Volume 168 **June 2001**

MILITARY LAW REVIEW

ARTICLES

BOOK REVIEWS

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MILITARY LAW REVIEW

Volume 168 **June 2001**

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ARTICLES

BOOK REVIEWS

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MILITARY LAW REVIEW

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THE SOLDIER-LAWYER: A SUMMARY AND ANALYSIS OF *AN ORAL HISTORY OF MAJOR GENERAL MICHAEL J. NARDOTTI, JR., UNITED STATES ARMY (RETIRED) (1969-1997)*[1]

MAJOR GEORGE R. SMAWLEY[2]

> [A] diligent concern for the rule of law, strong orientation toward the requirements of the military community they serve, and the standard of professional pride that is uniquely theirs. The Army lawyer has shown that the profession of law and the profession

1. Major Kevin M. Boyle & Major Michael J. McHugh, An Oral History of Major General Michael J. Nardotti, Jr., United States Army (Retired) (1969-1997) (May 2000) [hereinafter Oral History] (unpublished manuscript, on file with The Judge Advocate General's School Library, United States Army, Charlottesville, Virginia). The manuscript was prepared as part of the Oral History Program of the Legal Research and Communications Department at The Judge Advocate General's School, Charlottesville, Virginia. The oral history of Major General Nardotti is one of approximately two dozen personal histories on file with The Judge Advocate General's School Library. They are available for viewing through coordination with the School Librarian, Daniel Lavering, and offer a fascinating perspective on key leaders whose indelible influence continues to this day. This article also incorporates information provided by Major General Nardotti during an interview with the author. Interview with Major General Michael J. Nardotti, Jr. (Retired), in Washington, D.C. (Mar. 20, 2001) [hereinafter Nardotti Interview] (on file with author).

2. Judge Advocate General's Corps, United States Army. Presently assigned to the Office of The Judge Advocate General, United States Army. LL.M., 2001, The Judge Advocate General's School, United States Army, Charlottesville, Virginia; J.D., 1991, The Beasley School of Law, Temple University; B.A., 1988, Dickinson College. Previous assignments include Legal Advisor, Chief, Administrative and Civil Law, and Chief, International Law, United States Army Special Operations Command, Fort Bragg, North Carolina, 1998-2000; Senior Trial Counsel, Special Assistant United States Attorney (Felony Prosecutor), Chief, Claims Division, Fort Benning, Georgia, 1995-1998; Trial Counsel, Special Assistant United States Attorney (Magistrate Court Prosecutor), Operational Law Attorney, Chief, Claims Branch, 6th Infantry Division (Light), Fort Wainwright, Alaska, 1992-1995. Member of the bars of Pennsylvania, the United States Court of Appeals for the Armed Forces, and the United States Supreme Court. This article was written to satisfy, in part, the Master of Laws degree requirements for the 49th Judge Advocate Officer Graduate Course.

> of arms are complementary, not mutually exclusive. His is the deep personal satisfaction of dual achievement and dedicated public service.[3]

I. Introduction

On 6 December 1970, elements of the 1st Squadron, 9th Cavalry Regiment were conducting routine patrols in the III Corps area of operations in the southern "fishhook" region of Vietnam. By late afternoon, a dispatch arrived requesting support for an isolated four-man Ranger reconnaissance team under heavy enemy machine-gun and rocket fire. First Lieutenant Mike Nardotti, and seventeen soldiers from his "Blue" Platoon, Bravo Troop, were quick to respond. Under sporadic enemy fire, the young platoon leader and his point man were the first to rappel from a UH-1 helicopter to assist the Rangers. Shortly thereafter, all hell broke loose.[4]

With little warning, Bravo Troop and the Rangers suffered a sudden assault of rocket and machine-gun fire, which severely wounded the Ranger reconnaissance team leader and sent shrapnel shooting into the back and neck of Lieutenant Nardotti standing next to him.[5] The young platoon leader was able to fight his way back to the perimeter for medical aid. The Ranger, suffering from a serious head injury, was not. As darkness fell, bleeding and only able to whisper, the lieutenant and another soldier crawled ten meters beneath a canopy of enemy fire to retrieve the severely injured man. On the return trip, Lieutenant Nardotti was again wounded, this time by an AK-47 tracer round that lodged in his left arm. In the face of continued enemy fire, they nonetheless continued to move the Ranger forward to the perimeter until they were close enough for others to assist. Severely wounded only three months after his arrival, Lieutenant

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3. THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS, 1775-1975, at 261 (1975). The Judge Advocate General's School Library contains several volumes of this out-of-print text, published by the Government Printing Office on the 200th anniversary of the Corps. It offers a rich and worthy account of the heritage of the Army Judge Advocate General's Corps and the corresponding development of military justice.

4. Oral History, *supra* note 1, at 29-30.

5. Nardotti Interview, *supra* note 1.

Nardotti's service in Vietnam was over. He would finish his tour in a Long Binh hospital.[6]

Lieutenant Mike Nardotti's extraordinary courage and selflessness under fire earned him the Silver Star for gallantry[7] and helped define the personal philosophy and leadership character of an officer who would ultimately serve as the thirty-fourth Judge Advocate General of the Army. He was one of the last lions of his generation: that group of senior Army leaders who knew the reality of military combat, those who had sacrificed and endured. They were soldiers first, carrying their enthusiasm and understanding of military service with them beyond the battlefield and applying it throughout their professional lives.

This article is a summary and analysis of interviews conducted with the former Judge Advocate General of the Army in March 2000, interviews later transcribed and bound in *An Oral History of Major General Michael Nardotti (Retired),* which is maintained at the library of The Judge Advocate General's School, United States Army, Charlottesville, Virginia. The article introduces Major General Nardotti by discussing his professional experience and accomplishments, while identifying the unique leadership qualities that contributed to his success. In particular, this article highlights his philosophy of the "soldier-lawyer" that became the hallmark of his remarkable institutional—and cultural—legacy for the Army Judge Advocate General's Corps.

II. The Early Years, 1947-1969

Mike Nardotti was born 30 April 1947 in Brooklyn, New York. A couple of years later, his family relocated to Hempstead, Long Island, where he grew up attending parochial and public schools in a competitive environment marked by cultural and ethnic diversity. It was here that he first demonstrated an aptitude for academics and athletics, excelling at both. The combination of the two earned him scholarship offers from Dartmouth and Lehigh. The influence of friends and his own assessment

6. Oral History, *supra* note 1, at 30-33.
7. Nardotti Interview, *supra* note 1.

of the quality education he might receive, however, also led him to consider the Military and Naval Academies.[8]

He applied to Dartmouth and Lehigh because of their excellent reputations and emphasis upon engineering, a field he seriously considered due to a strong background in mathematics. For the Naval Academy, he sought and received the assistance of United States Senator Jacob Javitz, leading to an alternate appointment to Annapolis. This alternate appointment, however, caused Nardotti's local congressmen to drop him from consideration for his first choice—the Military Academy—which interested him because of its all-around high standards. Undeterred, and with the assistance of the Academy's wrestling coach, he convinced West Point officials to place him into the pool of alternates for consideration by members of Congress who had not used their allotted slots.[9]

The necessary nomination finally came from an unexpected source, Congressman Adam Clayton Powell, 18th District of New York, a district that included Harlem in New York City. At the time, Congressmen Powell was one of only a handful of African-Americans serving in Congress. Nardotti never forgot Powell's help, and he often reminded others that "[y]ou never know where your opportunity is going to come from."[10] Years later, he would be an enthusiastic supporter of initiatives that gave women and minorities access to career opportunities in the Judge Advocate General's Corps.[11]

In 1965, the year Nardotti graduated from Uniondale High School, the escalation of the war in Vietnam had begun. While the military build-up in the region was supported by a majority of Americans, there was nonetheless a keen awareness that the conflict in Southeast Asia was real and that Americans were going to die. Young men entering the military academies knew—or should have known—that there was an expectation for their service in the growing conflict. Mike Nardotti was no different. While his father had served in World War II, there was no other military tradition to introduce him to the idea of selfless service. It came naturally.

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8. Oral History, *supra* note 1, at 1-3.
9. *Id.* at 4.
10. *Id.* at 5.
11. *Id.* at 109.

> I went [to West Point] with the full expectation that I would go to Vietnam and it was because I assumed that your duty was to go where you were needed. There were plenty in my class who felt the same way, but there were others who didn't . . . and to the extent they could avoid that duty, they did.[12]

There were many opportunities at West Point. Nardotti continued to excel in athletics and academics, just as he had at Uniondale. The adjustment to the rigors of a structured military regime came easily to him. He was an all-American wrestler throughout his time at West Point,[13] he served as the secretary of the cadet honor committee, and he excelled in an academic curriculum concentrated in hard sciences and engineering. Leadership, not surprisingly, was another challenge the young cadet met and exceeded. By his fourth year, he was one of only ten permanent cadet captains—the highest rank among the Corps of Cadets—and had responsibilities as the Cadet Regimental Commander for the First Regiment of the Corps of Cadets.[14]

By his senior year, there was no doubt in the twenty-two year-old's mind that he wanted to be an infantryman. Much of the instruction and training at the Military Academy was geared toward basic Army and infantry skills. Infantry was Nardotti's first choice. "I guess I was really sold on the philosophy that the fundamental in combat is the individual fighting man and all the other functions are there to support what the infantry essentially does." By spring of his senior year, he had chosen the 1st Cavalry Division for his first assignment and had volunteered for Vietnam.[15]

III. Vietnam, 1969-1971

Nardotti received his Regular Army commission in the spring of 1969. Following graduation he successfully completed the U.S. Army Ranger School (the most challenging small unit tactics course available), Airborne School, and the Infantry Officer Basic Course at Fort Benning, Georgia. At the time, it was Army policy to send new Infantry officers to an interim developmental assignment to gain troop experience prior to entering combat in Southeast Asia. Accordingly, in February 1970, Nar-

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12. *Id.* at 7-8. Eighteen classmates ultimately lost their lives in the fields of Vietnam.

13. Nardotti Interview, *supra* note 1. He was ranked sixth in the nation for his respective weight-class in 1968.

14. Oral History, *supra* note 1, at 11.

15. *Id.* at 16.

dotti was sent to the 5th Infantry Division (Mechanized), Fort Carson, Colorado. There, he served as a Reconnaissance Platoon Leader and Headquarters Company Commander. Operationally, it was a distinctly unremarkable training experience for the young officer.[16] The 5th Infantry Division had a motorized, Warsaw Pact mission thoroughly inconsistent with the realities of the war in Vietnam. Moreover, the resources demanded by the effort in Southeast Asia left unaffiliated units strapped for money and material, compromising even the best efforts to maintain minimum readiness.[17] Nardotti recalls:

> [I]t was . . . a disaster. We were not able—we were not permitted to take our vehicles up until July because of fuel shortages. We could not take vehicles out of the motor pool for any distance. Basically we tried to maintain vehicles by starting them up every day. . . . It was a disastrous way to try to maintain vehicles . . . [and] it showed.[18]

One distinct benefit of the training, however, was the immediate exposure to non-commissioned officers (NCOs). Like most young officers, Nardotti began his career under the watchful eye of experienced NCOs who taught him about the Army and the critical manner in which they keep it running. Nardotti's first sergeant at Fort Carson was a twenty-six year veteran with experience in World War II, Korea, and Vietnam.[19] Indeed, on the day he was told he would receive a company command, Nardotti's senior officer was quick to remind him that "[b]efore you get too big a head, you just understand one thing—the only reason you're getting this opportunity is we have enough experienced NCOs in this organization to keep you out of trouble."[20] It was a lesson he never forgot.

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16. *Id.* at 23. "I keep using that word—disasters. It [the training environment at the 5th Infantry Division] was not a very pleasant situation. In that respect, it was not worthwhile . . . [because] it did not prepare me operationally [for Vietnam]."

17. *Id.*

18. *Id.*

19. Nardotti Interview, *supra* note 1.

20. Oral History, *supra* note 1, at 21.

By the summer of 1970, his interim assignment in Colorado was over. Commensurate with the request he made the year before at West Point, he was assigned to B Troop, 1st Squadron, 9th Cavalry Regiment, 1st Cavalry Division, with duty in South Vietnam. Eager for the experience, he quickly sought and received a leadership position as the troop's "Blue" platoon leader.[21]

> I want[ed] to be a platoon leader—Blue, Red, whatever you want to call it—I'll go. Over the next day or so . . . people would go (makes the sign of the cross). Apparently, the mortality rate of my predecessors was not very good. Or at least there was a series of people who held the job who didn't—who weren't in the job long before they were carried out on a stretcher.[22]

The response from the others in the troop proved prescient.

