (on file with author).
 21. See CID REPORT 2007, *supra* note 2, at 5 (stating that seventy-nine incidents were reported in 2007 and sixty incidents in 2006, compared with twenty-four in 2005); CID REPORT 2006, *supra* note 2, at 5 (stating that nine incidents were reported in 2004, and twelve in 2003). In 2006, the Army also reported a significant increase in on-post gang activity, which was rare in prior years. CID REPORT 2007, *supra* note 2, at 5-6 (“There was an increase in the number of gang related investigations on post with a decrease in the number of gang related investigations off post. The reason for that shift from the previous pattern could not be ascertained, but may be attributable to increased emphasis and policing by MP and CID.”).
 22. See *id.* at 10 graph 5 (noting that between 2005 and 2007 fifty-nine percent of gang-related offenders identified were in the grades of E1-E4, ten percent were in the grades E5 or E6, and thirty-one percent were civilian subjects).
 23. See *id.* at 9; see also CID REPORT 2006, *supra* note 2, at 8 tbl.5 (naming the Bloods, Crips, Gangster Disciples, Georgia Boys, Mexican Mafia, MS-13, Outlaw MC Gang, Sorenos, and Street Military as active within the military in 2006).
 24. See CID REPORT 2007, *supra* note 2, at 11-12; see also CID REPORT 2006, *supra* note 2, at 5 tbl.2, 10-11 (explaining that even though gang investigations comprise only 0.16% of the investigations pursued by CID in 2006, they tax the limited resources of criminal intelligence units).
 25. NGIC REPORT, *supra* note 5, at 5.

military-affiliated gang members at Fort Bliss since 2004, while the Army has identified nearly forty military-affiliated gang members at Fort Hood since 2003 and nearly 130 at Fort Lewis since 2005.²⁶ The report concludes that gang-related activity in the military is increasing and diversifying.²⁷ It refrains from quantifying these trends, because “[a]ccurate data reflecting gang-related incidences occurring on military installations is limited.”²⁸

The CID and NGIC reports both emphasize the involvement of dependent children of service members in gang activity on or near military installations.²⁹ Military children are “targets for gang membership because their families’ transient nature often makes them feel isolated, vulnerable, and in need of companionship.”³⁰ Dependents of service members have been involved in a number of reported crimes on and off of military bases.³¹

B. Crimes Committed by Gang-Affiliated Service Personnel

Gang incidents involving active-duty personnel encompass nearly the entire scope of criminal activity. As with civilian gangs, the most common felonies associated with gang activity in the military are illegal drug offenses.³² While these crimes typically involve the retail distribution of drugs,³³ military gang members have been known to use their security clearances and equipment to facilitate sophisticated drug-trafficking schemes.³⁴ Military gang members also engage in the smuggling of weapons.³⁵ In one instance, a gang member in

26. *See id.* at 5-6.

27. *Id.*

28. *Id.* at 6.

29. *See id.* at 15-16; CID REPORT 2006, *supra* note 2, at 9-10.

30. NGIC REPORT, *supra* note 5, at 16.

31. *See id.*

32. *See* CID REPORT 2006, *supra* note 2, at 9.

33. *See, e.g.*, Brief on Behalf of Appellee, *United States v. Prescott*, 62 M.J. 390 (C.A.A.F. 2005) (No. 05-0533), 2004 WL 3510903 (contesting defendant’s petition for grant of review of a forty-two month sentence for the distribution of marijuana).

34. *See* NGIC REPORT, *supra* note 5, at 12 (detailing an incident in which military personnel stationed in Colombia transported forty-six kilograms of cocaine to El Paso, Texas for distribution by a gang).

35. *See, e.g.*, *United States v. Zimmerman*, 43 M.J. 782, 785-87 (A. Ct. Crim. App. 1996); NGIC REPORT, *supra* note 5, at 10-12 (listing multiple recent examples of military personnel stealing and smuggling weapons for gangs); *cf.* *United States v. Roth*, 52 M.J. 187, 187-90 (C.A.A.F. 1999) (discussing defendant’s conviction for stealing night-vision goggles for use by a criminal street gang).

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the Army smuggled home four AK-47s from Iraq that were used to commit multiple bank robberies.³⁶ Due to the domestic security implications of such crimes, law enforcement agencies have identified all reported weapons-related incidents as serious threats.³⁷

Murder, assault, and robbery complete the list of felonies that gang members in the military reportedly commit.³⁸ Killings are often linked to inter- or intra-gang conflicts. One soldier stationed in Germany died after receiving numerous punches from fellow gang members during an initiation rite.³⁹ Three other soldiers in Alaska were charged with murder after they allegedly killed a civilian while exchanging gunfire with rival gang members.⁴⁰ Other killings occur at the hands of military gang members during the commission of separate criminal offenses.⁴¹

Gang members in the military also commit lesser crimes of vandalism, domestic disturbance, and money laundering.⁴² Gang-related vandalism has attracted the most media attention, with several national newspapers reporting a proliferation of gang graffiti on military installations.⁴³

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36. See CID REPORT 2006, *supra* note 2, at 12; see also Eric M. Weiss, *Robbers' Guns Came from Iraq, Officials Say*, WASH. POST, July 16, 2006, at C1 (describing the sale of smuggled weapons to gang members).
 37. See NGIC REPORT, *supra* note 5, at 10-11 (describing how convicted military gang members have detailed the ease with which they and other gang members stole military weapons and equipment and used them on the streets or sold them to civilian gang members); see also *Gang Members in the Military*, INTELLIGENCE OPERATIONS BULL. (Cal. Dep't of Justice, Sacramento, Cal.), Nov. 2005, at 2 [hereinafter *Gang Members*] (on file with author) (listing times in which law enforcement officials have recovered military-issued weapons and explosives—such as machine guns and grenades—from gang members while conducting searches and routine traffic stops).
 38. See CID REPORT 2006, *supra* note 2, at 9.
 39. CID REPORT 2006, *supra* note 2, at 2; see also Seamus O'Connor, *Airman Charged in Soldier's Beating Death*, ARMY TIMES, Dec. 17, 2007, http://www.armytimes.com/news/2007/12/airforce_gangbeating_charges_071213/.
 40. CID REPORT 2006, *supra* note 2, at 2; NGIC REPORT, *supra* note 5, at 13.
 41. See, e.g., CID REPORT 2006, *supra* note 2, at 12 (relating the facts of a case in which a soldier and gang member was arrested by civilian authorities for the robbery of an off-post convenience store and the murder of the store attendant).
 42. See NGIC REPORT, *supra* note 5, at 9-10.
 43. See Sheehan, *supra* note 7.

C. Implications of Gang Activity in the Military

The presence of gang members in the armed forces poses worrisome problems. In the military, gang members threaten unit order and compromise base security. A shocking example of this is found in the facts of *United States v. Quintanilla*,⁴⁴ in which a Marine sergeant and self-proclaimed gang member shot his commanding officer and executive officer—both lieutenant colonels—and threatened to continue killing officers until his fellow gang members were released from confinement.⁴⁵ Other examples of destabilizing gang influences involve narcotics crimes, robberies, and aggravated assaults.⁴⁶ Often, these incidents trigger other acts of disobedience or retaliation. Over the years in which the Army has recorded gang activity, the five bases initially reporting

44. 63 M.J. 29, 30-33 (C.A.A.F. 2006); *see also* *United States v. Quintanilla*, 60 M.J. 852, 854-55 (N-M. Ct. Crim. App. 2005) (describing the facts of the case in graphic detail).

45. *Quintanilla*, 60 M.J. at 855. A particularly relevant section of the case reads,

The appellant said, “Gunnery Sergeant, apprehend me, I just shot the CO and XO.” . . . The appellant talked about why he shot the CO and XO, complaining that he wasn’t treated well in the squadron and that he did it for his “brown brothers,” or words to that effect. At one point, the appellant stood up, pulled down his coveralls, took off his undershirt, and displayed the tattoos that covered his upper body. One of the large tattoos read “Sureno,” which the Government argued was a reference to Southern California gangs.

Id.

46. *See* CID REPORT 2007, *supra* note 2, at 9 (depicting the frequency of investigations into intra-unit offenses including drugs, aggravated assaults, thefts, and robberies); CID REPORT 2006, *supra* note 2, at 12-14 (relating how four gang-affiliated soldiers were convicted of robbing two other soldiers and listing additional gang-related criminal acts); NGIC REPORT, *supra* note 5, at 13 (describing crimes committed by soldiers in gangs against rival gang members). Other incidents of gang-related tension in military units include a gun fight between airmen over the playing of a rap song, *see* Supplement to Petition for Grant of Review at 3, *United States v. Coward*, 64 M.J. 198, (C.A.A.F. 2006) (No. 06-0696), 2006 WL 2191649, drug deals between military members, *see* Brief on Behalf of Respondent-Appellee at 2-4, *United States v. Prescott*, 62 M.J. 390 (C.A.A.F. 2005) (No. 05-0533), 2004 WL 3510903, and a base shooting that resulted from a basketball game between gang members, *see* Supplement to Petition for Grant of Review at 2-4, *United States v. Richardson*, 53 M.J. 113 (C.A.A.F. 2000) (No. 00-0087), 2000 WL 34615399. Colonel George Reed, the director of military police operations at Fort Bragg at the time of the last-mentioned incident, noted that the gang affiliations of the implicated soldiers were undetected prior to the shooting. *See* Telephone Interview with Colonel George Reed, U.S. Army (ret.) (Jan. 10, 2008) [hereinafter Reed Interview] (on file with author).

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high rates of gang activity have witnessed an increase in those rates despite efforts to address the situation.⁴⁷

The presence of gangs in the armed services also threatens to undermine the professionalism of the military and bring discredit upon the nation's forces. The potency of this threat to the public perception of the armed services is evidenced by the number of critical news reports published after reported incidents of military gang activity.⁴⁸ In each incident, gang members compromised the otherwise proud traditions of our country's armed forces.

Gang activity in the military has a negative impact on civilian communities as well. Law enforcement officials are concerned about gang-affiliated soldiers transferring their acquired training and weapons back to communities to facilitate the commission of crimes.⁴⁹ When such transfers of knowledge and supplies have occurred, communities have suffered and law enforcement officials have fared poorly.⁵⁰ In particular, civilian gangs with military ties have proven extremely dangerous to confront and track.⁵¹ These issues become even more problematic as gangs active in the military have become more sophisticated and mobile.⁵²

Examples of the dangers posed by gang members in the military are not scarce. In Ceres, California, a Marine, who was a Norteño gang member, fatally shot a police officer during an altercation.⁵³ The Marine had served in Iraq and chose his weapon because he knew its rounds could pierce body armor.⁵⁴ At Fort Hood, Texas, Army troopers affiliated with the Gangster

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47. See CID REPORT 2007, *supra* note 2, at 7 (noting that Fort Bliss, Fort Bragg, Fort Campbell, Fort Sill, and Fort Stewart have all shown increases in gang reporting for the last two consecutive fiscal years).
 48. See, e.g., Add Seymour Jr. & Carlos Campos, *Soldier Accused of Importing Guns*, ATLANTA J.-CONST., Sept. 22, 2006, at 9D; *Scarborough Country* (MSNBC television broadcast Mar. 15, 2006) (transcript available at <http://www.msnbc.msn.com/id/11857810/>); sources cited *supra* notes 7-8.
 49. See NGIC REPORT, *supra* note 5, at 3.
 50. See *id.* at 9-14.
 51. *Id.*
 52. See *id.* at 3; Reed Interview, *supra* note 46 (describing the many problems that military and civilian police face in following military gang activity and noting complications created by the mobility of military personnel).
 53. *Gang Members*, *supra* note 37, at 2 (describing the attack and noting how the Marine used his military training against the police); see also Janine DeFao, *Marine Who Killed Cop Linked to Gang Activity*, S.F. CHRON., Jan. 16, 2005, at A17; Press Release, Sheriff's Dep't, Stanislaus County, Cal., New Information About Andres Raya and His Gang Affiliation (Jan. 14, 2005), <http://www.ci.ceres.ca.us/newsreleases/20050114a.html>.
 54. See DeFao, *supra* note 53.