A primary mission of B Troop was to locate the enemy using reconnaissance and attack helicopters, and then deploy the infantry element—Blue Platoon—for short, limited operations. The platoon was trained to rappel in when transport helicopters—UH-1 "Hueys"—were unable to land. Operations included support of Ranger reconnaissance missions and search and rescue of downed pilots.[23] The new platoon leader felt prepared as he could be under the circumstances, confident that his training at Ranger School had given him the tools he needed to succeed.

This included the ability to integrate into the unit, and to motivate and win the confidence of subordinates. One of the first tests involved wrestling. Early on, word of the new lieutenant's athleticism had gotten out and led one of the M60 gunners to challenge Nardotti to "mix it up" in a wrestling match. The challenge was quickly met and, moments after it had

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21. *Id.* at 25. The official term was "platoon commander." The table of organization and equipment for B Troop included only one infantry officer billet; the rest of the officers were aviators.

22. *Id.* at 24.

23. *Id.* at 25-26.

> The Rangers in those days . . . were in a recon role. They did not have a "make contact with the enemy" mission. They strictly were recon but occasionally, if they got in trouble . . . they would need reinforcement very quickly and that's where you'd have to send people in. That was the function of [the Blue Platoon].

Id.

begun, the young gunner found himself in the dirt, tied up in knots. As Nardotti aptly noted later, "this is where being able to do everything that your troops do, even to the point of being able to kick their ass if you need to, comes in handy."[24]

The lesson was not lost on his unit. Credentialed as the only Ranger-qualified officer in B Troop, Nardotti was willing and able to demonstrate the physical prowess expected of an infantryman and to act decisively in early firefights, earning him the respect of superiors and subordinates alike. He sought tough jobs without hesitation and proved he was a soldier. The fortitude displayed in those early days would find its greatest test only weeks later, when everything changed for Nardotti and his unit.

It was late afternoon on 6 December 1970, when a Ranger reconnaissance element radioed for help. Earlier that day, Blue Platoon completed two missions, rappelling in to pursue fleeing enemy troops. Despite an already active day, when the call came to "bounce the Blues," B Troop responded without hesitation, loading six men each on three UH-1s, and flying off to assist the troubled four-man Ranger team.[25]

The air-mobile insertion to assist the reconnaissance team occurred under sporadic enemy fire, but the link-up went without incident. Nardotti's men helped set up a defensive perimeter and were preparing for the next phase of the operation when suddenly the enemy began a blistering assault involving rocket and .30 caliber fire. Nardotti was injured immediately, suffering shrapnel wounds to the neck and back as he was reaching for a radio headset to communicate with his troop commander circling in the air above. The shrapnel caused Nardotti's neck to go numb and shattered his voice box; he thought he was going to choke.[26]

Nardotti was positioned next to the reconnaissance team leader, who suffered a severe head wound in the initial assault. The two men were about ten meters forward of the perimeter. Nardotti was able to make it back to his medic for assistance. The injured Ranger team leader, however, was unable to follow. After quickly tending to his own situation, despite his wounds and the constant fire, Nardotti and another man went out to retrieve the wounded Ranger. As they were pulling him back, Nardotti was shot in the arm with a tracer round. Despite all that was happen-

24. *Id.* at 26.
25. *Id.* at 29-30.
26. *Id.* at 31.

ing, he never lost command or control of the situation. He coordinated for the unit to break contact with the enemy while another blue platoon from the 17th Cavalry deployed in support.

> We started this at about four. This is about eight-thirty at night [when the break contact order was given] so it's dark. We got a guy critically wounded. My radio operator, when I first got hit, was in a mild panic. . . . The pilots told me later, they said they thought I was a goner because they said what was coming out over of the radio was [that I] was hit in the head and wasn't looking good. . . . [As] this was happening, before I was able to get on the radio and calm things down . . . . I told [Sergeant Monty Cates] what we needed to do and got the word out over the radio that we were going to break contact.[27]

Nardotti forever recognized the role Sergeant Cates and the other young soldiers and NCO's played in the firefight, citing their professionalism and courage. He credits them with saving his life.[28]

Nardotti and the Ranger team leader were eventually medically evacuated to an intermediate firebase, and then to the military hospital at Long Binh. After a two-week stay, Nardotti began a series of moves—to Camp Zama, Japan, and then to Walter Reed Army Medical Center, Washington—that finally returned him to New York and the Saint Albans Naval Hospital. His recovery would take more than six months of inpatient and outpatient care. He never regretted the decisions that lead him to Vietnam, however: "I was very proud of myself for going . . . [because it] was where I needed to be."[29]

The severely wounded Ranger whom Nardotti tried so desperately to save later died. The nineteen year-old had only nine days left in Vietnam, and his mother had already lost one son to the war. His commander kept him in the field over his mother's pleas because the soldier wanted it that way—to finish out his time as a soldier, doing his duty. It was a display of

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27. *Id*. at 32.
28. Nardotti Interview, *supra* note 1.
29. Oral History, *supra* note 1, at 39.

courage and selfless service that Nardotti would never forget: a quality of character that those who avoided combat duty could never understand.[30]

The fortitude and professionalism displayed by the soldiers Nardotti encountered before and during Vietnam was not lost on the young infantry officer. He credits much of his success to the lessons and mentoring he received early in his career by men of unusual experience and insight. He knew firsthand of the talent that resides in soldiers and NCOs, and the critical difference they make for an organization. It was a perspective that he carried throughout his military career.

> The great words that I spoke frequently about NCOs, the importance of NCOs, were not because I read it in a book someplace and it's something nice to say. For me, the importance of NCOs and what they mean to the Army, and to soldiers and officers in particular, is what I learned early on.
>
> . . . .
>
> As General Rogers pointed out one time, he said, "Its no coincidence that in the Army . . . we have our people who are least experienced in the officer ranks . . . paired with people with the most experience . . . ." You learned early on that if you listen carefully, if you're not afraid to ask questions and don't worry about being embarrassed . . . if you're consistent and trustworthy and they know you have standards, you live by them and make others live by them, they're behind you solidly. . . . The fundamental lessons that you learn—again, you have to listen to your NCOs.[31]

IV. Return to West Point and Entry to the Judge Advocate General's Corps, 1971-1976

By May of 1971, Nardotti's injuries had healed sufficiently to allow him to leave Saint Albans Naval Hospital and begin a program of recovery. The Army decided two years after his graduation that the best place for him was to return to the Military Academy. There, during his rehabilitation, he

30. *Id.* at 34.
31. *Id.* at 34-36.

was assigned to the Physical Education Department where he taught and coached wrestling. In June 1971, he was promoted to captain.[32]

The return to West Point was a positive experience that allowed Nardotti to mentor young cadets while he recovered from his injuries.[33] It also gave him the time to seriously consider a career in law. Generally, his experience with judge advocates had been mixed. Many, in his view, were simply not predisposed toward the military.

> There was something about the people that were coming in [as judge advocates]. Their focus was not on the Army as an institution they wanted to stay with or soldiers generally being a population of clients they wanted to hang around. . . . [A number of them] were not sympathetic with the Army as an institution.[34]

This led Nardotti to think that his own unique military experience—as a Military Academy graduate, platoon and company commander, and combat veteran—might bring a valuable perspective to the services provided by judge advocates. In particular, he felt that his experience as a line officer gave him an insight to commanders that was lacking in many of the young lawyers he had dealt with:

> I thought that there was an element of experience that I would bring . . . that was not there in the vast majority of judge advocates at the time, the overwhelming majority. I thought it would be a plus. I thought I could add an element that would be of benefit to commanders that I knew, and to soldiers.[35]

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32. *Id.* at 40-41.
33. *Id.* at 40.

> I was glad to be there but it was because of very unusual circumstances. . . . [T]he fact that I knew some of the cadets, I had not been there too long before, [and that] I was severely wounded and . . . was in the process of recovery—there was a dose of realism there for cadets.

Id.

34. *Id.* at 42.
35. *Id.* at 43.

It was this early belief in the notion and value of the soldier-lawyer that ultimately led Nardotti to apply in 1972 for the Excess Leave Program to attend law school. He married his wife, Susan, the same year. By January 1973, he was accepted to Fordham University Law School, and thereafter was granted the excess leave he had requested, entering law school the following fall. In 1974, he was picked up under the newly created Funded Legal Education Program (FLEP). He graduated in 1976, formally left the infantry, and began his remarkable career in the Judge Advocate General's Corps.[36]

V. 3d Armored Division, Butzbach, Germany, 1977-78

Consistent with their request, the Nardottis' first assignment following the Judge Advocate Officer Basic Course was with the 3d Armored Division, in Butzbach, Germany.[37] His first supervisor was Lieutenant Colonel John Fugh.[38] The Butzbach office supported the largest armored brigade in the Army,[39] and it provided the young officer with excellent opportunities as a trial counsel and, later, as Officer In Charge of a branch office.[40] The trial experience in a troubled post-Vietnam Army is what Nardotti remembers most:

> You had serious disciplinary problems among troops. . . . It was great trial work. But what's good for the JAG Corps is not good for the Army . . . [and] was a reflection of the problems commanders had to deal with. . . . [I]t was just terrible . . . I think I tried about 80 cases, probably 50 GCMs, half of those contested cases before GCMs, most [of them with] juries. I think the 3d Armored Division was trying about 350 cases per year. It was very substantial.[41]

As in all military assignments, the work is only part of the experience. The people represent the other part. The Nardottis were welcomed with open arms and a generosity of spirit they have never forgotten. Another judge advocate provided the Nardotti family, now with two young chil-

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36. *Id.* at 44-45.

37. *Id.* at 47.

38. The Judge Advocate General of the Army, 1991-93. *Id.* at 52.

39. 1st Brigade, 3d Armored Division. Nardotti Interview, *supra* note 1.

40. Captain John D. Altenburg, later The Assistant Judge Advocate General of the Army, 1997-2001, succeeded him. *Id.*

41. Oral History, *supra* note 1, at 48.

dren, lodging in his home and a car to get around in the early days of the new assignment. "I asked one of the officers, 'How do [I] repay what you've given us?' He said, 'just pass it on. That's the way it's done.'"[42] The Fughs also displayed an uncommon kindness and attention toward the junior officers and their families.

> [T]he Fughs, John and June Fugh, were wonderful people to have as SJA and the SJA's wife. They were very close to, very attentive to all the captains. June Fugh was kind of like the mother for all the . . . bachelor captains . . . . [It] was a good lesson for us early on about what are the things you need to do as an SJA—you need to take care of your people, and he did. He looked out for them.[43]

In addition to his high standards for taking care of military families, Lieutenant Colonel Fugh inspired lasting impressions for the way he stood on principal in defense of his people, and for what he believed was right—values of leadership that did not go unnoticed by the young judge advocates who worked for him.[44]

Among his peers, Nardotti was among the precious few with any prior military background, as most were direct appointees. The enormous demands created by heavy case loads literally required young judge advocates to hit the ground running. This frustrated any effort on the part of leaders to train new judge advocates in basic soldiering skills or to impress upon them an appreciation for what their clients did for a living. As a result, many judge advocates genuinely considered themselves lawyers first, but did little to change the perception that they lacked key military sensitivities and training. "Quite frankly," Nardotti reflected, "[commanders'] impression of JAG officers was not necessarily favorable and the expectation wasn't that they were going to find people who were soldiers in the JAG ranks. They were going to be lawyers, [because] that's what they do."[45]

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42. *Id.* at 49.
43. *Id.* at 49-50.
44. *Id.* at 51.
45. *Id.* at 54.

Nardotti clearly recognized the importance of achieving a balance between the two. He saw that commanders appreciated officers who were effective advocates well-versed in the law, but who were also able to perform and advise in demanding environments. "[Y]ou may be soldiers—you've got to be soldiers—but you've got to be a damned good lawyer as well. That's what always made the difference."[46] He recognized that the ability to develop rapport with commanders created valuable relationships, particularly for defense counsel who were able to tap that resource on behalf of their clients.[47]

Few exemplified the balance between soldier and lawyer better than the young Vietnam veteran fresh out of law school. Obtaining that balance is not always easy, however. There is no doubting that Army culture, then as now, lends great deference to accomplishment in military schools, challenging jobs, and combat. Perhaps rightly so. It would be a mistake, however, to think that the soldiering emphasis facilitated by Nardotti in any way diminished the fundamental responsibility of judge advocates to provide timely and efficient legal counsel.

> We're not pushing being a soldier first—that was never my thought in this idea of the importance of being a soldier—you're not there to relive the glory days as an infantryman or anything else. What we tried to foster was the understanding that you're going to be a better lawyer, you're going to know your client better, and you're going to be able to keep up with your client.
>
> . . . .
>
> If you can't do the things that soldiers need to do, you're not going to be there when your commander needs you. If you don't know what it is like to be a soldier, you're not going to understand what the commander is thinking, feeling, doing, when he's on the verge of making an important decision or what that particular soldier may have been thinking or feeling at the time of something that went on. It gives you the ability to empathize with the client that would otherwise not be there.[48]

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46. *Id.*
47. *Id.* at 55.
48. *Id.* at 56.

The importance of caring for Army families and the notion of the soldier-lawyer were perhaps the greatest lessons garnered from Nardotti's two years with the 3d Armored Division. He saw soldiering as integral to the practice of military law, and he recognized that successful judge advocates could not simply be lawyers to the exclusion of broader responsibilities of officership. What was needed was a marriage of the two. A third lesson taken from the 3d Armored Division evolved from the relationship between government and defense counsel, who both worked for the SJA at that time. While "never doubting the vigor with which [both sides] represented clients," he observed the need to avoid letting litigation become personal.[49]

> Let me put it this way—I don't believe you serve the best interests of your clients when you get into that mode. If it gets to be personal, you better back away. . . . Sooner or later you're going to make a decision which is not in the client's interest, whether it's [on behalf of] the government or as the defense counsel.[50]

It was an important lesson about conducting litigation, which served him well in future assignments.

VI. The Graduate Course and U.S. Army Litigation Division, 1979-1985

Because of his seniority—he was selected for promotion to major his second year in Germany—the Judge Advocate Officer Graduate Course came early for Nardotti. It was, for several reasons, one of the two best years of his military life.[51] The Graduate Course provided time to step back from the Army and into an academic environment. "I think that's one of the reasons for the success of the Army, because at regular intervals you have the opportunity to reflect, whether it's an advanced course, CGSC, the War College. You need to reflect on where you've been and where you are going."[52]

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49. *Id.* at 58.
50. *Id.*
51. *Id.* at 61, 63 (He considered his year at the Army War College to be the best year.).
52. *Id.* at 61.

The second benefit of the Graduate Course was the opportunity to develop lasting relationships with his peers. "You can't keep the mask up very long in that environment. Your classmates . . . get to know you."[53] The year in Charlottesville was a chance to build personal and professional associations that lasted throughout his career and beyond. He found the shared experience of his classmates was the key collateral benefit of the course.[54]

The Graduate Course was also a tremendous opportunity for objective learning. Like so many others, Nardotti was impressed with the genuine talent and accessibility of the faculty at The Judge Advocate General's School, which remains among the best in the Army. "You never get that kind of comprehensive treatment of the law, ever, unless you took a year off and went to a [civilian] graduate course, but even then, you can't do that and get the things that you need for your profession as a judge advocate."[55]

Following the Graduate Course, Nardotti began a relatively long and remarkable tenure at the U.S. Army Litigation Division, although it was not the obvious assignment for him. Throughout the Graduate Course, he had focused heavily—with considerable success—on government contracts in anticipation of a follow up assignment to the Contract Appeals Division. As he later admitted, however, Federal Litigation was the only course he almost failed.

> I took from [the decision to assign him to Litigation Division] that they looked at my work . . . and said, "Well, he's got the contract stuff down so we're not going to waste our time sending him there. Let's send him to Litigation Division. He didn't get this stuff the first time. Maybe he'll learn it in Washington."[56]

He arrived at Litigation Division in June of 1980, where he was assigned to the Military Personnel Branch located in the Pentagon.[57] His first supervisor was Lieutenant Colonel Scott Magers.[58] Like Lieutenant Colonel Fugh before him, Magers was a superb mentor who actively engaged his subordinates both personally and professionally. In particular, he recognized the importance of striking a balance between the heavy

53. *Id.* at 62.
54. *Id.* at 63.
55. *Id.*
56. *Id.* at 65.
57. *Id.*
58. Later promoted to Brigadier General. *Id.* at 149.

demands of litigation and the needs of the individual and the family. "It was important for my supervisor to tell me you need to make sure you are taking care of yourself. That was a lesson I never forgot, and he [Magers] was good about it."[59]

Among his first cases to litigate was a challenge to the constitutionality of the Army chaplaincy. The case was started by "a couple of Harvard law students . . . on a theory that any expenditure of public funds for religious institutions like the chaplaincy violated the First Amendment, notwithstanding the military need."[60] The district court and the Court of Appeals for the Second Circuit largely sustained the government's position in the case, which was ultimately settled. It was just one of several interesting and challenging cases—including a massive number of actions arising from flawed officer promotion and selection boards—that occupied his time at Litigation Division during the early 1980s.[61]

The diversity of casework, and the dynamic environment of a litigation practice, was the "spice of life" that led Nardotti to spend nearly five years at Litigation Division.[62] He observed many outstanding young officers come and go during that period, armed with plenty of valuable experience that made the transition to civilian practice easy, if not inviting. In later years, this would help him to develop guiding principles for the JAG Corps and what, he believed, should be its offering to young attorneys.

> You don't sell the JAG Corps primarily on the idea that it's good experience. You sell it on the concept that there is honor in service, it's important to serve, and whether you stay three years, four years, or twenty years, the time you spend in uniform serving soldiers will be something that you look back on with great satisfaction. You'll be glad you did it.[63]

During his time at Litigation Division, Nardotti maintained a balanced and realistic view of where the JAG Corps fit in the larger scheme of the Army. While recognizing the value of time spent working in Wash-

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59. *Id.* at 67-68.
60. *Id.* at 69.
61. *Id.* at 74.
62. *Id.* at 78.
63. *Id.* at 76.

ington, D.C., he never lost focus on the importance of the people at the other end of the proverbial spear.

> [W]hen you are in this [headquarters] environment for a length of time, what you have to guard against is the inclination to think too much like a headquarters person. You must always remember that your reason for existence is to serve soldiers and to take care of the Army in the field.[64]

VII. 1st Cavalry Division, Fort Hood, Texas, 1985-1988

Following completion of the six-month course of study at the Armed Forces Staff College,[65] Nardotti left Washington for Fort Hood, Texas, where he became the Staff Judge Advocate for the 1st Cavalry Division. At that time, the division was a two-brigade organization with approximately 13,000 troops. The SJA office consisted of twelve judge advocates, eleven enlisted personnel, and a warrant officer, who together provided core legal services—military justice, routine administrative law, and soldier services. The move from Washington to the field held exciting new challenges for the young SJA. Nardotti encountered enhanced leadership responsibilities and the higher status afforded lieutenant colonels at the division level, a point his predecessor at Fort Hood tried to emphasize: "You have to understand something. Being a lieutenant colonel—lieutenant colonels take out their own trash in the Pentagon, but being a lieutenant colonel in a division is a big deal. Be ready for that."[66]

Colonel Tom Crean, who as a captain at the Personnel, Plans and Training Office (PP&TO) twelve years earlier had introduced Nardotti to the FLEP program, was the III Corps SJA.[67] Colonel Crean was a superb mentor to the junior SJAs at Fort Hood, and in particular, was admired by

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64. *Id.* at 72-73.

65. *Id.* at 89. Major General Nardotti opted, for family reasons, to attend the Armed Forces Staff College in Norfolk, Virginia, rather than the Command and General Staff College at Fort Leavenworth, Kansas. *Id.*

66. *Id.* at 123-24 (quoting Colonel John Wallace).

67. *Id.* at 95-96.

Nardotti for his talent of winning the trust and confidence of a demanding Commanding General.[68]

> Tom Crean as the SJA—I tell you, standing back and watching him, it really was a great credit to the JAG Corps because . . . [most] of the other staff sections did not have the rapport with the CG that Tom Crean had. Other staff members . . . looked with great admiration, that this guy who didn't always have good news for the boss had a good rapport with [him] and basically could go in and tell him the hard truths when he had to hear them. I was impressed by that, and it was a great source of pride . . . a real credit to the JAG Corps.[69]

It was also one of the first lessons Nardotti had as an SJA: the value and importance of developing a counselor relationship with senior officers, to leverage the unique role of the judge advocate into something more than just another staff officer.[70]

For his part, being an SJA was also Nardotti's first real opportunity to think about how he might focus and shape the training for his junior officers. Unlike the environment in Germany, where the breathtaking volume of misconduct often precluded other types of training, crime did not occupy as much time for the state-side Army in the mid-1980s. There was an opportunity to do more than just criminal law, and this allowed Nardotti to focus his subordinates on the division's war-fighting, operational mission. So, he sent them to the field.[71]

Nardotti began by challenging himself and his subordinates to carefully consider their place in the organization, and to seek out opportunities to "add value" in an operational context.[72] He was convinced that judge advocates could be—and should be—a force multiplier for commanders. This would be accomplished where judge advocates earned their seat at the

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68. Lieutenant General Crosbie Saint. Nardotti Interview, *supra* note 1.

69. Oral History, *supra* note 1, at 97.

70. *Id.* at 98.

71. *Id.* at 99.

72. *Id.* at 100. Major General Nardotti mentions an early anecdote where, during a command post exercise, there was no plan for a judge advocate to be in the command post or anywhere else in the field headquarters.

commander's table by using their experience and analytical training to assist the command.

> You need to understand where you fit into the mission and how you can help. . . . [I]t's a matter of education. There are issues that you will see that they will not see. . . . It's a matter of looking at the issues from the perspective that you deal from . . . and just apply the insights that you have—based on your training as a judge advocate—to see where there may be problems that you are getting paid to anticipate and, if you can, make them go away before they become problems.[73]

Nardotti's objective was nothing short of changing the way commanders viewed judge advocates and the way judge advocates viewed themselves. He wanted to move away from the "obstructionist" image that many in the field still attributed to Army lawyers, and away from the "never leave the office" orientation of many young judge advocates.[74] Implicit in this was a fundamental change in the way judge advocates conducted business. Rather than a reactive practice—waiting for the crime or crisis to come to the SJA office, Nardotti focused on pushing his young lawyers forward to integrate them early and often with their clients.

> [J]ust as the logistics people are supposed to be anticipating what the problems are going to be in their area and they come up with solutions, you have got to do the same thing for those issues that fall into the lap of the judge advocate. You don't wait until it happens. You get in there and look at it and figure out how you can add value early rather than later . . . to demonstrate [that judge advocates] . . . can be problem-solvers. They are team players. They are soldiers.[75]

Under Nardotti's leadership and initiative, 1st Cavalry Division began sending young judge advocates to the field with unprecedented frequency. "You go into that environment and just the fact that you show up out there with your LBE on correctly, looking like a soldier, makes a big difference . . . [and shows that] you are out there to learn." He would tell his young

73. *Id.* at 100-01.
74. *Id.* at 101.
75. *Id.*

brigade trial counsel, "This is an opportunity for you to go out and see what your clients do."[76]

It is important to note that this was not a singular effort. Colonel Crean, the III Corps SJA, and the two succeeding 2d Armored Division SJAs, Lieutenant Colonel Jim Smizer and Lieutenant Colonel Gary Leeling, together were working to move the JAG Corps forward in this regard. They were each "fighting the same battle, which was to 'show . . . relevance.'"[77]

> What is it that you will do that will add value? Rightly or wrongly, my view was you don't expect others to tell you how you can be important. Figure that out. That's what you get paid to do. You get to determine in some respects your own destiny. How important do you want to be?[78]

For Nardotti, it was not a difficult answer. He was determined to broaden the role of judge advocates from an operational and, indeed, an institutional perspective. The end-state was the same: more efficient, timely, and effective delivery of legal services. He wanted judge advocates at their commanders' sides, offering counsel as a valued member of the staff while anticipating problems, staying actively engaged, and understanding the operation.[79]

It was never Nardotti's intent for judge advocates to assume a role outside their area of expertise, but rather to strengthen the role already given them. In doing so, he proved that Army lawyers could be fully vested members of the brigade or division staff. This was not lost on his own commanding general, who was so impressed with Nardotti that he asked him to serve as the senior officer of the division forward location during a REFORGER exercise.[80] This was a long way from the first exercise, where the division SJA was not even part of the headquarters set up—not so much as a table or chair—and proved the validity of what Nardotti and the other SJAs at Fort Hood where trying to accomplish.