Disciples murdered the friends of a local nightclub owner who expelled their leader for unruly behavior.⁵⁵ At Fort Lewis, Washington, an Army specialist and several accomplices stole night-vision goggles to sell to a gang in California.⁵⁶ And in Columbia, South Carolina, four Marines were caught recruiting local teenagers into the Crips.⁵⁷

II. EXISTING MILITARY POLICIES ADDRESSING GANG AFFILIATION

The military justice system is well equipped to prosecute service personnel, including gang members, once they commit a crime. The Uniform Code of Military Justice (UCMJ) authorizes criminal and nonjudicial forms of punishment and empowers commanders to “promote efficiency and effectiveness in the military establishment.”⁵⁸ Assisting commanders in their disciplinary role, military police officers investigate crimes and members of the Judge Advocate General’s (JAG) Corps prosecute offenders. Where criminal provisions do not apply, commanders have broad administrative powers to impose other sanctions.⁵⁹

Notwithstanding the breadth of these criminal and administrative sanctions, the military has been unable to curb the spread of gang activity in its ranks.⁶⁰ The military has been unsuccessful because its procedures for screening and removing gang members fall short of the efficiency of its post-

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55. See *United States v. Billings*, 58 M.J. 861, 862 (A. Ct. Crim. App. 2003).
 56. See *United States v. Roth*, 52 M.J. 187, 187-90 (C.A.A.F. 1999). The defendant in *Roth* was a member of the West Coast Criminals. An agent from CID “testified without defense objection that the theft of night-vision goggles was a very serious offense because the goggles might ‘fall into the wrong hands.’ He went on to explain that the ‘wrong hands’ included drug traffickers and gangs.” *Id.* at 188.
 57. See *CBS Evening News: Are Gang Members Using Military Training?* (CBS television broadcast July 28, 2007), available at <http://www.cbsnews.com/stories/2007/07/29/eveningnews/main3108597.shtml>.
 58. JOINT SERV. COMM. ON MILITARY JUSTICE, DEP’T OF DEF., Preamble to MANUAL FOR COURTS-MARTIAL UNITED STATES, at I-1 (2005) [hereinafter MANUAL FOR COURTS-MARTIAL]; see also EUGENE R. FIDELL, ELIZABETH L. HILLMAN & DWIGHT H. SULLIVAN, MILITARY JUSTICE: CASES AND MATERIALS 133, 153-72, 401, 406-10 (2007) (discussing the breadth of military criminal law and providing examples of commanders’ authority to enforce criminal laws).
 59. See FIDELL ET AL., *supra* note 58, at 847-50; DEP’T OF THE ARMY, COMMANDER’S EQUAL OPPORTUNITY HANDBOOK app. B-8-1 (2005) [hereinafter EQUAL OPPORTUNITY HANDBOOK] (detailing the administrative options available to commanders), <http://www.wood.army.mil/eop/EO%20FILES/regspubs/TC26-6.pdf>.
 60. CID REPORT 2006, *supra* note 2, at 2-3.

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offense mechanisms. The Sections below analyze current gang countermeasures, focusing on the limitations and shortcomings that hinder the elimination of gangs in the military.

A. Recruitment

The rise in gang activity in the military has led some to fault the recruitment policies of the various branches.⁶¹ This criticism recently intensified after the Department of Defense relaxed its standards for granting “moral waivers” to recruits with criminal backgrounds.⁶² Critics generally complain that the military has lowered its standards to accommodate recruiting needs.⁶³ Because the Army has the greatest number of personnel and recruitment problems of any military branch, it has received the brunt of this criticism.⁶⁴

The Army has responded to critiques of its recruitment policies by maintaining that the quality of its applicants remains high and noting that its current policies are designed to “weed out” gang members.⁶⁵ Under these policies, recruiters interview applicants and ask them to divulge their criminal history, including expunged, sealed, and juvenile records. If an applicant discloses past law violations, he must undergo a suitability review that includes

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61. See Rod Powers, *Gang Activity in the U.S. Military*, ABOUT.COM: US MILITARY, Feb. 12, 2007, <http://usmilitary.about.com/od/justicelawlegislation/a/gangs.htm> (attributing increased military gang membership to lowered recruitment standards); cf. Press Release, Rep. Mike Thompson, House Passes Thompson’s Amendment To Prohibit Gang Members in the Military (May 17, 2007), <http://mikethompson.house.gov/prarticle.aspx?newsid=156> (discussing the need to stop “gang members from getting in the military in the first place”).
 62. See Turse, *supra* note 8; Military Recruiting 2007: Army Misses Benchmarks by Greater Margin, <http://www.nationalpriorities.org/book/export/html/6017> (last visited Dec. 3, 2008) (describing the troubled history of military recruiting since 2005).
 63. See, e.g., White, *supra* note 8; Fred Kaplan, *Dumb and Dumber: The U.S. Army Lowers Recruitment Standards . . . Again*, SLATE, Jan. 24, 2008, <http://www.slate.com/id/2182752> (“In order to meet recruitment targets, the Army has even had to scour the bottom of the barrel. There used to be a regulation that no more than 2 percent of all recruits could be ‘Category IV’ – defined as applicants who score in the 10th to 30th percentile on the aptitude tests. In 2004, just 0.6 percent of new soldiers scored so low. In 2005, as the Army had a hard time recruiting, the cap was raised to 4 percent. And in 2007, according to the new data, the Army exceeded even that limit – 4.1 percent of new recruits last year were Cat IVs.”).
 64. See, e.g., Turse, *supra* note 8 (asserting that lower recruiting standards have caused a troubling breakdown in the quality and composition of the Army).
 65. Jim Garamone, *Recruit Quality Remains High*, AM. FORCES PRESS SERVICE, July 12, 2006, <http://www.defenselink.mil/news/newsarticle.aspx?id=123> (reviewing the general quality of Army recruits).

a police record check. The record check requires a recruiter to solicit an applicant's criminal file from state and local authorities.⁶⁶ Applicants with a confirmed criminal history containing five or more minor nontraffic violations, two or more misdemeanor charges, a combination of four or more minor nontraffic or misdemeanor charges, or one serious criminal misconduct charge must seek a moral waiver or face discharge.⁶⁷ Moral waivers are granted by the Commanding General of the Army Recruiting Command, who applies the "whole person" concept of review.⁶⁸ This review concept considers the severity of the offense(s), the applicant's capacity for reform, and the degree to which the applicant meets other Army standards.⁶⁹

The Army's official position on accepting gang members is codified in Army Regulation (A.R.) 601-210, § 4-2(e)(1)(a)(9):

When it is reported . . . through a tattoo, behavior, verbal or written communication, appearance, or gestures that an individual is or may be involved with an extremist organization, group, or gang, the following procedures will be used to determine eligibility:

a. The commander must ensure from a series of direct and indirect questions that the applicant is in fact given fair assessment and determination without personal bias or predetermined outcome.

b. A person who admits to or is determined to have been associated with or in a gang linked to criminal or extremist activity will be questioned concerning the involvement. The fact that a person has

66. See DEP'T OF THE ARMY, ARMY REGULATION 601-210, § 2-11 (2007) [hereinafter A.R. 601-210], http://www.apd.army.mil/pdffiles/r601_210.pdf.

67. The Army does not have an exhaustive list of "serious criminal misconduct offenses," but the following crimes are generally considered to meet the standard: aggravated assault, arson, breaking and entering, bribery, burglary, carjacking, carnal knowledge of a minor, child abuse, domestic battery (especially if prosecutable under the Lautenberg Amendment), driving while intoxicated, embezzlement, forgery, graft, hate crimes, identity theft, kidnapping, manslaughter, murder, acts of moral turpitude, narcotics offenses, pandering, perjury, possession of explosives, rape, receiving stolen property, riot, robbery, sodomy, solicitation of prostitution, and terrorist threats. See Rod Powers, *Army Criminal History Waivers*, ABOUT.COM: U.S. MILITARY, <http://usmilitary.about.com/od/armyjoin/a/criminal5.htm> (last visited Dec. 3, 2008).

68. A.R. 601-210, *supra* note 66, § 4-2(c).

69. For the complete set of standards and procedures governing moral waivers, see U.S. ARMY RECRUITING COMMAND, DEP'T OF THE ARMY, USAREC REGULATION 601-56 (2006), http://www.usarec.army.mil/im/formpub/REC_PUBS/R601_56.pdf.

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been in a gang may not be grounds for disqualification. The whole person concept must be applied.⁷⁰

This regulation provides recruiters and commanders broad latitude in determining the extent and nature of an applicant's gang membership. Such latitude is not surprising, given force requirements and the historic perception of the Army as a place where individuals may seek a fresh start.⁷¹

In many ways, the Army's policies are justified. They balance competing interests, encourage information sharing, and give discretion to the individuals most familiar with the applicant. But shortcomings in the execution of the policies undermine the Army's good intentions and lend support to critics' claims of lowered standards for recruitment.

First, the evaluative process depends upon the honesty of the applicant. Those who admit prior criminal behavior are screened and subjected to a police record check, but "[a]pplicants who claim no law violations or claim only minor traffic offenses are not required to have police record checks or court checks."⁷² A recruiter may question an applicant's veracity and conduct a police check despite the applicant's claims, but such occurrences are rare—especially during a time of war.⁷³ Should a recruiter detect that an applicant is lying about his criminal history, the Army may only sanction the applicant with discharge and reenlistment restrictions.⁷⁴

Second, even when recruiters conduct a police record check, they are likely to miss important information and warning signs due to communication failures. These problems are the result of provisions in the regulations that expedite the recruitment process at the expense of efforts to gather information about questionable applicants. The most glaring of these provisions is A.R. 601-210, § 2-11, which permits a recruiter to dispense with a police record check if the police or court authorities (1) charge a processing fee,⁷⁵ or (2) do not respond to a file request within seven working days, despite military efforts.⁷⁶ These clauses result in a disconnect between recruiters and some state and local

70. A.R. 601-210, *supra* note 66, § 4-2(e)(1)(a)(9).

71. *See, e.g.*, SCOTT A. OSTROW, *GUIDE TO JOINING THE MILITARY* 16 (2d ed. 2004) (“[S]ome individuals who have made mistakes in the past get a fresh start in the military.”).

72. A.R. 601-210, *supra* note 66, § 2-11(b)(2).

73. *See* Ann Scott Tyson, *Military Waivers for Ex-Convicts Increase*, WASH. POST, Apr. 22, 2008, at A1.

74. A.R. 601-210, *supra* note 66, § 4-2(f).

75. *Id.* § 2-11(e).

76. *Id.* § 2-11(b).

offices.⁷⁷ Also troubling is the absence of a requirement for recruiters to seek federal records during a police check. Given the breadth and accessibility of federal agencies' resources, this is a noticeable omission.

Third, educational shortcomings hinder the efficient operation of recruitment procedures. Such deficiencies are particularly problematic at the recruiter level. Under the regulations, recruiters are expected to identify the potential attributes of a gang member.⁷⁸ To do so, they must possess extensive knowledge of common gang tattoos, clothing styles, terminology, and gestures. Even though recruiters receive extensive training, some are not fully familiar with these identifiers.⁷⁹ This unfamiliarity results, in part, from the military's tendency to underemphasize the threat from gangs: few commanders encourage recruiters to focus on eliminating the gang threat, so few recruiters seriously seek the information necessary to identify gang members.⁸⁰ A more significant reason for recruiter shortcomings, however, is the inadequacy of their educational resources. To detect a gang identifier, a recruiter currently must rely on a handbook that provides examples of suspect symbols, clothing, and gestures.⁸¹ This handbook is substantial in scope, but it does not fully account for local trends or the ever-changing nature of gang

77. Cf. NGIC REPORT, *supra* note 5, at 15 (citing to a report from the White House Office of National Drug Control Policy that highlights the recruiters' inability to access the criminal records of certain applicants).

78. A.R. 601-210, *supra* note 66, § 4-2(e)(1)(a)(9).

79. See NGIC REPORT, *supra* note 5, at 15 ("According to US Army reporting, some recruiters are not properly trained to recognize gang affiliation and unknowingly recruit gang members . . ."). In March 2006, the U.S. Army Recruiting Command directed recruiters to screen for gang members, and emphasized the continuing need for information and "awareness training to identify gang activity and paraphernalia." See CID REPORT 2007, *supra* note 2, at 12.

80. See NGIC REPORT, *supra* note 5, at 15 ("[S]ome recruiters are not properly trained to recognize gang affiliation and unknowingly recruit gang members . . ."); Turse, *supra* note 8 (describing how the military has not prioritized the elimination of gang members from the military); Reed Interview, *supra* note 46 (explaining that commanders rarely emphasize the importance of detecting possible gang affiliations because most units have not faced significant threats from gang activity).