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76. *Id.* at 103-04.
77. *Id.* at 104.
78. *Id.*
79. *Id.*
80. Return of Forces to Germany. *Id.* at 106-07. The exercise involved the deployment of 20,000 troops from Fort Hood, Texas. Nardotti Interview, *supra* note 1.

By getting judge advocates out of the office and into the field, these SJAs eroded the myth that Army lawyers lack the personal fortitude and resourcefulness ingrained in combat arms officers. Certainly, judge advocates were not going to be taking any hills, but they would be at the commander's side throughout the operation to assist with planning, targeting, refugees, and whatever other issues arose with a nexus to the law. If nothing else, they would be a presence, someone "willing to take the shift on the radio from three to five o'clock in the morning to let them know that you are ready to do what they need to do."[81] In this way they were combat multipliers facilitating the commander's mission, and their own.

> You are going to be out there in the rain, in the mud, doing all that stuff. You are part of the team. It is going to help you establish a rapport . . . . [Back in garrison, the commander knows this] isn't some guy who wears Class A's all the time and goes to court and comes down to see me about Article 15s. He is somebody who was out in the mud with me last week, and I'll talk to him, or I'll talk to her.[82]

One of the benefits of the soldier-lawyer emphasis was the integration of women into previously all-male environments. Nowhere was this more apparent than in the combat battalions and brigades. The Fort Hood division SJAs never made any distinction between male and female officers. Captains Jan Charvat and Amy Frisk were among the few—if not the very first—women to integrate into these units. "That was breaking new ground, getting women into that. [T]hey demonstrated that they could be soldiers too, that they could do the things that needed to be done. They would meet all the requirements and they were great lawyers."[83]

It was clear, however, that the vanguard effort by Fort Hood to get judge advocates out to the field and integrated into operational staffs was not fully appreciated by all members of the senior leadership of the JAG Corps. Certainly, the leadership was not thinking about the kinds of doc-

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81. Oral History, *supra* note 1, at 109.
82. *Id.*
83. *Id.*

trinal training changes that came later with the introduction of judge advocates at the national training centers.[84]

> At least one of the . . . one-stars at the time, I was led to believe, did not share the view that we had at Fort Hood about inserting ourselves. He took a more traditional view about how JAGs ought to be employed. If you need to go out there and try cases, that's one thing, but certainly not to use JAGs for performing functions that the operators ought to perform.[85]

Undeterred, Nardotti, Leeling, and Smizer continued to raise the profile of their efforts to get judge advocates into the field. In truth, it was not a radical idea or one without precedent. In the early 1940s, under the leadership of Colonel Edward Hamilton "Ham" Young, a West Point graduate and former infantry officer, the curriculum of The Judge Advocate General's School: "taught 'soldiering' as well as 'lawyering.' With great stress upon military discipline, military science and tactics included close order drill, interior guard, map reading, chemical warfare, staff functions, signal communications, weapons, and similar subjects designed to prepare students for duty as staff officers."[86] The Fort Hood initiative was simply a modern take on an old idea that officership is inseparable from soldiering.

VIII. U.S. Army Infantry Center, Fort Benning, Georgia, 1988-1990

The final SJA assignment of Nardotti's career was with the "Home of the Infantry" at Fort Benning, Georgia. It was like going home for the former infantryman. Indeed, his prior service as a line officer contributed to his getting the job. The two star commanding general at the time was a hardened infantryman who was unimpressed with the JAG Corps' plan to send a lieutenant colonel to the colonel's billet, and felt underserved by the Corps. Knowing this, the Chief of PP&TO, Colonel Walter Huffman,[87]

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84. *Id.* at 114.

85. *Id.*

86. THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS, 1775-1975, *supra* note 3, at 188-89. Nardotti also credits Major General Ken Hodson, The Judge Advocate General, 1967-71, for appreciating that soldiering skills are fundamental to officership. Nardotti Interview, *supra* note 1.

87. The Judge Advocate General of the Army, 1997-2001. Nardotti Interview, *supra* note 1.

asked Nardotti to interview for the job, and advised him to "[m]ake sure you're wearing everything (awards, decorations, and badges)."[88]

This was unusual. By statute, The Judge Advocate General has the responsibility to assign SJAs as he deems appropriate.[89] As a matter of policy, two star commanders and below have little say in the matter; three and four star commanders have veto power.[90] But in this case, the experience Nardotti had as a combat officer was precisely what the JAG Corps, and the gaining commander, were looking for. "The drill was to send down somebody who has all the infantry [credentials]. . . . It's the foot in the door. . . . [I]n terms of the background that I had, it was a perfect fit . . . ."[91] The commanding general was on the phone before Nardotti made it out of the building. He had the job.[92]

The Nardotti's arrived at Fort Benning in May 1988. He was selected by the colonels' board that met that summer, and pinned on a year later in June 1989. It was the first time he was "the colonel." For the first year prior to his promotion, "[t]here [were] no other JAG colonels in sight. . . . [T]here were two lieutenant colonels in the office. One was the deputy and one was the chief of claims," both of whom were senior to Nardotti. He managed the potentially awkward situation by valuing both men for who they were and what they were able to bring to the organization. "It's nothing any more special than treating people with the kind of respect and dignity that you would expect in similar circumstances."[93]

Following on an effort begun by his predecessor, Colonel Earl Lassiter, one of Nardotti's first objectives at Fort Benning was to upgrade and refurbish the SJA Office at Winship Hall.[94] The changes were dramatic: carpeting, dropped ceilings, better lighting, central air conditioning, landscaping, and new paint. Everyone painted their own offices, including the SJA, all in time for Major General William Suter's Article 6 visit.[95] During

88. Oral History, *supra* note 1, at 121-22.

89. 10 U.S.C. § 3037 (2000).

90. Nardotti Interview, *supra* note 1.

91. Oral History, *supra* note 1, at 122-23.

92. *Id.*

93. *Id.* at 126.

94. Named after Major General Blanton Winship, The Judge Advocate General, 1931-33, holder of the Distinguished Service Cross for heroism and the Silver Star for gallantry for action during World War I. THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS, 1775-1975, *supra* note 3, at 149-51.

95. UCMJ art. 6 (2000).

the office tour, Nardotti observed that Suter "did the best job [he] had ever seen of going through the office and . . . engaging people in a way that made every person . . . feel important." It was a lesson he would later seek to emulate.[96]

Although the soldiering at Fort Benning, a Training and Doctrine Command installation, was very different from the kind he experienced at Fort Hood, the importance of officers with soldiering skills continued to have a vitally important place for Nardotti. Following the death of a student at the Ranger Training Brigade, Nardotti sent an administrative law attorney with soldiering skills to advise the investigating officer, a brigade commander.

> [T]hey went out tromping the turf where [the accident] happened, and the fact that he had a guy who was a good soldier, a JAG who happened to be a good soldier, was really important. He didn't need to come up to speed on any of the issues about what was going on in this training setting. That came very quickly to him, and [the investigating officer] appreciated that.[97]

One of the most difficult events at Fort Benning during this period was a double murder that occurred prior to Nardotti's arrival, reopened in part due to the diligence of the father of one of the victims. The case involved "a lieutenant and his girlfriend who had been murdered, bodies mutilated. . . . [I]t was a . . . horrendous crime."[98] Nardotti recognized the opportunity for the office to become emotionally involved in the case, but he was careful not to allow such emotions to affect his judgment. In particular, he was keenly aware of the need to retain objectivity, and to defer any personal feelings about capital punishment in order to guarantee the integrity of the advice his commander would need. It was a lesson he had learned at Litigation Division.

> [Y]ou look at the circumstances of that crime, you look at an agonizing parent, and you have got to be careful that that's not what is driving your decision [to recommend a capital case]. . . . [I]f I felt that I had moral compunctions against capital punishment, then I should not be in a position [to advise] someone who makes decisions in that area. . . . [I]f you cannot give the deci-

96. Oral History, *supra* note 1, at 133.
97. *Id.* at 127.
98. *Id.* at 135.

> sion-maker the full range of options, if your personal viewpoint is going to affect that, it is something you better think about in continuing to occupy that position as an advisor.[99]

The case was tried capital, and it ultimately resulted in a life sentence for the accused.

IX. Army War College, Carlisle Barracks, Pennsylvania, 1990-1991

Without hesitation, Nardotti considered his next year in residence at the Army War College his best year in the Army. Personally and professionally, the academic setting of the Carlisle community was a rewarding experience for the Nardotti family. The program of instruction emphasized seminars populated by an accomplished group of highly experienced senior officers, which afforded the unique opportunity to share and discuss perspectives on everything from leadership to military history.[100]

The diverse student body also offered its own unique challenges. The War College, like the other senior service schools, is a place where judge advocates are peered with combat and support services officers. Rather than attempt to rely upon his former combat arms experience, Nardotti again integrated into the community of combat arms with a systemic, lawyerly approach—he listened.

> I paid attention, I listened a lot and as lawyers, your analytical abilities are going to be as good as anybody's . . . . It is like anything else—in any environment, if people perceive that you are someone who will listen to them, value their opinion, and factor it in in a deliberate and considered way, you're listened to. . . . [I]f your mission in life is to work with the operators in the division . . . if you handle [it] in the right way, they are going to value your opinion, they are going to seek your opinion. . . . They are going to treat you as another member of the team, another soldier.[101]

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99. *Id.* at 136.
100. *Id*. at 92-93, 138-39.
101. *Id*. at 94-95.

Being a member of the team came easily for Nardotti, in part, because he never shied away from the challenge. He understood the important contribution a judge advocate could make in any staff environment, so long as the effort was genuine and consistent. At no time did he attempt to cloak himself in the shroud of the "special services" which presumes an inability to be a force multiplier. He was engaged, and combined the analytical skills of an attorney with the mission-orientation of an infantryman.[102]

A Judge Advocate General's Corps general officers' board met in the summer of 1991, following Nardotti's graduation from the War College. At that time, he was preparing for his follow-on assignment as the Chief, Contract Appeals Division. With roughly two years in grade, Nardotti did not consider himself a likely choice.

> [W]hen senior commanders say things like, "this person should be a general officer," you have done what you need to do. You have satisfied the customer, you have demonstrated your competence, but there are plenty of people that can fill that position. You should never delude yourself into thinking that you are getting close, because . . . . [t]he system doesn't work that way.[103]

He was wrong. Nardotti's selection to brigadier general was announced shortly thereafter.

X. Assistant Judge Advocate General for Civil Law and Litigation, 1991-1993

At the time of his selection to brigadier general, Nardotti had only two years in grade as a colonel—one year at Fort Benning and one year in residence at the Army War College. He was "genuinely shocked" at his selection.[104]

> I looked around, [and] I was looking at these guys who were in Desert Storm—Walt Huffman, who I had known for years and respected. . . . [as well as] Ray Ruppert [and] Mack Squires. . . . I thought [the board would select] Fred Green. . . . [and that] I would be competitive . . . after the next job.[105]

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102. *See id.*
103. *Id*. at 145.
104. *Id.*

Indeed, Nardotti was selected early by most any standard, over and ahead of "sixty or seventy colonels" with senior dates of rank.[106]

> I really felt at that point I wasn't ready. I thought I had more to do—I knew I had more to do as a colonel to be ready. . . . I will say that there was not a little bit of anxiety about that, about how that was going to sit with my fellow colonels, who know how junior I was. If there was some bad feeling about it out there, I never got a hint of it.[107]

It should surprise no one that what distinguished the young colonel was his proven leadership experience. The timing was perfect. "As [Brigadier General] Scott [Magers] said, 'The decision has been made because they needed somebody with real leadership ability. That was the reason. [T]he Chief of Staff was talking to the president of the board and saying, 'Get me a soldier. Get me a leader.'"[108] Nardotti's years of dedicated service as a soldier-lawyer had been recognized as precisely what was needed at the time, proof that the balance he had worked so hard to achieve was valued by the Army leadership. Still, he understood how fortunate he was and answered the call with humility. Recalling the opening day of the general officer's orientation course, he took heart at being reminded not to "get too big a head because for every one of you standing out there, there are probably ten more of your contemporaries that [could] be standing in your shoes."[109]

Nardotti assumed duties as the Assistant Judge Advocate General for Civil Law and Litigation. Perhaps the two greatest challenges during this period were the down-sizing of the military and the Clinton Administration's new homosexual policy. He considered the first the greater challenge of the two, and credited then Department of Defense (DOD) General Counsel Jamie Gorelick with foresight in supporting a sustained judge advocate manpower structure.[110]

> [Gorelick] came in, and as we were talking through the issues . . . of reduction in force, reductions in the strength levels in all the services and all the associated problems that were going to come,

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105. *Id.* at 151.
106. *Id.* at 152.
107. *Id.*
108. *Id.* at 153.
109. *Id.*
110. *Id.* at 156-57.

> . . . she said, "This is the time we really should be increasing your legal assets to be able to deal with those with the idea that any drawdown in the JAG strength . . . will come after you have settled the rest of the organization down." [With the] multitude of problems that [were] going to be associated with the drawdown, it made no sense to her that they threw the lawyers into the same basket as everybody else.[111]

This critical support assisted the Corps in affecting the officer strength at a time of increased deployments, expanded responsibilities, and the difficult political environment of reductions in the overall force following the end of the Cold War.[112] The efforts of Nardotti, the JAG leadership, and the dedicated efforts of plans officers at PP&TO and SJAs in the field, along with the support of key allies like Ms. Gorelick, are largely the reason the Corps exists as it does today.[113]

In addition, one of the collateral issues that arose during the manpower realignment was the role of the National Guard and U.S. Army Reserves. "Desert Shield/Desert Storm demonstrated how dedicated members of the Guard and Reserves are and how much value added they can bring to the organization."[114] The challenge for the active component was to find ways to effectively integrate these officers and NCOs into the overall mission. This was a priority for Nardotti, and he worked hard to establish training programs and a culture of inclusion that helped make the Guard and Reserve components fully enfranchised members of the Corps. The vital role these units have played in the Balkans is a testament to the importance, success, and foresight of this effort.[115]

Issues arising from the new homosexual policy were given to Nardotti because they had their origins in litigation.[116] It was a concern that followed him through his tenure as The Judge Advocate General. At its core, the furor surrounding the policy arose from a philosophical difference of

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111. *Id.*
112. *Id.*
113. Nardotti Interview, *supra* note 1.
114. Oral History, *supra* note 1, at 157.
115. *Id.* at 158-62.
116. *Id*. at 181.

opinion between members of Congress, the military establishment, and the new, inexperienced Clinton administration.[117]

> The difficulty for the Clinton administration coming in, and the [Chiefs of Staff], was the difference between what the President believed he could do, number one, and what he thought he had the authority to do, number two; what in theory looked like a good idea, that is, "[w]hy not let homosexuals . . . serve, and just put them out if they engage in conduct," verses the Chiefs' concern about the consequences, without making any moral judgments about homosexuality . . . that we are dealing with this from a unit cohesion standpoint, the unit morale standpoint, [and looking at] the practicalities of putting someone who is attracted to another person of the same sex in this environment.[118]

Nardotti observed that the absence of experienced military advisors contributed to the failure of the new President to fully appreciate the implications of what the Administration was trying to accomplish. "To say there was not an overabundance of people with military experience in the Clinton Administration early on would be silliness. There was a virtual absence of people with military experience, certainly with people who were sympathetic to the views of the Chief or the Army . . . ."[119] This inexperience led to the Administration's attempted policy-by-decree for a liberalized homosexual policy, and drew heavy opposition from Congress and the Chiefs of Staff.[120]

> [The Administration's] expectation was that they were going to go in and be confronted by some out-of-touch, arch-conservative military people who would not be able to compellingly articulate a position as to why [the existing] policy ought to be maintained. What they got was just the opposite. . . . [They discovered] the Chiefs' collective position was not the result of random thought processes or homophobic biases.[121]

The final policy fairly represented the position of the military leadership, and it was strongly influenced by efforts of Ms. Gorelick, the Chiefs of Staff, and the service Judge Advocates General.[122] It preserved and

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117. *Id.* at 182-83.
118. *Id.*
119. *Id*. at 183-84
120. *Id*. at 184.
121. *Id*. at 184-85.

strengthened the existing policy through a statutory mandate fairly representative of the Chiefs' perceived service interests.[123] The process of getting there, however, was rarely easy.

Nardotti observed two interesting forces at work. First, were the efforts by the Chiefs of Staff not to appear openly insubordinate to the President while at the same time exercising their statutory responsibility to assert the best interests of the military.[124] This was poorly understood both in and outside the government.[125]

> [T]he Chair—the Joint Chiefs—are in a different position than all other senior officers. . . . [A]ny member of the Joint Chiefs can raise an issue to Congress that that chief deems important to the national defense. . . . I don't think that was appreciated by the Administration early on. They had a very simplistic notion of "you're the Commander-in-Chief, these are your subordinates, you can tell them what to do and that's all there is to it." They learned a hard lesson.[126]

A second observation was the peculiar manner in which the Administration appeared to seek input for the policy from outside the Pentagon, and politicize it further with apparent distrust of the expertise of the President's own military advisors.[127]

> Our views were not always heeded, and quite frankly we got the impression . . . that the Administration was talking to a number of different parties. When they gave the press conference announcing the policy, the actual policy that was written and discussed clearly had been in the hands of homosexual rights advocates. I remember one professor from Georgetown[128] who obviously had time to study and read and consider it, more time than we had, to see the final version. That was troubling.[129]

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122. *Id.* at 186.

123. *Id.* at 186-89.

124. *See* 10 U.S.C. § 151(f) (2000). The Chiefs of Staff have statutory authority and responsibility to bring to the attention of Congress matters of concern to the military. The only limitation is a notification requirement to the Secretary of Defense. *Id.*

125. Oral History, *supra* note 1, at 188-89.

126. *Id*.

127. *Id*. at 190.

128. Professor Chai R. Feldblum, Director, Federal Legislation Clinic, Georgetown University School of Law. Nardotti Interview, *supra* note 1.

The DOD homosexual policy, and preservation of the judge advocate manpower allocations, capped two productive years for Nardotti and prepared him for the challenges ahead. Both issues would follow him beyond his tenure as The Assistant Judge Advocate General.

XI. The Judge Advocate General of the Army, 1993-1997

Brigadier General Nardotti and Brigadier General Kenneth Gray were promoted to major general and sworn in, respectively, as The Judge Advocate General and The Assistant Judge Advocate General of the Army on 1 October 1993. Early on, the Vice Chief of Staff of the Army advised Nardotti of the ephemeral nature of his tenure, and suggested he focus on those issues of greatest importance to the Corps.[130] In particular, he emphasized that the time would go by quickly and that the new JAG Corps leadership should think about the direction they wanted to move the organization. Among the goals were: institutional healing following the Senate's failure to confirm Major General William Suter and Colonel John Bozeman; development of an operational law program with emphasis on the soldier-lawyer ethic; enhanced automation; compensating for the loss of criminal litigation experience; integration of the Guard and Reserves; and NCO development.[131]

A full and substantive discussion of the issues surrounding the Senate's failure to confirm Major General Suter as The Judge Advocate General, and its return of Colonel Bozeman's nomination to major general, are beyond the scope of this article and Major General Nardotti's Oral History. Briefly, in both cases the Senate was deeply concerned by allegations of unlawful command influence in the mid-1980s, resulting in the retrial of 250-300 courts-martial arising from the 3d Armored Division, Germany. The underlying issue was the legal advice provided to the Commanding General, Major General Gene Anderson, who publicly questioned the integrity of any officer who forwarded a case for a general court-martial and then testified on the accused's behalf in extenuation and mitigation. The chilling effect on an accused's ability to enter that testimony at trial was obvious. The issue ended Major General Anderson's career. Colonel Bozeman was his SJA. The issue erupted shortly after his nomination to brigadier general in 1989. The issue ultimately led the Senate to

129. Oral History, *supra* note 1, at 190.
130. *Id.* at 163.
131. *Id*. at 162-73.

return Colonel Bozeman's nomination, and impacted Major General Suter's nomination to be The Judge Advocate General of the Army.[132]

The institutional repercussions echoed for years, and continued into the tenure of Major General Fugh in the early 1990s. Nardotti recognized the difficult environment Colonel Bozeman was in at the time, and the strong personalities that may have contributed to the mistakes that were made. He also recognized Bozeman as a fine and capable officer—a highly decorated veteran of Vietnam, Panama, and the Gulf War—who demonstrated true professionalism throughout the crisis. As part of the healing process, Nardotti actively reached out to retired judge advocates—those who knew and respected Colonel Bozeman and Major General Suter—to remind them that they were forever valued and respected members of the JAG community.[133]

The next task for Nardotti was building on the lessons learned at Fort Hood to develop an operational expertise within the Corps. To accomplish this, he dedicated time and resources that enhanced the visibility and responsibility of judge advocates at the national training centers, which demonstrated to commanders that Army lawyers should be integrated into the organizational structure as fully vested members of the operational team.[134] This included "resuscitating" the Center for Law and Military Operations as the Army's clearinghouse for operational law issues.[135] Critical to this effort was the integration of modern automation into the operational setting.

> Our vision from the beginning was [that] we need to get to the point where you can send a small team . . . a couple of JAGs, a couple of NCOs in support [of an operation]. They have to be able to carry with them into any environment whatever they need to respond to the commander's needs. . . . If the technology is there, why can't a JAG, through the satellite connection, be able to reach back in and tap into . . . what they need to know? . . . [A]utomation was a big part of our long-term thought.[136]

Nardotti and the JAG leadership were also concerned about the diminished level of expertise in criminal litigation that they observed

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132. *Id.* at 115-16, 163-64.
133. *Id.* at 164.
134. *Id.* at 165.
135. *Id.* at 198.
136. *Id.* at 174-75.

throughout the Corps. The demise of the post-Vietnam Army had dramatically improved the quality of military personnel. This narrowed the opportunities for young judge advocates to develop the litigation skills necessary for more challenging cases and, ultimately, compromised their ability to carry on as chiefs of justice, deputies, and SJAs.[137] Nardotti was quick to recognize the institutional implications of the loss of critical skills for the military justice mission, and he struggled with ways to compensate for perceived weaknesses through training, incorporation of the litigation talent available in the Reserves, and other initiatives.[138]

Recognizing the untapped potential in Guard and Reserve officers and NCOs, a renewed effort was underway to recognize the successes of SJAs who had made great and meaningful use of Reserve judge advocates. Nardotti made it clear, however, that equality within the force would move both ways, and that the Reservists had to meet the soldiering standards he expected of his judge advocates.

> [W]e had to say to the Reserves, "We have the same expectations of you as we've got of the active force. You're soldiers. You have got to be soldiers. You have got to be physically fit. You have got to look like soldiers. You have to know your soldier skills." When they say, "You're going to deploy," they don't give you an extra two days [for] the JAGs to get their act together. The JAGs [had] better be ready to go, ready to deploy and ready to do [the] mission.[139]

In addition, Nardotti never forgot the lessons he had learned as a young lieutenant as to the importance of enlisted soldiers and NCOs. They were a vital part of his JAG Corps family. He emphasized this throughout his tenure as The Judge Advocate General.[140]

> Some would argue that the JAG Corps is just the officer [corps]. Well, if you look at the statute[141] that defines that, there is a little bit of flexibility there in terms of other members as determined by the Secretary. . . . [M]y interpretation of that is that [it] encompasses not just the officers—we all know who judge advocates

137. *Id*. at 166.
138. *Id.* at 166-67.
139. *Id*. at 168.
140. *Id.*
141. 10 U.S.C. § 3072 (2000).