81. The Department of the Army has not released the complete details of this handbook. However, similar identifying information is located in the Army's pamphlet on extremist activity, DEP'T OF THE ARMY, DEPARTMENT OF THE ARMY PAMPHLET 600-15 (2000) [hereinafter PAM 600-15], http://www.army.mil/usapa/epubs/pdf/p600_15.pdf; in Army Regulation 600-20, DEP'T OF THE ARMY, ARMY REGULATION 600-20 (2008) [hereinafter A.R. 600-20], http://www.apd.army.mil/pdffiles/r600_20.pdf; and in the *Commander's Equal Opportunity Handbook*, EQUAL OPPORTUNITY HANDBOOK, *supra* note 59, app. B.

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identifiers.⁸² Obtaining such information requires cooperation with local police and other agencies.

Fourth, the military has hindered the effectiveness of its anti-gang provisions by failing to define key terms like “gang,” “involved,” and “gestures” in recruitment regulations and training handbooks.⁸³ The Army avoids specifying these terms because doing so might spark legal action from affected groups and limit recruiter discretion.⁸⁴ This justification, however, provides thin cover for the problems that stem from a lack of specificity. Without proper definitions prompting duties to inspect and penalize gang activity, military officials may let pass possible threats or violations. Recruiters choose not to press applicants about their records, commanders err on the side of leniency when considering moral waivers, and prosecutors are disinclined to file charges against soldiers who hide their previous gang activities.⁸⁵ Furthermore, the definitions that do exist are often incomplete or ineffective. The definition of “serious criminal misconduct,” for instance, omits offenses like conspiracy or gang trespass violations that might screen out more gang member applicants.⁸⁶

Gang membership in the armed forces, and principally in the Army, is increasing because of the military’s inability to strike a balance between the need to eliminate the gang threat through recruitment and the desire to maintain an easy path to service in arms. As gang members join the ranks, they add to the problems that commanders and military police must handle during active-duty operations.

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82. See NGIC REPORT, *supra* note 5, at 17 (discussing known recruiter policies); CID REPORT 2007, *supra* note 2, at 12 (highlighting that Army recruiters also have access to a website “that identifies common tattoos that may signal gang association,” but neglecting to describe its scope or current nature).
83. These terms are not defined in PAM 600-15, A.R. 600-20, A.R. 601-210, or in any of the lesser Army publications made available to the public.
84. See Reed Interview, *supra* note 46.
85. *Id.*
86. See A.R. 601-210, *supra* note 66, § 4-11 (defining typical serious criminal misconduct offenses). For examples of successful policing of gang trespass violations, see THE U.S. CONFERENCE OF MAYORS: BEST PRACTICES CTR., U.S. DEP’T OF JUSTICE, BEST PRACTICES OF COMMUNITY POLICING IN: GANG INTERVENTION & GANG VIOLENCE PREVENTION 25-27, 73-74, 137-38 (2006) [hereinafter BEST PRACTICES OF COMMUNITY POLICING]. Policing these violations has produced solid results, but many have questioned their legality. See, e.g., Matthew Mickle Werdegar, *Enjoining the Constitution: The Use of Public Nuisance Abatement Injunctions Against Urban Street Gangs*, 51 STAN. L. REV. 409 (1999); Stephanie Smith, Note, *Civil Banishment of Gang Members: Circumventing Criminal Due Process Requirements?*, 67 U. CHI. L. REV. 1461 (2000).

B. Detection and Prevention

Unit commanders and military police are left to guard against gang influences when gang members pass undetected through the recruitment process. These leaders must ensure that soldiers understand that participation in gangs is inconsistent with the responsibilities of military service and must act promptly to identify and prevent gang-affiliated conduct.⁸⁷ This is a tall order for any commander, and it is complicated further by many existing rules and regulations.

1. Extremist Organization Regulations

While no Department of Defense regulation specifically pertains to gangs, each of the military services has developed policies that relate to extremist organizations.⁸⁸ The Department of Defense has a set of policies governing “extremist” activities.⁸⁹ These policies were adapted in 1995 from Department of Defense Directive 1325.6, which was issued during the Vietnam War to clarify the military’s intolerance for discriminatory organizations and practices.⁹⁰ The 1995 policies, codified by the Army in A.R. 600-20 and Army Pamphlet (PAM) 600-15, recognize that extremist “members and their activities can have a devastating effect on the good order and conduct essential in the army.”⁹¹ To protect against this threat, A.R. 600-20 proclaims that “[m]ilitary personnel must reject participation in extremist organizations and activities,” and provides an extensive list of prohibited actions and command options.⁹² Included within this list are prohibitions against public

87. See PAM 600-15, *supra* note 81, § 2-6.

88. The Army’s anti-extremist regulations are the most detailed. See, e.g., A.R. 600-20, *supra* note 81; PAM 600-15, *supra* note 81. The Navy’s anti-extremist policy is not expansive, focusing only on illegal discrimination and the use of force or violence against government agencies. See DEP’T OF THE NAVY, NAVY MILITARY PERSONNEL MANUAL 1910-160 (2008) [hereinafter NAVY MILPERSMAN]. The Air Force’s provisions are similar in scope to the Army’s, but not as specific in their guidance to commanders and airmen. See U.S. AIR FORCE, AIR FORCE INSTRUCTION 36-2903 (2006); U.S. AIR FORCE, AIR FORCE INSTRUCTION 51-903 (1998).

89. A.R. 600-20, *supra* note 81, § 4-12.

90. See DEP’T OF DEF., DIRECTIVE 1325.6: GUIDELINES FOR HANDLING DISSENT AND PROTEST ACTIVITIES AMONG MEMBERS OF THE ARMED FORCES (1969). For a history of Directive 1325.6, see Walter M. Hudson, *Racial Extremism in the Army*, 159 MIL. L. REV. 1, 30-35 (1999).

91. Foreword to PAM 600-15, *supra* note 81.

92. A.R. 600-20, *supra* note 81, § 4-12.

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demonstrations, attending extremist meetings, recruiting or training extremist members, taking a visible leadership role in an extremist organization, and distributing extremist literature.⁹³

By implementing the extremist organization regulations, the armed services took a major step forward from pre-1995 policies, which contained a stark distinction between active and passive participation in extremist groups.⁹⁴ This distinction derived from the mere membership doctrine, a pillar of military law that shields soldiers from prosecution based solely on their membership in a group.⁹⁵ The doctrine still arises in cases involving extremist speech and actions,⁹⁶ but its terms now provide less protection to soldiers affiliated with extremist organizations and they no longer deter commanders from discouraging association with extremist groups.⁹⁷

Despite their expansive scope, the military's anti-extremist regulations provide little help to commanders seeking to curb gang activity for the following reasons: (1) the anti-extremist regulations contain no mention of gangs and do not specifically prohibit gang activity; (2) the regulations raise constitutional concerns by allowing commanders to restrict viewpoint-based speech rights without defining harmful secondary effects associated with the speech; (3) the regulations provide commanders with insufficient support and guidance on how to identify gang-affiliated threats; and (4) the regulations fail to address the problem of military-dependent gang members.

First, neither A.R. 600-20 nor PAM 600-15 describes criminal street gangs as extremist organizations. Instead, the provisions describe extremist organizations as those that

93. *See id.* § 4-12(b).

94. The 1995 policies do not completely eliminate the distinction between active and passive membership in an extremist organization, but they do significantly blur the dividing line. *See* A.R. 600-20, *supra* note 81, § 4-12. For a detailed discussion of anti-extremist policies pre-1995, *see* Hudson, *supra* note 90, at 30-35.

95. Military law experts have recently focused on the mere membership doctrine in the context of detained enemy combatants. *See* Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079, 1101-06, 1124-26 (presenting the views of legal experts on the mere membership doctrine's application in terrorism cases).

96. *See, e.g.,* United States v. Dornon, ACM S31144 (F REV), 2008 WL 2259758, at *3-4 (A.F. Ct. Crim. App. May 28, 2008) (discussing the relevance of the mere membership doctrine to prosecutions of service personnel for violations of anti-extremist policies).

97. *See, e.g.,* A.R. 600-20, *supra* note 81, § 4-12(e) (detailing the responsibility of commanders to stem even the mere membership of soldiers in extremist organizations).

advocate racial, gender, or ethnic hatred or intolerance; advocate, create, or engage in illegal discrimination based on race, color, gender, religion, or national origin; advocate the use of or use force, violence or unlawful means to deprive individuals of their rights under the United States Constitution or the laws of the United States or any State by unlawful means.⁹⁸

It is possible to read the last clause of this definition as applicable to gang activities, but the JAG Corps has avoided making such an argument and the NGIC has expressed reservations about the possibility of sustaining disciplinary action against gang members under the provision.⁹⁹ The inapplicability of the anti-extremist regulations to gang activity is reinforced by the Department of the Army's decision not to revise A.R. 600-20 when it issued a new version of the regulation on June 7, 2006—a date by which the Army was well aware of gang-related problems.¹⁰⁰ Because every other service branch faces the same definitional shortcoming, the applicability of anti-extremist policies to gangs is limited service-wide.¹⁰¹

Second, the anti-extremist policies face possible constitutional challenges. Under the regulations, a unit commander may “order Soldiers not to participate in those activities that are contrary to good order and discipline or morale of the unit or pose a threat to the health, safety, and security of military personnel or a military installation.”¹⁰² This broad grant of authority raises questions about what constitutes a legally permissible speech-limiting command. Several commentators have asserted that commanders' power to restrict speech and association rights in the name of anti-extremism violates

98. PAM 600-15, *supra* note 81, § 2-2. A separate Army publication, the *Commander's Equal Opportunity Handbook*, does place the term “gangs” under its extremist organization heading. The handbook defines a gang as “a group of individuals who band together, usually along racial or ethnic lines. Generally, gangs are prone to violent behavior.” EQUAL OPPORTUNITY HANDBOOK, *supra* note 59, app. B-3-1. The mention of gangs in this handbook, however, has little bearing on whether gangs should be considered covered under the terms of A.R. 600-20 and PAM 600-15. As the handbook states, the term is defined only to familiarize commanders with the concept. See EQUAL OPPORTUNITY HANDBOOK, *supra* note 59, app. B-2-1.

99. See NGIC REPORT, *supra* note 5, at 20 n.84.

100. See, e.g., A.R. 600-20, *supra* note 81. The 2006 CID Report proves that the Army was collecting data on the threat from criminal gangs as early as 2003. CID REPORT 2006, *supra* note 2, at 6.

101. See DEP'T OF THE NAVY, NAVY MILPERSMAN 1910-160 (2005); U.S. AIR FORCE, AIR FORCE INSTRUCTION 36-2903 (2006); U.S. AIR FORCE, AIR FORCE INSTRUCTION 51-903 (1998).

102. A.R. 600-20, *supra* note 81, § 4-12(c).

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First Amendment protections.¹⁰³ The First Amendment, they argue, secures soldiers' "right to both verbal and non-verbal speech," including wearing attire or associating with a group that falls into "gray areas" of permissibility.¹⁰⁴ This critique seems overstated given the Supreme Court's deference to the military in matters related to administrative actions that burden speech. The military has time and again successfully defended speech-restrictive orders that would violate the First Amendment in the civilian context.¹⁰⁵ Nevertheless, the commentators are right to note that the breadth of the anti-extremist regulation could create some constitutional problems.¹⁰⁶

In every case in which a soldier has challenged an order or administrative action on First Amendment grounds, courts have required the government to show that it restricted soldiers' speech "no more than is reasonably necessary to protect [a] substantial governmental interest."¹⁰⁷ The anti-extremist regulations fail to ensure that commanders' orders comply with this test because they do not require a commander to articulate the negative impact that the regulated speech has on good order and discipline. Without this requirement, a commander may restrict speech or expression simply because it is irregular or unseemly. In such an instance, there would be little justification for judicial deference to the commander's discretion.¹⁰⁸ Constitutional considerations may thus complicate the implementation of the anti-extremist regulations—especially in gang-related matters, where the military has not precisely defined what most threatens unit cohesion.

103. See, e.g., John P. Jurden, *Spit and Polish: A Critique of Military Off-Duty Personal Appearance Standards*, 184 MIL. L. REV. 1, 39-50 (2005); cf. Donald N. Zillman & Edward J. Imwinkelried, *Constitutional Rights and Military Necessity: Reflections on the Society Apart*, 51 NOTRE DAME L. REV. 397 (1976) (questioning the application of different constitutional standards to the military).

104. Jurden, *supra* note 103, at 40.

105. See, e.g., *Goldman v. Weinberger*, 475 U.S. 503, 510 (1986) (holding that issuing a letter of reprimand for failure to obey a lawful order forbidding the wearing of a yarmulke while in uniform did not violate the First Amendment); *Brown v. Glines*, 444 U.S. 348, 354-58 (1980) (holding that an Air Force regulation prohibiting distribution of petitions without permission did not violate the First Amendment).