> are—but when you talk about the JAG Corps, that's the whole team. That includes enlisted people that are part of our force.[142]

So much did Nardotti respect the role of enlisted members that, following a recommendation by Sergeant Major John Nicolai, he initiated a change to the regimental coin to reflect the vital role enlisted soldiers play in the success of the organization. Following his retirement, it was changed.[143] "I know they changed this after I left, and what it has in the front, I think it says, 'The Army's Advocates since 1775' [suggesting a reference to judge advocates, not the enlisted]." It was simply Nardotti's view that the statute, which states that, "The Judge Advocate General's Corps consists of . . . members of the Army assigned thereto by the Secretary of the Army," could easily accommodate enlisted personnel as well as judge advocates.[144] Acknowledging a deep and genuine regard of NCOs and soldiers, he felt the regimental coin ought to reflect their contribution to the JAG family.

Throughout his tenure, Nardotti made a concerted effort to talk to enlisted personnel and recognize them for the tremendous contribution they make to the organization. "They will assume more responsibility if you let them [be part of the team] and they will also help accomplish the most difficult task that . . . SJA's have, which is teaching new officers how to be soldiers."[145] He valued NCOs for their leadership and repeatedly counseled young judge advocates to reach out and seek assistance from NCOs who could make the difference between success and failure.[146]

Nardotti's approach to leadership—high standards for professional competency, military bearing, and a focus on people—was wholly consistent with the style of his Chief of Staff, General Gordon Sullivan.[147] General Sullivan loved soldiers, and "in the midst of all the pressures he had to deal with . . . could go out, get two or three hours of sleep a night over a five-day period, and come back and look refreshed because he spent the time with troops."[148] On one occasion, because of some remote litigation concerns, General Sullivan invited Nardotti along for a trip to the West

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142. Oral History, *supra* note 1, at 168.

143. The old coin read, "Serving the Army Since 1775." The current coin reads, "The Army's Advocates Since 1775."

144. Oral History, *supra* note 1, at 169 (quoting 10 U.S.C. § 3072 (5)).

145. *Id*. at 169.

146. *Id*. at 170.

147. *Id*. at 177.

148. *Id*.

Coast for the dedication of a park in memory of a soldier killed in a Blackhawk helicopter shot down over Iraq. In an emotional setting, General Sullivan met privately with the families and later volunteered to speak to the crowd that had gathered, making time to honor a fallen soldier and speaking openly with the public. "It was just a marvelous demonstration of leadership in action."[149]

Nardotti would work closely with General Sullivan and his successor, General Dennis Reimer, at the Army and DOD level on important issues ranging from the homosexual policy, the trial of The Sergeant Major of the Army, extremist activity, and the Aberdeen Proving Ground drill sergeant cases.[150] As to justice matters, it was important to remind the leadership that the Chief was not a convening authority—although the Secretaries of Defense and the Army were—and that every caution was required to prevent any appearance of command influence.[151]

This issue arose during the extremist cases at Fort Bragg which, had they been handled poorly, could have inflicted tremendous harm to the Army. Secretary of the Army Togo West, having been briefed by the XVIII Airborne Corps Commander, General Hugh Shelton, resisted the pressures of the Congressional Black Caucus to insert himself directly and "do something" about the allegations of racism. Instead, West correctly deferred all justice matters to the local command. To quiet the political storm, he also established a task force to investigate extremism throughout the Army, and thereby avoided any direct involvement in the cases and investigations ongoing at Fort Bragg. "That was a good lesson [that], even when a commander is doing the right thing, sometimes they need top cover in order for them to continue to do their jobs. Timely action at the right level by a senior leader can make a big difference."[152]

The Aberdeen drill sergeant cases were another instance where the Army leadership resisted the temptation to become directly involved in a high profile justice matter, thereby avoiding any appearance of command influence. The Aberdeen SJA[153] later recalled a presentation by Brigadier General John Altenburg on the subject of diminished military justice expertise. "He said, 'You never know. You could be at some sleepy little post out there and all of a sudden all hell breaks loose in terms of a major

149. *Id.* at 178.
150. Nardotti Interview, *supra* note 1.
151. Oral History, *supra* note 1, at 200.
152. *Id*. at 201-02.
153. Lieutenant Colonel Edward "Buz" France. Nardotti Interview, *supra* note 1.

case that you are going to have to deal with.' [The Aberdeen SJA] said he thought about that every day."[154]

For his part, Nardotti was concerned with the lack of understanding by most of the public and many members of Congress as to the differences between trainee and sexual abuse.[155] Otherwise, he let the Aberdeen SJA—who had done a superb job of keeping Nardotti informed—do his job, and he provided support only as requested.[156] Nardotti trusted his SJAs, but reminded them of the importance of tempered, judicious, and thoroughly reasoned action.

> My advice under those circumstances to SJAs is that you have got to get it right before you do it fast. Just take your time. Do it right. If it is going right, it will become non-newsworthy very quickly. If you screw it up, you'll be on the front page.[157]

As to his accomplishments during four years as The Judge Advocate General, Nardotti forever credited the genuine camaraderie and teamwork of the Corps' five general officers for the tenor and success of his tenure. Always eager to share praise and credit, the former infantryman valued his general officers for their individual talents, their commitment to excellence, and their cohesion and singular voice that they brought to the Corps. "[I]f in developing where you want to go you are doing it with your team, it's not your legacy that you are developing or your philosophy, it is a philosophy that the collective leadership of the Corps has formulated."[158] In particular, Nardotti valued the special relationship he had with Major General Ken Gray. Nardotti thought that he and Gray formed an effective partnership because they were ideal complements to one another. He relied upon Gray for his superb judgment, and he felt Gray set the highest possible standard as a soldier, a gentleman, and an officer.[159]

Nardotti believed that the best way to emphasize his message of the soldier-lawyer was to lead by example and to remind judge advocates that the message is about "lawyering in a soldier environment."[160] He recognized that the momentum for change was there at Fort Hood and Fort Ben-

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154. Oral History, *supra* note 1, at 205.
155. *Id.* at 204.
156. *Id*. at 205.
157. *Id*. at 206.
158. *Id*. at 223.
159. Nardotti Interview, *supra* note 1.
160. Oral History, *supra* note 1, at 232.

ning, and that he could nurture and facilitate a Corps culture that valued officers who "looked like soldiers . . . understood soldiers, and by the way, [were] damn good lawyers."[161]

XII. Private Citizen, 1997-Present

There was never any doubt when Major General Nardotti would leave the Army. The same letter from the General Officer Management Office that congratulated him on his promotion also reminded him of the effective date of his retirement, 30 September 1997.[162] Despite some rumors that he had tried to remain on active duty longer—possibly as the Deputy Inspector General—that date was always clear to him "from the beginning and [he] never suggested to anybody otherwise."[163] In fact, when the time finally came, he was more than ready. "[I] was tired. I enjoyed every minute of it but I ran hard and was ready to stop."[164] Nardotti stopped, but only after twenty-eight years of remarkable and dedicated service, in the greatest tradition of the United States Army.

On 1 November 1997, he became a partner in the Washington, D.C., law firm of Patton Boggs, where he is a "member of the government contracts practice and works closely with the litigation and public policy groups, advises and represents clients in variety of commercial litigation, and on matters of defense and national security policy."[165] He was warmly welcomed by the firm, and he easily made the adjustment to private practice owing to his love of the law, the chance to train and mentor young litigation associates, and the "spice" of a diverse practice that he so enjoyed in the military.[166] His humility, patience, and desire to learn tempered any sense of diminished status that one might expect of a retired major general.[167]

> [T]he generals who were making the transition expect life to be the same way. I had no illusions about that. I knew life was

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161. *Id*. at 233.

162. *Id.* at 220.

163. *Id*. at 219-20.

164. *Id*. at 221.

165. The Patton Boggs Internet Web site may be viewed at http://www.pattonboggs.com. Information about Major General Nardotti's current areas of practice may be viewed at http://www.pattonboggs.com/ourlawyers/a-z/mnardotti.html.

166. Oral History, *supra* note 1, at 237.

167. *Id.* at 238.

> going to change. I was ready for that. I knew in particular if I did private practice, and I came [to Patton Boggs] as a partner—there are gradations of partners—but I knew that I probably would do some things that in some respects would be more suitable for an associate, but I did them anyway because I really needed the education, I needed to learn. I was prepared for that. I knew I had to come in here and roll up my sleeves and get to work.[168]

It is, in the end, still about soldiering for Mike Nardotti. Soldiers adapt quickly to new environment, shift when the targets move, and always seek the opportunity to press their advantage. Soldiers listen and they learn; they rarely act with haste. Soldiers look to improve others as they continually improve themselves and thrive in any environment that brings them new challenges. The fortitude Major General Nardotti demonstrated on the battlefield continues to carry him forward to meet the personal and professional challenges that have long become his hallmark. He was, and remains, the consummate soldier-lawyer.

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168. *Id.*

CALLING FOR A TRUCE ON THE MILITARY DIVORCE BATTLEFIELD: A PROPOSAL TO AMEND THE USFSPA

MAJOR MARY J. BRADLEY[1]

Lieutenant Commander (Retired) Catherine Wdowiak sends 18.5% of her retired pay to a man she divorced in 1996 after he revealed he was having an affair. Her ex-spouse remarried and that couple now earns more than $100,000 per year . . . while she struggles to keep a fledgling business afloat on what remains of her retired pay, about $24,000 a year.[2]

I. Introduction

A military divorce is not simply "the legal dissolution of a marriage by a court"[3] with one party in the armed service.[4] Parties to a military divorce must contend with emotional issues beyond who will have custody of the children and who will keep the house.[5] A military divorce involves

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2. *Military Retirees, Ex-spouses, Battle*, BEAUFORT GAZETTE (S.C.), July 14, 2000.

3. BLACK'S LAW DICTIONARY 493 (7th ed. 1999) [hereinafter BLACK'S].

4. Fifty-five percent of all marriages end in divorce. The military divorce rate is generally the same as the civilian divorce rate. MARSHA L. THOLE & FRANK W. AULT, DIVORCE AND THE MILITARY II vii (1998).

5. Just as military divorce is different from civilian divorce, so is military marriage. A military marriage must contend with more and greater hardship than the average civilian couple. *See id.* at 71.

dividing military retired pay, which is much more than a pension or 401K plan. Both service members and their spouses have a unique emotional attachment to military retired pay, which cannot equate to other marital property.

To service members, military retired pay represents twenty or more years of patriotic, selfless service to their country.[6] Military retired pay is what is owed to them in return for living a life where at a moment's notice they could be sent anywhere in the world, possibly in the line of hostile fire. Military spouses have a different emotional attachment to military retired pay. To military spouses, the retired pay represents a partnership where they sacrificed their own careers and stability to follow their spouses, single-handedly cared for the children, and supported the military community. In addition to the emotional attachment, parties litigate divi-

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6. Some service members are eligible for early retirement at fifteen years. However, this article refers to the typical twenty-year career as the point retired pay vests.

7. Military retired pay is frequently the most significant asset acquired during a military member's marriage. Military pensions often have greater value than nonmilitary pensions because payments begin immediately upon retirement and do not have to wait until the retiree reaches a certain age. Some military members retire before the age of forty and begin receiving retired pay immediately; compare this to a nonmilitary pension that may not be paying until age fifty-five or sixty. *See* MARSHAL S. WILLICK, MILITARY RETIREMENT BENEFITS IN DIVORCE xx (1998) (noting that in military divorces, the retired pay often exceeds the value of all other assets combined, including the house); Letter from Marshal S. Willick, Esq., Family Law Section of the ABA, to Francis M. Rush, Jr., Acting Assistant Secretary of Defense, subject: Comprehensive Review of the Federal Former Spouse Protection Law, at 2 (Mar. 14, 1999) [hereinafter ABA Position Letter] (on file with author) ("[I]f [retired pay] is inequitably divided, it is usually impossible to make a military divorce fair to both parties."); Letter from Marilyn H. Sobke, President, National Military Family Association, to Office of the Assistant Secretary of Defense for Force Management Policy, subject: Comments of the National Military Family Association on the Uniformed Services Former Spouses' Protection Act (Feb. 12, 1999) [hereinafter NMFA Position Letter] (responding to a Federal Register Notice of Dec. 23, 1998) (on file with author).

Besides their military retirement, the only retirement savings service members may have are individual retirement accounts (IRAs) or private savings. Many military families' financial situations do not allow them to save for retirement. Department of Defense (DOD) surveys reveal fifty percent of members do not have any appreciable levels of savings. ARMED FORCES FINANCIAL NETWORK, SURVEY OF ARMED FORCES FINANCIAL NEEDS AND BEHAVIORS 16 (1996), *cited in* OFFICE OF ASSISTANT SECRETARY OF DEFENSE, FORCE MANAGEMENT POLICY REPORT (May 21, 1998). Service members save one half of the amount saved by the average citizen. *Id. But see* THOLE & AULT, *supra* note 4, at 28 (noting that military

sion of military retired pay because it is often the largest asset of the marriage.[7]

When both parties to a divorce adamantly believe that they are entitled to the military retired pay, courts often cannot equitably divide the retired pay to the parties' satisfaction. All the courts can do is apply the state divorce law and, where appropriate, the federal law specific to military divorce. In the case of military divorce, one federal law that preempts state domestic relations law is the Uniformed Services Former Spouses' Protection Act (USFSPA).[8] Since Congress enacted the USFSPA in 1982, state courts have struggled with interpreting it in light of their own domestic relations laws. Enforcement loopholes, differing court interpretations, amendments to the USFSPA, and the changing role of women in society,[9] all create situations where military divorce results in inequities, costly hearings, numerous rehearings, and even imprisonment.[10]

How did the USFSPA evolve into an inequitable and ineffective law? This question is troubling because Congress enacted the USFSPA[11] to resolve the inequities in military divorce and to recognize a spouse's important role in a military marriage.[12] In its simplest terms, the USFSPA allowed that state courts *may* treat disposable retired pay as marital property.[13] Despite Congress's intended corrective result, enacting the

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7. (continued) retired pay used to be the only major asset of the military couple, but that is no longer the case; couples now own real estate, individual retirement accounts (IRAs), and other investments).

8. 10 U.S.C. § 1408 (2000). The USFSPA applies to the Office of the Secretary of Defense, the Military Departments, the Coast Guard (under agreement with the Department of Transportation), the Public Health Service (PHS) (under agreement with the Department of Health and Human Services), and the National Oceanic and Atmospheric Administration (NOAA) (under agreement with the Department of Commerce). *See* 32 C.F.R. § 63.2 (2000) (explaining the applicability and scope of former spouse payments from retired pay). The "uniformed services" aspect of the USFSPA applies to the Army, Navy, Air Force, Marine Corps, Coast Guard, commissioned corps of the PHS, and commissioned corps of the NOAA. *Id.* Because NOAA and PHS have relatively few USFSPA cases, this article focuses on the USFSPA and military services. *See* Interview with Lieutenant Colonel Thomas K. Emswiler, at the Pentagon, Washington D.C. (Feb. 1, 2001) [hereinafter Emswiler Interview].

9. The proportion of military spouses in the labor force increased from fifty-four percent in 1985 to sixty-five percent in 1998. THOLE & AULT, *supra* note 4, at vii. The changing role of women in the military began with the women's movement in the 1970s. The increase of women entering the military increased the number of male spouses. Courts began to deal with a new set of challenges as these women started to retire in the 1990s. *Id.*

10. *See infra* note 164 and accompanying text (discussing former service members who were imprisoned for contempt for failing to make USFSPA payments).

USFSPA began nearly twenty years of litigation focusing on interpreting and applying this federal statute.[14] Litigation and the resulting precedent-setting opinions are one factor in the evolution of the USFSPA.

The USFSPA also evolved through congressional amendments and revisions to address problems and oversights in the original law.[15] Nearly every congressional session has attempted to resolve problems with the USFSPA.[16] In the current Congress, Representative Cass Ballener[17] introduced House Bill 1983, Uniformed Services Former Spouses Equity Act of 2001 (Equity Act), which addresses some of the highly controversial aspects of the USFSPA.[18] While a similar bill, entitled the Equity Act of 1999, did not pass during the 106th Congress, with its primary sponsor, Representative Bob Stump, as the new chair of the House Armed Services Committee the current bill may receive more attention during this Congress.[19] Despite congressional attempts to resolve issues with the USFSPA, neither former spouses nor former service members are satisfied with the current law.[20] Many former spouses organizations, former ser-

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11. The Uniformed Services Former Spouses' Protection Act, Pub. L. 97-252, 96 Stat. 730 (1982) (codified as amended at 10 U.S.C. §§ 1072, 1076, 1086, 1408, 1447, 1448, 1450, 1451 (2000)). Among other things, the USFSPA allowed state courts to reconsider judgments in light of their marital property and procedural laws, disregarding the decision in *McCarty v. McCarty*, 453 U.S. 210 (1981). The USFSPA took effect on 1 February 1983 and applied retroactively to the date of the *McCarty* decision, 26 June 1981. 10 U.S.C. § 1408(c)(1).

12. *See McCarty*, 453 U.S. at 210 (holding that certain state community property laws are preempted by the federal law).

13. 10 U.S.C. § 1408(c)(1) (emphasis added). *But see* THOLE & AULT, *supra* note 4, at 7 ("The USFSPA has operated in theory as an option but in practice as a mandate.").

14. *See* LEGAL ASSISTANCE BRANCH, ADMINISTRATIVE AND CIVIL LAW DEPARTMENT, UNIFORMED SERVICES FORMER SPOUSES' PROTECTION ACT, JA 274, app. B (Feb. 1999) [hereinafter JA 274] (providing a state-by-state analysis of the divisibility of military retired pay); *see also* THOLE & AULT, *supra* note 4, at 161-85 (same); Major Janet Fenton, *Former Spouses' Protection Act Update*, ARMY LAW., July 1996, at 22-28 (same).

15. *See infra* note 64 (providing an overview of the amendments to the USFSPA).

16. *See id.*

17. Republican, North Carolina.

18. H.R. 1983, 107th Cong. (2001). The primary proposals of the Equity Act are: (1) the termination of USFSPA payment of retirement to a former spouse upon remarriage; (2) award of retired pay to be based on retiree's length of service and pay grade at time of divorce; (3) a statute of limitations for seeking division of retired pay; and (4) a limitation on apportionment of disability pay when retired pay has been waived.

19. Representative Stump (Republican, Arizona) was the author of the Equity Act of 1999, H.R. 72, 106th Cong. (1999).

20. *See* discussion *infra* Section IV (providing the views and opinions of former spouses and former service members).

vice member organizations, veterans advocacy organizations, and private organizations have recommended changes to the USFSPA.[21] These changes are as diverse as they are controversial.

What is the main problem with the USFSPA? Is it the law itself? Is it how the courts interpret and apply the law? This article argues that the USFSPA can be an effective tool for dividing retired pay in a military divorce, but the federal procedures for enforcing the provisions of the USFSPA are incomplete and ineffective.[22] Unnecessary requirements and loopholes in the law cause parties to endure more emotional turmoil and higher litigation costs than necessary.

Appropriate changes to the USFSPA can reduce the continued animosity over division of retired pay.[23] To reach this goal, the USFSPA must provide thorough procedural tools to make state courts' orders effective and enforceable and continue to allow states to apply their own domestic relations laws. State court control of military retired pay combined with complete procedural and administrative policies can bring equity to military divorces. This article recommends changes to the USFSPA and proposes legislation as an equitable solution to this contentious law.

To arrive at the legislative proposal, which is presented in the Appendix, the following section of this article, Section II, reviews the history of the USFSPA. This historical review discusses the case that triggered the USFSPA, *McCarty v. McCarty*, and Congress's intent when passing the USFSPA. In Section III, this article describes the current state of the law—

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21. Specific proposals are included in Section V *infra* and in the Appendix.

22. Court opinions express disgust with the USFSPA. *See, e.g.*, Ratkowski v. Ratkowski, 769 P.2d 569, 572 (Idaho 1989) (Shepard, C.J., dissenting) ("In the instant case, although the result is unfair, and palpably unjust, nevertheless I feel it mandated by the insulation afforded by the federal [USFSPA] statutes.").

23. Animosity between the parties is evident whenever the USFSPA is publicly discussed. One example is the repartee in a series of editorials in the *San Antonio Express-News* in July 2000. John Verburgt, Senior Master Sergeant, U.S. Air Force (Retired), *Law Promotes Divorce* (Editorial), SAN ANTONIO EXPRESS-NEWS, July 8, 2000, at 6B; Mary L. Gallagher, *Pay is Community Property* (Editorial), SAN ANTONIO EXPRESS-NEWS, July 18, 2000, at 4B (responding to Verburgt's editorial of 8 July); Karen Silvers, *Get the Facts Straight* (Editorial), SAN ANTONIO EXPRESS-NEWS, July 18, 2000, at 4B (responding to Verburgt's editorial of 8 July, but she gets the facts wrong, incorrectly stating that the marriage must last for ten years before the former spouse can receive any portion of the retired pay; such a minimum term of years is not required); Roy Alba, U.S. Air Force (Retired), *Ex-Military Wives Wrong* (Editorial), SAN ANTONIO EXPRESS-NEWS, July 27, 2000, at 4B (responding to editorials written by former military wives).

the USFSPA and its application. In Section IV, this article reviews the various parties' positions and suggestions for changing the USFSPA, including former service members, former spouses, and the Department of Defense (DOD). While this article supports many of the parties' recommended changes, those not advocated by this article are discussed within Section IV.

Section V of this article proposes changes to the USFSPA, including an explanation of each problem, proposed changes, and factors that Congress must consider before enacting each revision. This article proposes many statutory changes to the USFSPA—some revisions are substantive, while others are procedural and will advance administration of the USFSPA. All the proposed changes will make the USFSPA a more equitable law. Finally, following a conclusion, this article presents proposed legislation in the Appendix.

II. History of the USFSPA

A. Origins of the USFSPA: *McCarty v. McCart*y

Congress passed the USFSPA[24] in direct response to the U.S. Supreme Court decision in *McCarty v. McCarty.*[25] On 4 November 1981, within five months of the *McCarty* decision, Senator Roger Jepsen introduced the USFSPA as Senate Bill 1814.[26] Less than a year later, Congress enacted the USFSPA.[27] To understand the congressional intent behind such hasty action,[28] the *McCarty* decision and its impact must be explained.

In *McCarty*, the Supreme Court contemplated whether federal statutes preempt state courts from dividing non-disability retirement benefits upon divorce. Concerning preemption in general, the Supreme Court has said,

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24. *See supra* note 11.

25. 453 U.S. 210 (1981). The Supreme Court decided *McCarty* on 26 June 1981. Before 1980, state domestic relation law pertaining to military retired pay varied widely. *See* WILLICK, *supra* note 7, at 9.

26. S. REP. No. 97-502, at 4 (1982), *reprinted in* 1982 U.S.C.C.A.N. 1596, 1598.

27. Congress enacted the USFSPA on 8 September 1982. Passing the USFSPA attracted little attention at the time because it was a rider to the annual DOD Authorization Act. *See* THOLE & AULT, *supra* note 4, at 24.

28. Early critics of the USFSPA believed that Congress enacted the USFSPA too quickly. *See, e.g.*, Comment, *The Uniformed Services Former Spouses Protection Act: A Partial Return of Power,* 11 W. ST. U. L. REV. 71 (1983).

"[I]f Congress evidences an intent to occupy a given field, any state law falling within that field is pre-empted."[29] With respect to preempting domestic relations law, the Supreme Court has held that "state interests . . . in the field of family and family-property arrangements . . . should be overridden . . . only where clear and substantial interests of the National Government . . . will suffer major damage if the state law is applied."[30]

Applying this definition of preemption, the Supreme Court reviewed the facts and legal arguments in *McCarty.* Colonel and Mrs. McCarty had been married for almost twenty years when they divorced in 1976.[31] In the divorce proceedings, the superior court ruled that Colonel McCarty's military retired pay was distributable as "quasi-community property."[32]

On appeal to the Supreme Court, Colonel McCarty raised two arguments. While preemption was the second argument, the first argument is worthy of discussion because former service members still use this argument to lobby for re-characterizing military retired pay. In his first argument, Colonel McCarty argued that military retired pay was not subject to division as marital property because it was different than civilian retired pay.[33] In support, Colonel McCarty cited federal cases to establish that military retired pay is actually reduced current pay for continued service in the armed forces at a reduced level.[34] Under this theory, military retired pay, unlike civilian retired pay, is not considered an asset earned during

29. Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984).