106. See Jurden, *supra* note 103, at 41-50.

107. *Brown*, 444 U.S. at 355.

108. See Hudson, *supra* note 90, at 71. The military might still be able to defend a speech-restrictive, anti-extremist order that was less than reasonably necessary to protect a substantial government interest, but the courts recently have shown less deference to extremist-related command decisions. See, e.g., *United States v. Wilcox*, 66 M.J. 442 (C.A.A.F. 2008) (holding that the government did not adequately justify a conviction for wrongfully advocating antigovernment sentiments and encouraging participation in extremist organizations to the prejudice of good order and discipline).

Third, even assuming that the anti-extremist provisions apply to gang activity and are constitutional, they give inadequate guidance and support to commanders. Under PAM 600-15, the implementing pamphlet for A.R. 600-20, commanders are told to “maintain constant vigilance to foil any attempts by extremists to further their cause through the Army.”¹⁰⁹ More specifically, they are charged with fostering an extremist-free unit climate, educating soldiers, detecting and investigating potential problems, and enforcing the anti-extremist policies.¹¹⁰

PAM 600-15 recommends that commanders encourage soldiers to “[e]xamine personal viewpoints in light of the Army’s values and loyalty to their military team,” “avoid extremist affiliations and views,” and “report specific indicators.”¹¹¹ The pamphlet also advises commanders to work with junior leaders to keep abreast of soldiers’ surreptitious meetings, off-duty clothing, music selections, reading materials, computer use, and personal displays of extremist symbols.¹¹² Beyond these general suggestions, however, PAM 600-15 provides very little guidance on *how* commanders should operate or for *what* exactly they are looking (for example, what constitutes extremist off-duty clothing, what is extremist music, what computer use is improper). This lack of specificity is complicated by the pamphlet’s suggestion that commanders consider requesting assistance from the military police or Criminal Investigation Command only “in serious and/or complex cases.”¹¹³

The regulations also fail to provide commanders with adequate tools to educate their troops about unauthorized extremist activities. PAM 600-15 does contain a lesson plan designed to (1) “define the Army’s policy on extremism,” (2) “explain the restrictions on participation in extremist organizations,” and (3) “describe the definitions of terms related to extremism.”¹¹⁴ But this lesson plan is just as vague as the rest of the regulation, providing a paltry measure of specificity in the definition of extremist groups:

109. PAM 600-15, *supra* note 81, § 3-1.

110. *See id.* § 3-2(c).

111. *Id.* § 3-2(a).

112. *Id.* § 3-2(b).

113. *Id.* § 3-2(f)(2). The Army does encourage commanders to “[u]se Equal Opportunity Advisers (EOAs) to monitor available information on extremist groups, activities, and philosophies and train commanders,” *id.* § 3-2(c)(8), but it is unclear what measure of clarity EOAs may provide, and it is likely that commanders will still hesitate to file a complaint.

114. *Id.* app. B.

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While the following groups are not representative of all extremist groups, a large portion fall into one of the . . . following categories:

a. White Supremacy Ideology. This ideology emphasizes theories of white superiority and the duty of Caucasians to survive and defend the U.S. is tied to white supremacy and to “racial purity,” the safeguarding of the existence and reproduction of the Caucasian race.

b. Black Supremacy Ideology. This ideology emphasizes theories of black superiority and the need for separation of the black race.¹¹⁵

This is inadequate guidance for any anti-extremism training, let alone anti-gang instruction. Moreover, any training conveyed through the lesson plan is not mandatory; as noted in PAM 600-15, “Commanders *may* incorporate extremism training as a biannual requirement.”¹¹⁶

Fourth, the anti-extremist regulations ineffectually handle the problems caused by the involvement of military dependents in criminal street gangs. As noted in the NGIC report, gang members commonly target military dependents for recruitment, relying on them to facilitate communication between civilian and military communities.¹¹⁷ Dependents of service members are prone to becoming involved in illegal drug operations and conflicts with rival gangs.¹¹⁸ The military, however, does not have a regulation or handbook focused on preventing dependent involvement in gangs. As a result, commanders are left to use their discretion and frequently choose to ignore or trivialize the issue.¹¹⁹

2. Structural Shortcomings

Aside from the limitations of the extremist organization regulations, the military faces structural hurdles in its effort to retain good personnel while eliminating the criminal gang threat. Most notable of these hurdles is the military’s hesitancy to communicate and cooperate fully with civilian law

115. *Id.*

116. *Id.* § 3-2(e) (emphasis added).

117. NGIC REPORT, *supra* note 5, at 16.

118. *See id.* at 15-16; CID REPORT 2007, *supra* note 2, at 11 (detailing the number and type of offenses in which civilian subjects, a category which includes military dependents, were involved); *see also* United States v. Miller, 53 M.J. 504, 507 (A.F. Ct. Crim. App. 2000) (describing the affiliation of the accused’s son with a local gang).

119. *See* NGIC REPORT, *supra* note 5, at 16 (explaining that “many military spokespersons have dismissed [dependent gang members] as ‘wannabe gang members’”).

enforcement agencies. In some instances, this hesitancy stems from legal restraints that limit the extent to which the military may assist civilian officials. In others, it is the product of interagency misgivings and the lack of efficient information sharing. In no case does this hesitancy benefit the military or civilian communities affected by gang activity.

The Posse Comitatus Act¹²⁰ is the primary legal restraint on military cooperation with civilian law enforcement agencies. A remnant of the Reconstruction era, the Act was passed to prevent the federal government from using troops to enforce voting rights.¹²¹ Over time, the Act morphed into a blanket prohibition against the participation of military forces in civilian law enforcement. Today, the Act reads,

Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.¹²²

The Act does not limit the involvement of military police or investigators in an investigation that involves a military nexus, but it does divide law enforcement activity into military and civilian spheres.¹²³ The Department of Defense supports this division to avoid assuming collateral civilian duties.¹²⁴ When Congress created safe harbor provisions for military assistance in enforcing customs, drugs, immigration, and terrorism laws, the Department of Defense responded by promulgating regulations that permit cooperation with civilian law enforcement groups only “to the extent practical”—language that

120. 18 U.S.C. § 1385 (2000).

121. See Gary Felicetti & John Luce, *The Posse Comitatus Act: Setting the Record Straight on 124 Years of Mischief and Misunderstanding Before Any More Damage Is Done*, 175 MIL. L. REV. 86, 100-13 (2003).

122. 18 U.S.C. § 1385.

123. In discussing the Posse Comitatus Act, Christopher Grey, Chief of Public Affairs for the Army CID, stressed that the military nexus requirement is satisfied fairly easily in most investigations. A crime need only implicate military personnel, a military dependent, or a direct threat to an installation to permit military police involvement. See Grey Interview, *supra* note 20. However, Mr. Grey also confirmed that the Army CID, as advised by the Army JAG Corps, holds fast to the division between military and civilian spheres when a clear military nexus is not apparent. See *id.*

124. Felicetti & Luce, *supra* note 121, at 161.

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has come to mean “only when necessary.”¹²⁵ Cautious interpretation of the Posse Comitatus Act has led to situations in which military police will not coordinate with civilian police in anti-gang efforts that may affect the military but do not directly involve a military actor.¹²⁶ This failure to coordinate reduces the effectiveness of both military and civilian police at combating gangs.¹²⁷

Even within the bounds of the Posse Comitatus Act, the military could do more to cooperate with civilian agencies in the fight against gangs. The armed services do interact with some agencies on a regular basis. The Army Criminal Investigation Command, for instance, has representatives on a national gang task force, communicates with the FBI about ongoing investigations, and works with the Federal Bureau of Prisons to identify potential gang threats.¹²⁸ Shortcomings in information sharing still exist, however, between the military and other state and federal agencies.¹²⁹ These shortcomings diminish the

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125. U.S. DEP’T OF DEFENSE, DIRECTIVE NO. 5525.5, enclosure 3 (1986). Congress moved most dramatically to reduce the restrictiveness of the Posse Comitatus Act through the Department of Defense Authorization Act, 1982, Pub. L. No. 97-86, 95 Stat. 1099 (relevant portions codified at 10 U.S.C. §§ 371-378 (2006)), and the Homeland Security Act of 2002 (HSA), Pub. L. No. 107-296, 116 Stat. 2135 (codified primarily in scattered sections of 6 U.S.C. and 18 U.S.C.). In particular, the HSA states that the Posse Comitatus Act does not bar the President from “us[ing] . . . the Armed Forces for a range of domestic purposes, including law enforcement functions, when . . . the President determines that the use of the Armed Forces is required to fulfill the President’s obligations under the Constitution.” *Id.* § 886 (codified at 6 U.S.C. § 466(a)(4)). For a discussion of how the Department of Defense responded to these efforts, see Felicetti & Luce, *supra* note 121, at 149-66; and John R. Longley III, Note, *Military Purpose Act: An Alternative to the Posse Comitatus Act—Accomplishing Congress’s Intent with Clear Statutory Language*, 49 ARIZ. L. REV. 717, 737-39 (2007).
126. For example, military police normally would not assist in a civilian effort to track gangs operating near a base without a clear military nexus, even though it is well established that civilian gang activity near a base often spills over into the installation. See Reed Interview, *supra* note 46.
127. *Id.* (describing how the Posse Comitatus Act hindered the ability of Fort Bragg military police to cooperate completely with state and local law enforcement agencies in Fayetteville, North Carolina). There is some indication that the military is beginning to work more with local law enforcement authorities on gang matters. In fact, the Army Criminal Investigation Command has noted that its Gang Activity Threat Assessment “required each CID office . . . to make contact with Military Police, DoD Police and local law enforcement agencies within their area of responsibility to collect information about local gang activity.” CID REPORT 2007, *supra* note 2, at 12; cf. FIDELL ET AL., *supra* note 58, at 304-17 (outlining the limitations of military jurisdiction over civilians independent of the Posse Comitatus Act).
128. See Grey Interview, *supra* note 20.
129. See Telephone Interview with Tina Farales, Branch Chief, Gang Violence Suppression Branch, Cal. Dep’t of Justice (Aug. 19, 2008) [hereinafter Farales Interview] (on file with

military's ability to confront gangs, and they create discrepancies within the information used to assess the criminal gang threat.

The lack of communication between military and civilian authorities was demonstrated by the military's response to the NGIC report. The military declined to comment on any aspect of the NGIC report during the period in which FBI analysts compiled it.¹³⁰ Following release of the report in January 2007, however, the military charged the FBI with "overstat[ing] the problem, mixing historical and more recent events, and using unsupported hearsay type comments and statements from various undocumented experts."¹³¹ The Army CID, the Naval Criminal Investigative Service, and the Air Force Office of Special Investigations sent a joint memorandum to the FBI "contesting parts of the assessment, asking for its withdrawal, and offering increased cooperation and coordination to obtain a more accurate estimate of the gang problem in the military."¹³² When the FBI refused to withdraw its report, the military services responded by issuing their own reports that failed to address many of the NGIC report's major themes.¹³³ This type of interagency wrangling hinders efforts to assess the threat posed by gangs in the military and stalls the formation of improved anti-gang initiatives.

3. *Rehabilitative Measures*

If a commander detects gang activity in his unit and chooses to address it, he may seek guidance from several sources. A.R. 600-20 states that commanders must take "positive actions" to put soldiers "on notice of the potential adverse effects that participation in violation of Army policy may have upon good order and discipline in the unit and upon their military service."¹³⁴ The "positive actions" recommended by A.R. 600-20 include educating soldiers about the Army's equal opportunity policy and advising soldiers that the commission of any prohibited actions will be considered when evaluating their overall duty performance, leadership qualification, classification, and

author); Grey Interview, *supra* note 20 (noting that the Army CID does not have access to the FBI fingerprint database or the Combined DNA Information System).

130. NGIC REPORT, *supra* note 5, at 17 n.66.

131. CID REPORT 2007, *supra* note 2, at 12.

132. *Id.*

133. See, e.g., *id.* (failing to comment on the full extent of the NGIC Report, particularly the sections on intergang violence, crimes against law enforcement, and service member dependents).

134. A.R. 600-20, *supra* note 81, § 4-12(e).

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security clearances.¹³⁵ To assist in conducting these actions, PAM 600-15 provides a sample extremist counseling memorandum, which commanders could adapt to accommodate incidents of gang violations.¹³⁶

Commanders can find additional advice on administering rehabilitative measures in the publications of their individual services. The *Commander's Equal Opportunity Handbook* has a section devoted to "Planning and Conducting Focus Groups."¹³⁷ These groups "are a form of group interviews to gather specific information about the unit or given command," and the handbook encourages their use in situations where commanders hope to learn more about the challenges facing members of their units.¹³⁸ More specific advice for commanders also may exist at the base level. The Fort Bragg Provost Marshal Office, for example, has an entire handbook with pragmatic and problem-specific suggestions for dealing with gangs and extremist groups.¹³⁹

As a final measure, commanders may attempt to rehabilitate a gang-affiliated soldier through the use of nonjudicial punishment under Article 15 of the UCMJ.¹⁴⁰ Nonjudicial punishment serves as an alternative to more formalized judicial proceedings, allowing commanders to discipline subordinates with a reduction in grade, deprivation of liberty, deprivation of pay, or censure.¹⁴¹ Nonjudicial punishment for a minor offense bars later court-martial proceedings for the same offense. Punishment for a serious crime, on the other hand, does not act as a bar.¹⁴² A commander or his superior may suspend these punishments at any time and need not make a record of them.¹⁴³ Because the military does not directly suggest the use of nonjudicial punishment for gang or extremist members, however, it is unclear whether officers confronting gang issues currently make much use of Article 15's flexibility.¹⁴⁴

135. *Id.*

136. PAM 600-15, *supra* note 81, § 7.

137. EQUAL OPPORTUNITY HANDBOOK, *supra* note 59, app. F-1-1.

138. *Id.*

139. See XVIII AIRBORNE CORPS & FT. BRAGG PROVOST MARSHAL OFFICE, DEP'T OF THE ARMY, COMMANDER'S HANDBOOK: GANGS AND EXTREMIST GROUPS (3d ed. 1999).

140. 10 U.S.C. § 815 (2000).

141. See *id.* § 815(b)(2); see also DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE § 3-6 (6th ed. 2004).

142. SCHLUETER, *supra* note 141, § 3-3(C).

143. See 10 U.S.C. § 815(d).

144. Part of the military's hesitation to authorize nonjudicial punishment for gang or extremist members may result from the existence of the mere membership doctrine. See *United States v. Zimmerman*, 43 M.J. 782, 785-87 (A. Ct. Crim. App. 1996) (describing the contours of the

The military's rehabilitation measures are thus not as meager as other aspects of the existing policies addressing gang affiliation. Nevertheless, they fail to facilitate the actual rehabilitation of many military gang members.¹⁴⁵ This may be partly attributed to the current policies' focus on counseling soldiers with warnings rather than with active assistance or advice. A more practical explanation is that commanders often prefer to initiate separation proceedings for gang members instead of devoting the time and resources necessary to facilitate their rehabilitation.¹⁴⁶

C. Removal

Although commanders generally have administrative and prosecutorial authority to remove delinquent service personnel, the existing procedures for removing gang members are at times inadequate. The Army policies governing active-duty enlisted administrative separations are found in A.R. 635-200. This regulation states that administrative separations are measures of last resort designed to "maintain[] high standards of conduct and performance."¹⁴⁷ It further defines different offense categories that warrant administrative separations and sets forth mitigating factors that a commander must consider.¹⁴⁸ Several offense categories are commonly applicable to active-duty gang members.

mere membership doctrine); *supra* notes 92-94 and accompanying text. As the distinction between active and passive membership often requires adjudication, quick application of nonjudicial punishment may not always be prudent.

145. See Reed Interview, *supra* note 46 (explaining that commanders often prefer to initiate removal proceedings following a warning, rather than to expend time and resources in a rehabilitative process).

146. See *id.*

147. See DEP'T OF THE ARMY, ARMY REGULATION 635-200, § 1-1(a) (2005) [hereinafter A.R. 635-200], http://www.apd.army.mil/pdffiles/r635_200.pdf. While administrative discharges may be measures of last resort, the current trend is to use them rather than a court-martial. See SCHLUETER, *supra* note 141, § 1-7.

148. A.R. 635-200, *supra* note 147, § 1-15. More specifically, the regulation notes that commanders should consider the following factors when deciding to retain or separate an individual:

- (1) The seriousness of the events or conditions that form the basis for initiation of separation proceedings. Also consider the effect of the soldier's continued retention on military discipline, good order, and morale.
- (2) The likelihood that the events or conditions that led to separation proceedings will continue or recur.
- (3) The likelihood that the soldier will be a disruptive or undesirable influence in present or future duty assignments.
- (4) The soldier's ability to perform duties effectively now and in the future, including potential for advancement or

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One offense category permits commanders to remove individuals for defective enlistments. As gang members often misrepresent their criminal history to pass enlistment screenings, this offense category presents perhaps the easiest way to remove gang members from the ranks.¹⁴⁹ To justify a defective enlistment separation, a commander need only show that a soldier concealed his past gang affiliation or criminal behavior and would “normally . . . not be considered for retention.”¹⁵⁰ As this standard applies even to the concealment of juvenile offense records,¹⁵¹ it can serve as a convenient administrative catchall.

Another option for commanders confronting gang members is separation for unsatisfactory performance or misconduct. These provisions are applicable to soldiers who “have an adverse impact on military discipline, good order, and morale” and “will likely be a disruptive influence in duty assignments.”¹⁵² Since a higher risk of abuse exists within these provisions, commanders acting under them must guarantee adequate counseling for separated soldiers and seek the approval of their immediate commanders.¹⁵³ The problem with applying these separation paths to gang members is that commanders must identify specific disruptive actions that constitute more than mere membership in a gang.¹⁵⁴ While membership in a gang is frequently linked to disruptive actions, identifying such actions under the current set of guidance provisions may prove challenging for commanders.¹⁵⁵

A major drawback of any administrative separation proceeding is the danger it creates for civilian communities. When the military administratively discharges a gang member, it does not ensure that he is rehabilitated or that the training he acquired will be used appropriately. The armed services currently neither track discharged gang members nor notify civilian law

leadership. (5) The soldier’s rehabilitative potential. (6) The soldier’s entire military record

Id.

149. *See supra* Subsection II.B.2.

150. A.R. 635-200, *supra* note 147, § 7-17(b)(3).

151. *Id.* § 7-17(b)(4).

152. *Id.* § 13-2. Soldiers must meet other criteria as well. *See id.*

153. *Id.* §§ 13-4 to 13-5.

154. *See, e.g.,* United States v. Dornon, ACM S31144, 2008 WL 2259758, at *3-4 (A.F. Ct. Crim. App. May 28, 2008) (noting that Air Force Instruction 51-903, the mirror provision to A.R. 600-20 concerning dissident and protest activities, requires more than a showing of mere membership in an extremist organization).

155. *See supra* Subsection II.B.2.

enforcement agencies of their whereabouts.¹⁵⁶ Gang members with military training are simply released from their units to rejoin civilian gangs. Once a military-trained gang member reenters a civilian street gang, his acquired training can be passed on to other gang members.¹⁵⁷ This makes it even more likely that the response of civilian authorities – assuming they even discover the heightened risk posed to their community – will be too little, too late.

The UCMJ provides the criminal sanctions that administrative separations lack, but commanders and prosecutors rarely employ its articles to their fullest extent. To understand the range of disciplinary options available to commanders under the UCMJ, it is helpful to divide offenses into two categories: (1) gang membership with the commission of a serious crime, and (2) gang membership without the commission of a serious crime.¹⁵⁸ When a gang member has committed a serious crime, the prosecutor almost certainly will focus on the crime, using the expansive terms of the UCMJ to secure a conviction. Many prosecutors may even avoid introducing evidence of the defendant's gang affiliation out of fear that an appellate court may find the information more prejudicial than probative.¹⁵⁹ But when a commander seeks to prosecute a gang member who has not committed a serious crime, there are specific provisions of the UCMJ that become extremely important.

The first avenue for prosecuting a gang member who has not committed a serious crime is Article 134 of the UCMJ. This general article criminalizes three categories of offenses not covered elsewhere in the UCMJ. Offenses in the first category – referred to as Clause 1 offenses – involve “all disorders and neglects to the prejudice of good order and discipline.”¹⁶⁰ Clause 2 offenses include “all

156. See Telephone Interview with Angela Spidell, Information Release Specialist, U.S. Army Human Res. Command (Aug. 21, 2008) (on file with author) (noting that the Army does not compile data on the number of soldiers dismissed for gang affiliation and does not share individual discharge information with civilian authorities unless they have filed a special request).

157. See *Gang Members*, *supra* note 37, at 2.

158. For a list of what the Army considers serious crimes, see *supra* note 67.

159. Indeed, the prejudicial nature of gang evidence has been hotly contested in military appeals. See Supplement to Petition for Grant of Review at 13, *United States v. Richardson*, 53 M.J. 113 (C.A.A.F. 2000) (No. 00-0087), 2000 WL 34615399 (“The limited probative value of the ‘gang evidence’ is substantially outweighed by the danger of unfair prejudice. Given the criminal misconduct and violence associated with gangs, mention of gang affiliation is extremely prejudicial.”). And civilian courts have noted the danger of admitting such evidence. See, e.g., *United States v. Irvin*, 87 F.3d 860, 864 (7th Cir. 1996) (“[W]e have also long recognized the substantial risk of unfair prejudice attached to gang affiliation evidence, noting such evidence ‘is likely to be damaging to a defendant in the eyes of the jury’ and that gangs suffer from ‘poor public relations.’” (citations omitted)).

160. 10 U.S.C. § 934 (2000).

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conduct of a nature to bring discredit upon the armed forces.”¹⁶¹ Clause 3 offenses involve “noncapital crimes or offenses which violate Federal law including law made applicable through the Federal Assimilative Crimes Act.”¹⁶²

To convict a soldier for gang involvement under Article 134, Clause 1, a prosecutor must show that the soldier’s actions prejudiced good order and discipline in a “reasonably direct and palpable” manner.¹⁶³ This test is satisfied if there is “clear proof that a defendant specifically intends to accomplish [the aims of the organization] by resort to violence”¹⁶⁴ or if the defendant engaged in disorderly conduct involving firearms or drugs.¹⁶⁵ Although a Clause 1 charge usually accompanies other UCMJ violations, it may stand alone if the alleged improper act is prejudicial in more than an “indirect or remote sense.”¹⁶⁶

The armed forces have convicted gang members for Clause 1 offenses,¹⁶⁷ but the defendants in each case were established gang members who committed a serious crime.¹⁶⁸ The military’s failure to bring Clause 1 actions against gang members who have not committed serious crimes may be attributed to two factors. First, military prosecutors may hesitate in labeling a suspect a gang member until a gang nexus is confirmed through a serious criminal act. Proven membership in a gang is not required to sustain a Clause 1 conviction, however, so long as the defendant advances the purposes of a gang in a way that detrimentally affects good order and discipline.¹⁶⁹ Second, until a

161. *Id.*

162. See MANUAL FOR COURTS-MARTIAL, *supra* note 58, ¶ 60.c.(1), at IV-95.

163. *Id.* ¶ 60.c.(2)(a), at IV-96.

164. *Scales v. United States*, 367 U.S. 203, 229 (1961) (alteration in original) (citations omitted) (internal quotation marks omitted).

165. See SCHLUETER, *supra* note 141, § 2-6(A).

166. MANUAL FOR COURTS-MARTIAL, *supra* note 58, ¶ 60.c.(2)(a), at IV-96.

167. See, e.g., *United States v. Billings*, 58 M.J. 861 (A. Ct. Crim. App. 2003), *aff’d*, 61 M.J. 163 (C.A.A.F. 2005); *United States v. Quintanilla*, 60 M.J. 852, 854-56 (N-M. Ct. Crim. App. 2005); *United States v. Khamsouk*, 57 M.J. 282, 283 (C.A.A.F. 2002).

168. The defendant in *Billings*, for example, was the leader of a local chapter of Gangster Disciples who had planned and ordered the commission of numerous crimes. See 58 M.J. at 861-64.

169. See *United States v. Dornon*, ACM S31144 (F REV), 2008 WL 2259758, at *2 (A.F. Ct. Crim. App. May 28, 2008). The court in *Dornon* stated that “formal membership or participation in an organization” is not required “for a service member to be found guilty of violating paragraph 5 of AFI 51-903,” the Air Force regulation proscribing membership in an extremist organization. *Id.* The court explained that “[i]t is the participation in certain activities associated with these organizations, that are undertaken in furtherance of the objectives of those organizations which are prohibited, regardless of ones membership

suspected gang member commits a crime posing a “clear danger” to the military unit, prosecutors may fear violating his First Amendment right of freedom of association.¹⁷⁰ But in light of the Supreme Court’s deference to the military in such matters, this fear also seems unfounded.¹⁷¹

Clause 2 of Article 134 “makes punishable conduct which has a tendency to bring the service into disrepute or which tends to lower it in public esteem.”¹⁷² With all of the negative press associated with the presence of gangs in the military, one might expect that Clause 2 convictions would be common. Yet there have been surprisingly few, and not a single conviction for gang membership independent of serious criminal conduct.¹⁷³ The decision in *United States v. Wilcox* suggests a reason for Clause 2’s disuse.¹⁷⁴ The court in *Wilcox* held that a soldier could not be guilty of a Clause 2 violation on account of speech or association unless the government (1) proved that the soldier’s speech “interfere[d] with or prevent[ed] the orderly accomplishment of the mission or present[ed] a clear danger to loyalty, discipline, mission, or morale,” or (2) established “a direct and palpable connection” between his speech and the military mission or environment.¹⁷⁵ The facts of *Wilcox* suggest that this is not an easy test to meet.¹⁷⁶ In that case, the defendant had identified

status in the organization.” *Id.* Admittedly, the court was not directly discussing gang membership, but the reasoning seems applicable to all Article 134, Clause 1 claims.

170. The “clear danger” test is part of a more comprehensive formula for determining whether a servicemember’s speech or association is protected by the First Amendment. *See infra* text accompanying note 176.
171. *See, e.g., Parker v. Levy*, 417 U.S. 733, 761 (1974) (finding it a violation of Article 134 of the UCMJ for an Army doctor to “publicly urg[e] enlisted personnel to refuse to obey orders”); *United States v. Priest*, 45 C.M.R. 338, 344-46 (C.M.A. 1972); *United States v. Daniels*, 19 C.M.A. 529, 534-35 (C.M.A. 1970) (holding that, although a request for mast would generally be lawful, encouraging other soldiers to request mast and refuse to fight in Vietnam was punishable under Article 134).
172. MANUAL FOR COURTS-MARTIAL, *supra* note 58, ¶ 60.c.(3), at IV-96.
173. An example of a winning prosecution in a gang-related case for service-discrediting conduct may be found in *Billings*. 58 M.J. at 866. There, the defendant knowingly “led and recruited active duty soldiers and local civilians . . . into an organization that settled disputes through murder and assault and raised money through armed robbery.” *Id.* The court found it “beyond dispute” that these actions “injured the reputation of the United States Army.” *Id.*
174. 66 M.J. 442 (C.A.A.F. 2008).
175. *Id.* at 448 (citations omitted) (internal quotation marks omitted).
176. The court in *Wilcox* noted that the stringency of this test was necessary because “[i]f such a connection were not required, the entire universe of servicemember opinions, ideas, and speech would be held to the subjective standard of what some member of the public, or even many members of the public, would find offensive. And to use this standard to impose

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himself as a paratrooper while making statements on a public webpage that were antigovernment and extremely racist. The court nevertheless found that the communications did not constitute unprotected “dangerous speech” and determined that the record “did not establish a reasonably direct and palpable connection between the speech and the military.”¹⁷⁷ Applying such reasoning to the gang context, one can see why prosecutors might hesitate to charge suspected gang members with Clause 2 violations.

Clause 3 permits a prosecutor to bring a charge under any applicable federal or state law that is not preempted by an article of the UCMJ.¹⁷⁸ Prosecutors have used the clause to convict military gang members of the following offenses:

transferring a firearm with knowledge that it would be used in a drug trafficking crime, in violation of 18 U.S.C. § 924(h) (4 specifications); knowingly making false and fictitious statements in connection with the acquisition of a firearm, in violation of 18 U.S.C. § 922(a)(6) (3 specifications); and knowingly transferring a firearm to a non-resident of the state, in violation of 18 U.S.C. § 922(a)(5) (2 specifications).¹⁷⁹

Yet, as with the rest of Article 134, prosecutors have not made the best use of Clause 3.

One noticeable omission from the list of charged Clause 3 crimes is the Racketeer Influenced and Corrupt Organizations Act (RICO).¹⁸⁰ Under RICO, a prosecutor may charge a person with racketeering if he is a member of an enterprise that has committed any two listed offenses within a ten-year period.¹⁸¹ A person is a member of an enterprise for the purposes of RICO if he directly or indirectly receives income from the group, participates in the enterprise’s affairs, or conspires to do so.¹⁸² The criminal punishments for a

criminal sanctions under Article 134, UCMJ, would surely be both vague and overbroad.” *Id.* at 449.

177. *Id.* Government counsel had believed that the Clause 2 offense was proven because “the accused, while holding himself out as a member of the United States Army . . . recruited others into activities involving racial intolerance” and because he violated A.R. 600-20. *Id.* at 446 (citations omitted) (internal quotation marks omitted).

178. 10 U.S.C. § 934 (2000); MANUAL FOR COURTS-MARTIAL, *supra* note 58, ¶¶ 60.c.(4)(a)-(c), at IV-96 to IV-97.

179. *United States v. Ivey*, 55 M.J. 251, 252 (C.A.A.F. 2001).

180. 18 U.S.C. §§ 1961-1968 (2000).

181. *Id.* § 1961.

182. *Id.* § 1962.

RICO offense include imprisonment for a maximum of twenty years, a fine, and forfeiture of all property derived from racketeering activity.¹⁸³

Federal civilian prosecutors have used RICO actions against gangs with great success.¹⁸⁴ The military, by contrast, has never used the RICO statute in a gang prosecution.¹⁸⁵ In light of the many advantages that using RICO could provide to military prosecutors—especially with regard to gang members who have not committed a serious crime—this record is difficult to defend. One possible justification is that RICO cases are hard to prosecute. As Wesley McBride stated before Congress, “Prosecution of street gangs based on current R.I.C.O. statutes [is] too time consuming and labor intensive for local gang prosecution.”¹⁸⁶ With its many resources and insulated structure, however, the JAG Corps has the capability to manage and fund a RICO effort.

Other underutilized prosecutorial tools available through Article 134, Clause 3 include the many gang-targeting state laws. Through the Federal Assimilative Crimes Act, Congress has adopted state criminal laws for areas of exclusive or concurrent federal jurisdiction. The Act applies to all noncapital state offenses, provided that federal law—including the UCMJ—has not defined an applicable offense for the misconduct committed.¹⁸⁷ In the context of gang prosecutions, the Federal Assimilative Crimes Act permits a prosecutor at a military installation to file a charge under any relevant law of the state in which the installation is located.¹⁸⁸ This authority is a powerful prosecutorial device. Many states have gang-related laws that are not preempted by the UCMJ.¹⁸⁹ California set the standard for other states by penalizing

183. *Id.* § 1963.

184. In 2007, for example, a federal jury in Maryland convicted fifteen members of the MS-13 gang of RICO offenses. See Press Release, U.S. Att’y for the Dist. of Md., Dep’t of Justice, MS-13 Leader Sentenced to Life in Prison (Sept. 24, 2007), available at http://www.usdoj.gov/usao/md/Public-Affairs/press_releases/presso7/SecondMS-13LeaderSentencedtoLifeinPrison.html; see also Allison Klein, *Fighting MS-13, Mafia Style*, WASH. POST, Aug. 28, 2005, at C1 (discussing the MS-13 indictment).

185. This conclusion is based on a search of available court opinions and party briefs in military criminal cases.

186. *Combating Gang Violence in America: Examining Effective Federal, State, and Local Law Enforcement Strategies: Hearing Before S. Comm. on the Judiciary*, 108th Cong. 107 (2003) (statement of Wesley McBride, President, California Gang Investigators Association).

187. See MANUAL FOR COURTS-MARTIAL, *supra* note 58, ¶ 60.c.(4)(c)(ii), at IV-96 to IV-97.

188. *Id.*

189. The National Youth Gang Center has compiled a detailed database of all gang-related legislation in the United States. See National Youth Gang Center, *Compilation of Gang-Related Legislation in the United States*, <http://www.iir.com/nygc/gang-legis/default.htm> (last visited Dec. 3, 2008).

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participation in a gang,¹⁹⁰ recruiting or soliciting for a gang,¹⁹¹ defacement of property with graffiti,¹⁹² and the failure of convicted gang members to register with local authorities after relocating.¹⁹³ Maryland adds a promising new law to this list of standard offenses through the Gang Prosecution Act of 2007.¹⁹⁴ Modeled loosely on the federal RICO statute, the Act seeks to expand the prosecution of gang members by prohibiting a person from knowingly participating in a gang that engages in a pattern of criminal activity.¹⁹⁵ Supporters of the bill tout it as an effective way to fight gangs without overburdening prosecutors with procedural complexities.¹⁹⁶

Because the military installations with the highest rate of gang activity are located in the states with the most gang-related laws, the military could make excellent use of state provisions to prosecute gang members in the ranks. Yet, again, the armed services appear never to have pursued such a path. By not taking advantage of gang-related state laws, military commanders and prosecutors lose an opportunity to remove gang members before they commit a serious crime.

Beyond the clauses of Article 134, other provisions of the UCMJ that could sustain convictions against gang members include Articles 81, 83, 107, 116, and 117. Article 81 is the conspiracy clause of the UCMJ.¹⁹⁷ This article casts a wide

190. CAL. PENAL CODE § 182.5 (West 2008) (“Notwithstanding Subdivisions (a) or (b) of Section 182, any person who actively participates in any criminal street gang . . . with knowledge that its members engage in or have engaged in a pattern of criminal gang activity . . . and who willfully promotes, furthers, assists, or benefits from any felonious criminal conduct by members of that gang is guilty of conspiracy to commit that felony and may be punished . . .”); *id.* § 186.22(a) (“Any person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang, shall be punished . . .”).

191. *Id.* § 186.26(a)-(c).

192. *Id.* § 594; CAL. EVID. CODE § 1410.5 (West 2008).

193. CAL. PENAL CODE §§ 186.30-33.

194. MD. CODE ANN., CRIM. LAW §§ 9-801, 9-804 (LexisNexis 2007).

195. *Id.*; *see also* Ruben Castaneda, *Bill Seeks To Expand Prosecution of Gangs*, WASH. POST, Feb. 11, 2007, at SM5. The Maryland legislature defined “gang” as any group of three or more persons, required only two crimes of violence or felonies to make a “pattern of criminal activity,” and assigned a possible ten-year prison sentence to the crime. *See* MD. CODE ANN., CRIM. LAW §§ 9-801, 9-804.

196. *See, e.g.*, Castaneda, *supra* note 195.

197. 10 U.S.C. § 881 (2000). In particular, this provision reads, “Any person subject to this chapter who conspires with another person to commit an offense under this chapter shall, if one or more of the conspirators does an act to effect the object of the conspiracy, be punished as a court-martial may direct.” *Id.*

net and subjects conspirators to “the maximum punishment authorized for the offense which is the object of the conspiracy.”¹⁹⁸ Perhaps because of this, Article 81 is often used in actions against military gang members.¹⁹⁹ One limitation to its wider application is the difficulty that can arise from the need to prove a criminal connection between individuals joined only through a nebulous association.²⁰⁰ Recent developments in terrorism cases, however, indicate that the criminal connection requirement is more easily satisfied in cases with a homeland security nexus.²⁰¹ As cases involving the threat of military-trained gang members arguably contain such a nexus, the conspiracy charge should remain a functional method for pursuing convictions of gang members.

Article 83 is the mirror provision to the administrative discharge for fraudulent enlistment. This article has broad applicability to cases involving personnel with a history of gang involvement, but it is infrequently used by prosecutors. This is explained by the complications involved with proving pre-enlistment gang affiliation. One successful application of the provision in a gang case occurred in *United States v. Khamsouk*.²⁰² A member of an Asian gang concealed his criminal history at the time of enlistment in the Navy and was convicted of violating Article 81 after military police discovered his involvement in a criminal scheme.²⁰³

Article 107 punishes anyone who knowingly makes a false statement with intent to deceive. This could provide a potential hook for individuals who conceal their gang affiliation in a setting that bears a “clear and direct relationship” to their duties.²⁰⁴ Such instances could include statements in an official interview, authorized focus group, or communication with civilian

198. MANUAL FOR COURTS-MARTIAL, *supra* note 58, ¶ 5.e., at IV-6.

199. *See, e.g.*, *United States v. Billings*, 58 M.J. 861 (A. Ct. Crim. App. 2003), *aff'd*, 61 M.J. 163 (C.A.A.F. 2005).

200. *See* MANUAL FOR COURTS-MARTIAL, *supra* note 58, ¶¶ 5.b.-c., at IV-5 to IV-6 (outlining the elements of a conspiracy charge under the UCMJ).

201. *See* Chesney & Goldsmith, *supra* note 95, at 1104-06 (discussing the expansive application of the conspiracy charge in the case of Jose Padilla).

202. 57 M.J. 282 (C.A.A.F. 2002).

203. *Id.* at 283, 295.

204. *United States v. Morgan*, 65 M.J. 616, 620 (N-M. Ct. Crim. App. 2007) (citation omitted) (setting forth the test for an Article 107 violation).

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police.²⁰⁵ Prosecutors have applied Article 107 in the extremist context, but have not done so in a gang-related investigation.²⁰⁶

Article 116 prohibits “riot or breach of the peace” and may be applied against any gang member who “causes or participates in” violent or turbulent acts.²⁰⁷ Such an act under the provision includes anything that “disturb[s] the public tranquility or impinge[s] upon the peace” and encompasses most unruly behavior.²⁰⁸ Similarly, Article 117 proscribes “provoking speeches or gestures,” which include hazing practices and gang signs.²⁰⁹ Both of these articles are used by military prosecutors, but neither features prominently in gang cases.²¹⁰

The UCMJ thus provides options for removing gang members who have not committed a serious crime, but offers few that commanders and prosecutors actually use. Moreover, as with administrative separations, there is a concern that civilian communities will face the threat of convicted servicemen returning to their home gangs because only a handful of convictions under the listed articles carry significant jail time.²¹¹ Thus, the military needs better procedures for removing gang members before they commit a serious crime.

205. *Id.*

206. See, e.g., *United States v. Wilcox*, 66 M.J. 442, 444 (C.A.A.F. 2008) (charging a paratrooper for violating Article 107 via postings on a webpage).

207. 10 U.S.C. § 916 (2000). The full elements of riot are as follows:

- (a) That the accused was a member of an assembly of three or more persons; (b) That the accused and at least two other members of this group mutually intended to assist one another against anyone who might oppose them in doing an act for some private purpose; (c) That the group or some of its members, in furtherance of such purpose, unlawfully committed a tumultuous disturbance of the peace in a violent or turbulent manner; and (d) That these acts terrorized the public in general in that they caused or were intended to cause public alarm or terror.

MANUAL FOR COURTS-MARTIAL, *supra* note 58, ¶ 41.b.(1), at IV-61.

208. See MANUAL FOR COURTS-MARTIAL, *supra* note 58, ¶ 41.c.(2), at IV-61.

209. *Id.* ¶ 42, at IV-62; see also *United States v. Isaacs*, No. NMCCA 9901168, 2003 WL 21785753, at *1 (N-M. Ct. Crim. App. July 30, 2003) (linking hazing to Article 117).

210. Cases that involve Article 116 include *United States v. Threefingers*, No. NMCM 99 01714, 2000 WL 1455305, at *1 (N-M. Ct. Crim. App. Aug. 29, 2000), and *United States v. Rush*, 51 M.J. 605, 606 (A. Ct. Crim. App. 1999). Article 117 is featured in *United States v. Meo*, 57 M.J. 744 (C.G. Ct. Crim. App. 2002), and *United States v. Adams*, 49 M.J. 182 (C.A.A.F. 1998).

211. See, e.g., *Wilcox*, 66 M.J. at 444 (sentencing a soldier to eight months in prison for violating Articles 92, 107, and 134); *United States v. Dornon*, ACM S31144 (F REV), 2008 WL 2259758, at *2 (A.F. Ct. Crim. App. May 28, 2008) (affirming a sentence of eight months and twenty days for violating Articles 92, 112a (drug possession), and 134); *United States v. Chavez*, No. NMCCA 200000198, 2004 WL 433857, at *1 (N-M. Ct. Crim. App. Mar. 5, 2004) (sentencing a sailor to restriction for forty-five days for “using provoking words and

III. RECOMMENDATIONS FOR CONFRONTING THE CRIMINAL GANG THREAT

The military now has an opportunity to enact real change in the provisions governing criminal gangs. Congress recently provided this opportunity by directing the Secretary of Defense to “prescribe regulations to prohibit the active participation by members of the Armed Forces in a criminal street gang.”²¹² This directive is found in Section 544 of the National Defense Authorization Act for Fiscal Year 2008, which took effect on January 28, 2008.²¹³

Congress passed Section 544 in response to reports from law enforcement and news agencies about the worsening problem of gang members in the armed forces. As stated by the measure’s sponsor, Representative Mike Thompson,

This is an important amendment that is a first step in solving a very serious problem on our military bases both here in the States and abroad; and it is a problem that, unfortunately, spills over into our communities. And this is the issue of members of criminal street gangs joining the military and getting the training that they get in the military and now, unfortunately, on the battlefield, and then bringing that back into the community and deploying those tactics on the streets in our neighborhoods.²¹⁴

To comply with Congress’s instruction, the military must face difficult legal questions and embrace new enforcement techniques. The Sections below provide a number of recommendations that the military may consider in drafting its new anti-gang policies. As in Part II, these Sections are organized according to the stages of recruitment, detection and prevention, and removal.

gestures, and aggravated assault, in violation of Articles 117 and 128”); *United States v. Meo*, 57 M.J. 744 (C.G. Ct. Crim. App. 2002) (assigning defendant a sentence of less than 120 days for violating Articles 86, 91, 92, 111, 117, and 134).

212. National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 544, 122 Stat. 3, 116.

213. See Press Release, The White House, President Bush Signs H.R. 4986, the National Defense Authorization Act for Fiscal Year 2008 into Law (Jan. 28, 2008), <http://www.whitehouse.gov/news/releases/2008/01/20080128-10.html>.

214. 153 CONG. REC. H5246-47 (daily ed. May 16, 2007) (statement of Rep. Thompson).

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A. Recruitment

The recruitment stage is where the most can be done to reduce the presence of gang members in the military. All of the armed services should begin their overhaul of the anti-gang recruitment policies by defining what constitutes active membership in a criminal gang. The Army CID provides the following definition of “gang”: “A group, organization or association of three or more persons, and the group must have a common interest and/or activity characterized by the commission of or involvement in a pattern of criminal activity or delinquent conduct.”²¹⁵ According to the Army CID, a “gang member”

- a. Must be a member of a group, or sub-group thereof, which meets the criteria for a gang
- b. Has admitted membership in that gang at the time of his arrest or incarceration.
- c. Meets any two of the following:
 - i. Has been identified as a gang member by an individual of proven reliability.
 - ii. Has been identified as a gang member by an individual of unknown reliability, and that information has been corroborated
 - iii. Has been observed by law enforcement members to frequent a known gang’s area, associated with known gang members, and/or affect that gang’s style of dress, tattoos, hand signals or symbols.
 - iv. Has been arrested on more than one occasion with known gang members
 - v. Has admitted membership in a gang at any time other than at the time of current arrest/incarceration.²¹⁶

The other services could adopt these definitions to unify their anti-gang initiatives.

Alternatively, the military could follow federal law, which defines “criminal street gang” as

²¹⁵. CID REPORT 2007, *supra* note 2, at 25.

²¹⁶. *Id.*

an ongoing group, club, organization, or association of 5 or more persons – (A) that has as one of its primary purposes the commission of one or more of the criminal offenses described in subsection (c);²¹⁷ (B) the members of which engage, or have engaged within the past 5 years, in a continuing series of offenses described in subsection (c)²¹⁸

The same statute defines “gang member” as a person who

1. participates in a criminal street gang with knowledge that its members engage in or have engaged in a continuing series of offenses described in subsection (c);
2. intends to promote or further the felonious activities of the criminal street gang or maintain or increase his or her position in the gang; and
3. has been convicted within the past five years for [a felony or gang-related offense]²¹⁹

The military may also seek a set of definitions that dovetails with state laws. Thirty-five states and Washington, D.C. currently have statutes that define a “gang.” In most instances, these statutes describe a gang as consisting of three or more persons, and nearly all of the statutes include a list of criminal behaviors, names, and symbols that serve as gang identifiers.²²⁰

Once the military settles on a common definition of terms pertinent to anti-gang prohibitions, it should list the specific groups it considers to be gangs, along with their affiliated symbols, clothes, and tattoos. This process may face legal challenges from named groups, but the reward of greater clarity is worth the legal risks. For guidance in identifying gangs, the military could look internally to publications like the Fort Bragg Provost Marshal Office’s gang and extremist handbook, which provides an extensive catalogue of

217. These crimes include a “[f]ederal felony involving a controlled substance . . . for which the maximum penalty is not less than 5 years,” a “[f]ederal felony crime of violence that has as an element the use or attempted use of physical force against the person of another,” and a “conspiracy to commit [one of the two previously listed offenses].” 18 U.S.C. § 521(c) (2000).

218. *Id.* § 521(a).

219. *Id.* § 521(d).

220. For a comprehensive review of the existing federal and state definitions of “gang,” “gang crime,” and “gang member,” see NAT’L GANG CTR., U.S. DEP’T OF JUSTICE, BRIEF REVIEW OF FEDERAL AND STATE DEFINITIONS OF THE TERMS “GANG,” “GANG CRIME,” AND “GANG MEMBER” (2008), <http://www.nationalgangcenter.gov/documents/definitions.pdf>.

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proscribed groups and symbols.²²¹ It could look as well to federal, state, and local law enforcement groups for advice and assistance in naming gangs. After the military completes its lists, it should publish them prominently for recruiters and recruits to review.

Beyond these identifying measures, the military could improve its recruitment policies by making gang member detection a priority for recruiters. This could be accomplished primarily through the command structure. If commanders emphasize the screening of gang members during the recruitment process, recruiters will focus more on detecting and eliminating those individuals whose actions and records indicate active gang participation. Commanders may convey their seriousness in this regard by limiting grants of moral waivers. They may also improve the quality of recruit screening by demanding better efforts to train and educate recruiters. Such efforts might include seminars and classes on gang activity and must include a revision of recruiters' handbooks to incorporate information acquired from civilian law enforcement agencies operating in their districts.

Besides making internal changes, recruiters should communicate more effectively with law enforcement groups. This would entail eliminating the bar to information sharing created by provisions like A.R. 601-210, § 2-11(b) – the Army regulation that waives the police record check requirement if police or court authorities do not respond within seven days or charge a data-processing fee.²²² Local and state law enforcement groups could likewise assist by improving response time and eliminating processing fees for military requests. At the federal level, military recruiters and civilian agencies could improve their relations by sharing more information.²²³ The FBI should take the lead in this effort, as it has focused the most on military gang issues.

B. Detection and Prevention

Reform is perhaps most urgently needed in the military's gang detection and prevention policies. To usher in this reform, the military should draft a new set of regulations, modeled on A.R. 600-20 and PAM 600-15, devoted to gang activity. These regulations should incorporate the definitions and lists of

221. See XVIII AIRBORNE CORPS & FT. BRAGG PROVOST MARSHAL OFFICE, *supra* note 139, apps. H-M.

222. See *supra* note 75 and accompanying text.

223. See *id.* (noting that the current recruitment regulations do not require information sharing between military recruiters and federal agencies).

gangs and gang identifiers developed in the recruitment context.²²⁴ The regulations should seek to ease commanders' tasks by clarifying their responsibilities and providing them with the means to complete their assignments.

Any new regulation must provide guidance for soldiers and commanders on what constitutes unauthorized gang activity. Modeling on A.R. 600-20, the new anti-gang regulations should outline the general policy against participation in gangs, broadly define gang participation, and describe unlawful gang actions.²²⁵ Specific prohibitions that the military may consider include the following: (1) communicating with known members of a criminal street gang with the intent to further a gang-related activity; (2) participating in a gang-related activity or providing assistance to gang members; (3) recruiting or training gang members; (4) creating, organizing, or taking a visible role in a gang; (5) distributing literature or correspondence related to a gang activity; and (6) knowingly displaying gang identifiers.

The new anti-gang regulations should next explain how commanders should implement the general policies. In many respects, PAM 600-15 provides an excellent example of what proactive measures and strategies might look like. It provides a broad grant of command authority—"commanders have the authority to prohibit military personnel from engaging in or participating in any . . . activities that the commander determines will adversely affect good order and discipline or morale"—followed by detailed recommendations for positive command actions.²²⁶ There are several ways, however, in which the armed services could improve upon this model in an anti-gang regulation. As mentioned in Subsection II.B.1, the anti-extremist regulations fail to describe what commanders should look for when attempting to detect extremist off-duty clothing, music, or reading materials. The military could fix this problem in the gang context by providing an appendix of recognizable gang tattoos, clothing, terminology, and music.²²⁷ The drafters of the new anti-gang regulations also could improve upon the PAM 600-15 model by including a more comprehensive lesson plan for commanders and requiring them to

224. See *supra* Section III.A.

225. See A.R. 600-20, *supra* note 81, § 4-12.

226. See PAM 600-15, *supra* note 81, §§ 2-4, 3-1, 3-2.

227. The military could compile this appendix with greater ease than one might assume. Organizations like the Fort Bragg Provost Marshal Office have essentially completed the task. See XVIII AIRBORNE CORPS & FT. BRAGG PROVOST MARSHAL OFFICE, *supra* note 139, apps. H-M; Grey Interview, *supra* note 20 (noting that the Army CID has organized a comprehensive handbook on gang identifiers, but that it is not shared with commanders or recruiters).

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conduct anti-gang training on an annual basis. Doing so would better accommodate the realities of troop rotation and improve the knowledge base of soldiers and commanders.

The drafters of the new anti-gang regulations should further consider the inclusion of a section guiding commanders on how to exercise their discretionary authority in a way that accommodates constitutional requirements.²²⁸ Writing about the anti-extremist regulations,²²⁹ Major Walter M. Hudson suggests that commanders should employ an eight-factor test as a template for developing sensible and constitutional policies. The first four of these factors require a commander to articulate a “secondary effect,” separate from the content of the regulated speech.²³⁰ Hudson’s first four factors are:

- (1) Does the extremist speech/conduct to be proscribed openly challenge military authority/policy . . . ?
- (2) Is it connected to an actual or possible credible threat of extremist activity in the area (based upon, for example, Criminal Investigative Command (CID)/local law enforcement investigations)?
- (3) Have there been racial/ethnic or similar type disturbances/complaints in the unit?
- (4) What is the status of the unit (e.g., deployed, in training, on alert)?²³¹

The next four factors form the basis for answering command policy questions and addressing potential vagueness problems:

- (5) Should the [policy] single out a particular extremist viewpoint to be proscribed?
- (6) If not, how broad should the proscriptive language in the [policy] be?
- (7) Should the [policy] extend off-post as well as on-post and concern off-duty speech/conduct as well as on-duty?
- (8) How closely do any proscriptions in the [policy] conform to [existing] prohibitions . . . ?²³²

²²⁸. See *supra* notes 103-106 and accompanying text (describing the constitutional problems involved with the existing anti-extremist regulations).

²²⁹. See Hudson, *supra* note 90, at 75-86.

²³⁰. See *id.* at 76-77.

²³¹. *Id.*

If adapted for anti-gang policies and incorporated into new official regulations, this eight-factor template could help ensure that commanders act within their constitutional limits, thereby protecting the rights of soldiers while allowing commanders to use their discretion effectively.

Military gang detection and prevention initiatives would benefit as well from an increased focus on military dependents. The military should place a particular emphasis on children residing in base communities with high rates of gang activity. For assistance in designing anti-gang youth programs, the military should turn to state and local agencies that have confronted youth gangs. California has a three-year sentence enhancement for participating in gang activity near schools and for recruiting a minor to join a gang.²³³ Boston authorities initiated a program, Operation Homefront, designed to address youth gangs by recognizing “the importance of the family as the first line of defense in fighting gang activity.”²³⁴ This program organizes joint visits by police and clergy to homes of troubled students and offers educational and social services to parents and children.²³⁵ Using military communities’ resources and supportive nature, commanders could implement programs like Operation Homefront at military bases in the United States and abroad.

In addition to working with outside groups on the design of youth initiatives, the military should seek to improve its coordination with civilian law enforcement groups on other gang detection and prevention operations. The military particularly should reconsider its narrow interpretation of the Posse Comitatus Act and seek an exception to its terms for gang investigations.²³⁶ As indicated by Congress’s interest in the issue of military gangs and its past legislation, it is doubtful that the military would meet much resistance on this point.²³⁷

Lastly, no improvements to the military’s anti-gang policies will be complete without the addition of rehabilitative measures. Commanders should have options other than the use of warnings and nonjudicial punishment.

232. *Id.*

233. See CAL. PENAL CODE §§ 186.22, 186.26 (West 2000). A number of other states have similar provisions in their criminal codes. See Jesse Christopher Cheng, Note, *Gangs in Public Schools: A Survey of State Legislation*, 2003 BYU EDUC. & L.J. 285.

234. BEST PRACTICES OF COMMUNITY POLICING, *supra* note 86, at 21.

235. See *id.*

236. For a description of the obstacles to anti-gang enforcement caused by the Posse Comitatus Act, see *supra* notes 120-127 and accompanying text.

237. See *id.*

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Possibilities include the power to transfer active-duty gang members to other units, improved counseling and antidrug programs, and compelled participation in community-organized gang prevention activities.

C. Removal

As discussed in Section II.C, the military's existing discharge and punishment measures are fairly robust. Nevertheless, the military could make a number of worthwhile improvements. First, the military must develop its post-separation notification policies, which currently allow military-trained gang members to reenter civilian life without notifying law enforcement agencies of their presence.²³⁸ This may be the easiest and most effective change that the military can make to its existing policies. With proper notification, civilian authorities can monitor ex-military gang members and better protect their citizens. Enhanced post-separation procedures would also aid the military's effort to determine what offenses gang-affiliated ex-soldiers commit and how those crimes are linked to military training and equipment.

Second, the military could express the seriousness of its anti-gang efforts by utilizing the available provisions of the UCMJ to prosecute gang members who have not committed a serious crime. The three clauses of Article 134 should play a key role in this initiative. Through more Article 134, Clause 1 convictions, the armed services would send a message that participation in a gang is prejudicial to good order and discipline regardless of whether the members commit criminal offenses. Filing charges under Clause 2 of Article 134 similarly would confirm that gang affiliation discredits the armed forces. Clause 3 could do the most by making federal statutes like RICO available and granting prosecutors access to gang-specific state crimes.

Other provisions that military prosecutors should use include Articles 81 and 83, which often apply to gang members and can subject guilty persons to significant punishments. Articles 116 and 117 are suitable candidates as well, because they are flexible in their application and avoid constitutional challenges by articulating specific infringements. If a new anti-gang regulation is promulgated, military prosecutors may also use Article 92 to punish gang offenders. Article 92 authorizes a court-martial for any person who "violates or fails to obey any lawful general order or regulation."²³⁹ The use of this

²³⁸. For a more complete discussion of this problem, see *supra* notes 156-157 and accompanying text.

²³⁹. 10 U.S.C. § 892 (2000). A general order is an order generally applicable to an armed force and properly published by the President or the Secretary of Defense, of Transportation, or

provision by prosecutors is particularly attractive as it will accentuate the fact that suspects are being prosecuted for membership in a gang and not a peripheral crime.²⁴⁰

Third, the military should support amendments to the UCMJ modeled after effective gang-specific state laws. Simply assimilating such laws through Article 134, Clause 3 works well for prosecutions occurring in states that sponsor anti-gang legislation, but the assimilative process offers little help to military prosecutors in foreign countries or states lacking gang laws. Laws that the military might adopt could include statutes like the Maryland Gang Prosecution Act of 2007, which make it easier to prove a gang nexus and punish gang members before they commit a serious crime.²⁴¹

Finally, the military should consider advocating an amendment to the UCMJ that creates an additional punitive article for soldiers convicted of committing an act in furtherance of gang activity. A provision of this nature would ensure longer jail time for convicted gang members without necessitating harsher punishments for general violators of the UCMJ.²⁴² This would slow the transition of military-trained gang members from the armed forces to civilian communities, thereby giving authorities more time to communicate, conduct threat assessments, and prepare protective or rehabilitative measures.²⁴³ A sentence enhancement provision may also increase the deterrent effect of gang-related convictions.

of a military department, and those issued by an officer having general court-martial jurisdiction. See *MANUAL FOR COURTS-MARTIAL*, *supra* note 58, ¶ 16.c.(1)(a), at IV-23.

240. For a discussion of the educational value of criminal charges, see Daniel C. Richman & William J. Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 *COLUM. L. REV.* 583 (2005).

241. See *supra* notes 194-196 and accompanying text.

242. There is some question as to how a sentence enhancement provision for gang-related UCMJ violations would apply to prosecutions under Article 92, which addresses failure to obey orders or regulations. It would be odd to seek a sentence enhancement for violating a regulation against gang membership on the ground that the violation was committed "in association" with a gang. One way to avoid this might be to exclude violations of Article 92 from the purview of the sentence enhancement provision and amend the punishment standards of Article 92 to account for the increased danger posed by gangs. For instance, where there are currently three punishment standards for violations of Article 92—(1) violation of lawful general order or regulation (maximum two years); (2) violation of other lawful order (maximum six months); and (3) dereliction of duties (maximum six months)—the military could add a fourth that more severely penalized violations of regulations pertaining to gangs or extremist organizations. See *MANUAL FOR COURTS-MARTIAL*, *supra* note 58, ¶ 16.e.(1)-(3), at IV-24 to IV-25.

243. See *supra* note 211 and accompanying text.

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For examples of how to draft a sentence enhancement provision, the military may look to the twenty-five states that have such clauses in their criminal codes.²⁴⁴ California's sentence enhancement provision is the most developed:

(b)(1) . . . any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished by an additional term of two, three, or four years at the court's discretion, . . . [except that] if the felony is a serious felony . . . the person shall be punished by an additional term of five years If the felony is a violent felony . . . the person shall be punished by an additional term of ten years.

. . .

(b)(3) The court shall order the imposition of the middle term of the sentence enhancement, unless there are circumstances in aggravation or mitigation. The court shall state the reasons for its choice of sentencing enhancements on the record at the time of the sentencing.

. . .

(d) Any person who is convicted of a public offense punishable as a felony or a misdemeanor, which is committed for the benefit of, at the direction of or in association with, any criminal street gang with the specific intention to promote, further, or assist in any criminal conduct by gang members, shall be punished . . . by imprisonment in the state prison for one, two, or three years . . . and shall not be eligible for release . . . until he or she has served 180 days.²⁴⁵

The military could adapt California's model to suit its disciplinary demands, but the basic outline of any proposed provision need not differ much from this form. In general, other states' sentence enhancement clauses mandate three to

²⁴⁴. In addition to the twenty-five states that have enhanced penalties for gang-related criminal acts, twenty-two states have public nuisance laws that count gang activity among the factors in determining a nuisance. See National Youth Gang Center, Highlights of Gang-Related Legislation, <http://www.iir.com/nygc/gang-legis/highlights-gang-related-legislation.htm> (last visited Dec. 3, 2008).

²⁴⁵. CAL. PENAL CODE § 186.22 (West 2000).

five years additional imprisonment, contain some kind of misdemeanor provision, and treat violent crimes more harshly than nonviolent offenses.²⁴⁶

In advocating the addition of a sentence enhancement provision covering gang membership to the UCMJ, the military should emphasize the rapidity with which states have adopted similar clauses as a measure of their effectiveness.²⁴⁷ It may also note that the current *Manual for Courts-Martial* already includes three sentence enhancement provisions punishing criminal recidivism and exceedingly reckless crimes.²⁴⁸ By securing the implementation of a sentence enhancement provision for gang activity, the armed forces would improve the security of civilian and military communities alike.

CONCLUSION

While the threat and presence of military gang members has intensified over the past decade, the military has done little to improve its existing policies. It is time for this to change. The military needs to overhaul its recruitment process, draft new regulations to detect and prevent gang influences, and improve its removal procedures. The various military services should accomplish this by coordinating with other agencies and adopting the best practices of civilian law enforcement groups. By seizing the opportunity provided by Congress, the military may realize its goal of sustaining a robust fighting force that is free from the influence of criminal street gangs.

246. See National Youth Gang Center, Enhanced Penalties—Sentencing, http://www.iir.com/nygc/gang-legis/enhanced_penalties.htm (last visited Dec. 3, 2008).

247. For further arguments in favor of gang sentencing enhancement provisions, see Gary R. Brown, *Less Bark, More Bite: Fixing the Criminal Street Gang Enhancement*, 16 FED. SENT'G REP. 148 (2003).

248. See SCHLUETER, *supra* note 141, § 16-2(E) (discussing the current escalator provisions in detail). Another nontrivial factor favoring adoption of a sentence enhancement provision for gang membership or activity is the preemption of similar state provisions by military sentencing requirements. This prevents even military prosecutors in the states sponsoring such enhancement provisions from applying them through Article 134, Clause 3. See MANUAL FOR COURTS-MARTIAL, *supra* note 58, ¶¶ 60.c.(4)(c)(ii)-(5)(a), at IV-97 (explaining the limitations of the Federal Assimilative Crimes Act and Article 134).