30. United States v. Yazell, 382 U.S. 341, 352 (1966).

31. McCarty v. McCarty, 453 U.S. 210, 216 (1981).

32. *Id.* at 218 (discussing community property, quasi-community property, and marital property). In community property states, each party has a 50-50 right to all property acquired during the marriage. Quasi-community property is property acquired outside the state that would have been community property if acquired within the state; community property states divide this property like community property. *See* WILLICK, *supra* note 7, at 9. In equitable distribution states, the court divides the property "equitably," which may not be a 50-50 split. *See* THOLE & AULT, *supra* note 4, at 19; *see generally* Captain Kristine D. Kuenzli, *Uniformed Services Former Spouses' Protection Act: Is There Too Much Protection for the Former Spouse?*, 47 A.F. L. REV. 1, 2-3 (1999) (discussing basic marital property law including community property states versus common-law property states and classifying property acquired during marriage which affects distribution of assets at divorce).

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

34. *Id.* (discussing United States v. Tyler, 105 U.S. 244 (1882), Hooper v. United States, 326 F.2d 982 (1964)).

employment with payment deferred until retirement. Rather, by remaining on the retired list, military retirees continue to serve in a reduced capacity subject to recall. Consequently, their military retired pay is a monthly pay in return for their reduced service.[35] However, the Court did not adopt this theory. Instead, the Court focused on Colonel McCarty's second argument, preemption.

Colonel McCarty's second argument was that a conflict existed between the terms of the federal retirement statutes and the state community property right asserted by his former spouse.[36] Specifically, the state property rights allowing division of military retired pay significantly affected the purpose of the federal military personnel program, such that the court should not recognize the community property right.[37]

Colonel McCarty argued that military retirement benefits constituted an important part of Congress's goal of meeting the personnel management needs of the active military forces.[38] Specifically, retired pay was designed to induce enlistment and reenlistment, to create an orderly career path, and to ensure a "youthful and vigorous" military force.[39] Colonel McCarty's position, therefore, was that allowing state courts to divide retired pay would frustrate Congress's goals in these areas because the potential for dividing retired pay is a disincentive to the pursuit of military careers.[40] The Court agreed.

The Court found that treating military retired pay as community property directly conflicted with the intent of the federal military retirement plan.[41] Congress intended to provide for retired service members; dividing retirement benefits upon divorce would frustrate this congressional intent and disrupt military personnel management.[42] The Court concluded that this case satisfied the preemption test and that service members' retire-

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35. Several former service members and their organizations still argue "reduced pay for reduced service" as the reason why retired pay is not property, and thus payment from retired pay should end upon a former spouse's remarriage. *See infra* Section IV.A.1.

36. *McCarty*, 453 U.S. at 223.

37. *Id.* at 232.

38. *Id.* at 232-33.

39. *Id.* at 234.

40. *Id.* at 235.

ment benefits were *not subject to division upon divorce as community property assets.*[43]

The Court, however, suggested that congressional action could remedy the result of this preemption by legislating protection for former spouses. Writing for the majority, Justice Blackmun suggested that Congress could legislate more protection for former military spouses.[44] Justice Blackmun emphasized that the Court gave Congress great deference in "the conduct and control of military affairs."[45] Congressional reaction to *McCarty* began with Justice Blackmun's suggestion. In the wake of *McCarty*, many critics voiced their opinion on necessary congressional legislative action.

B. Criticism of *McCarty*

Following the Supreme Court's decision in *McCarty*, critics flooded legal journals with concerns about the decision and the Supreme Court's use of preemption.[46] A central criticism was that state courts had traditionally controlled domestic relations issues, and the Supreme Court's use of

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41. *Id.* at 232. The Court used a two-step analysis to decide the preemption issue. Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979) (establishing the two-part preemption test). First, the Court determined that Congress intended to grant retired service members a "personal entitlement" to the benefits and dividing this entitlement in conformity with state-community property provisions conflicted with federal military retirement statutes. *McCarty*, 453 U.S. at 232 (citing S. REP NO. 1480, at 6 (1968), *reprinted in* 1968 U.S.C.C.A.N. 3294, 3298). Second, the Court considered whether the "application of community property principles to military retired pay threatened grave harm to clear and substantial federal interests." *McCarty*, 453 U.S. at 232.

42. *McCarty*, 453 U.S. at 233-35.

43. *Id.* at 236.

44. *Id.* at 235-36.

45. *Id.* at 236.

46. *See, e.g.*, Leonard Bierman & John Hershberger, *Federal Preemption of State Family Proprety Law: The Marriage of McCarty and Ridgway*, 14 PAC. L.J. 27 (1982); Anne Moss, *Women's Pension Reform: Congress Inches Toward Equity*, 19 U. MICH. J.L. REFORM 165 (1985); Note, *McCarty v. McCarty: A Former Spouse's Claim to a Service Member's Military Retired Pay is Shot Down*, 13 LOY. U. CHI. L.J. 555 (1982); Note, *McCarty v. McCarty, the Battle Over Military Nondisability Retirement Benefits*, 34 BAYLOR L. REV. 335 (1982); Note, *Military Retirement Pay Not Subject to Division as Community Property Upon Divorce: McCarty v. McCarty*, 19 HOUS. L. REV. 591 (1982); Note, *Federal Law Preempts State Treatment of Military Retirement Benefits as Community Property: McCarty v. McCarty*, 13 TEX. TECH. L. REV. 212 (1982); Louise Raggio & Kenneth Raggio, *McCarty v. McCarty: The Moving Target of Federal Pre-emption Threatening All Non-Employee Spouses*, 13 ST. MARY'S L.J. 505 (1982).

preemption in *McCarty* threatened to usurp that role. Many critics were concerned that the Supreme Court's ruling would trigger substantial litigation surrounding the characterization of other pension and retirement plans. Legal scholars pondered whether private and state pensions and retirement benefits were in jeopardy of federal preemption. The American Bar Association (ABA) believed that with the *McCarty* decision "[t]he Court . . . materially and adversely affected the practice of family law in the United States."[47] Recognizing the legal community's concerns, Congress set out to nullify the *McCarty* decision.

C. Congressional Reaction to *McCarty*

After *McCarty*, Congress recognized that it must enact legislation allowing a state to continue to divide military retired pay in divorce.[48] Congress needed to protect former spouses by correcting the problem started in *McCarty*.[49] While searching for a resolution, Congress first reviewed the role of military spouses in the military community.[50]

Congress, through the Committee on Armed Services, examined the role of the military spouse extensively.[51] The Committee concluded, "[T]he unique status of the military spouse and the spouse's great contribution to the defense require that the status of the military spouse be acknowledged, supported, and protected."[52] Further, military spouses contribute to the effectiveness of the military community while at the same time forgoing the opportunity to have careers and their own retirement. The means to acknowledge, support, and protect military spouses, even

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47. 128 CONG. REC. 18,314-15 (1982) (letter from Robert D. Evans, Director, ABA) (Evans further stated: "More specifically, this decision has cast a shadow over untold thousands of final divorce decrees in this country.").

48. By 1981, a growing body of state domestic law included division of pensions and retired pay. Case decisions in virtually all community property states and a number of common law property states employing equitable distribution principles, specifically considered military retired pay as an asset of the marriage and subject to division. At least six other states had specifically ruled that military retired pay could not be considered marital property. S. REP. No. 97-502, at 2 (1982), *reprinted in* 1982 U.S.C.C.A.N. 1555, 1597.

49. "The primary purpose of the bill is to remove the effect of the United States Supreme Court decision in *McCarty v. McCarty*." *Id.* at 1, *reprinted in* 1982 U.S.C.C.A.N. at 1596.

upon divorce from the service member, came in the form of the USFSPA proposal.

In the course of reviewing the USFSPA proposal, the Committee looked to the DOD for input. While the DOD recognized the importance of the military spouse, concerns were that the USFSPA may "adversely affect future military recruiting and retention, and pose military personnel assignment problems."[53] The service secretaries all agreed that some form of remedial legislation, which was fair and equitable to service members and military spouses, was necessary in response to *McCarty*.[54] The service secretaries also recognized the significant sacrifices and contributions made by military spouses. The DOD agreed that congressional action should overrule *McCarty*, but state court authority to divide military retired pay should be "subject to certain limitations necessary to protect the personnel management requirements of the military services."[55] One specific

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50. *Id.* at 6, *reprinted in* 1982 U.S.C.C.A.N. at 1601 (discussing the contribution of military spouses to military life). "The concept of the military family and its importance to military life is widespread and publicized. Military spouses are still expected to fulfill an important role in the social life and welfare of the military community." *Id.*

> Childcare and management of the family household are many times solely the spouse's responsibility. The military spouse lends a cohesiveness to the family facing the rigors of military life, including protracted and stressful separations. The committee finds that frequent change-of-station moves and the special pressures placed on the military spouse as a homemaker make it extremely difficult to pursue a career affording economic security, job skills, and pension protection. Therefore, the committee believes that the unique status of the military spouse and the spouse's great contribution to our defense require that the status of the military spouse be acknowledged, supported, and protected.

Id.

51. *Id.* at 6, *reprinted in* 1982 U.S.C.C.A.N. at 1601. "[T]he committee received extensive testimony from the uniformed services and public witnesses on the contributions and sacrifices made by the military spouse throughout the service member's career." *Id.*

52. *Id.* at 6-7, *reprinted in* 1982 U.S.C.C.A.N. at 1601.

53. *Id.* at 7, *reprinted in* 1982 U.S.C.C.A.N. at 1601-02. While DOD voiced these concerns, the agency did not submit any empirical data to support their concern on retention and manpower. The Committee on Armed Services conducted their own research and found that community property states seemed to handle retirement pay fairly. This research assisted their decision to allow the states to divide military retired pay. *Id.*

54. *Id.* at 7, *reprinted in* 1982 U.S.C.C.A.N. at 1601.

55. *Id.* at 7-8, *reprinted in* 1982 U.S.C.C.A.N. at 1602-03. According to the DOD, domestic relations matters should primarily be governed by state law, through state courts. *Id.* at 8, *reprinted in* 1982 U.S.C.C.A.N. at 1601.

limit that DOD asked the Committee to consider was jurisdictional prerequisites to guard against potential abuses inherent in forum shopping.[56]

With this information gathered, the Committee looked to balance the importance of the military spouse with the DOD's personnel issues. The Committee supported the conclusion that the effect of allowing state court's the discretion to divide military retired pay may not be "so detrimental to military manpower management as to warrant retaining the fundamental result of the *McCarty* decision."[57]

Based on the Committee report, Congress passed the USFSPA and restored state marital property law.[58] Further, Congress substantially revised the federal system for directing military disposable retired pay.[59] With the USFSPA, states can classify military retirement pay as marital property. To accomplish a balance between protecting the former spouses and the personnel needs of DOD, Congress placed limits on the ability of state courts to divide retired pay. Specifically, states can divide only disposable retired pay not gross pay.[60] As marital property, spouses cannot transfer their share of the retired pay and benefits.[61] Further, a state

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56. The term "forum shopping" in this context implies a search for the jurisdiction with the most advantageous law and procedures in which to commence a divorce proceeding. The most favorable jurisdiction might be a state with which the spouse or service member has had little previous contact. *See* BLACK'S, *supra* note 3, at 666. S. REP. No. 97-502, at 8 (1982), *reprinted in* 1982 U.S.C.C.A.N. 1555, 1603.

57. S. REP. No. 97-502, at 8, *reprinted in* 1982 U.S.C.C.A.N. at 1603.

58. The USFSPA does not *require* a state to divide military retired pay; it merely provides a means to enforce valid state court orders that divide retired pay as martial property. Many early post-*McCarty* cases discussed the purpose of the USFSPA. *See, e.g.*, Allen v. Allen, 488 So. 2d 199 (3d. Cir. 1986) (stating that the USFSPA was intended to end the adverse effect of *McCarty*, which held that federal law precludes state courts from dividing military non-disability retirement pay pursuant to state law); Neese v. Neese, 669 S.W.2d 388 (Tex. Ct. App. 1984) (stating simply that the USFSPA is intended to place courts in the same position they were in before the *McCarty* decision); Steczo v. Steczo, 659 P.2d 1344 (Ariz. Ct. App. 1983) (stating that the effect of the USFSPA is to allow state courts to apply their community property law regarding divisibility of military retirement to all cases pending in trial court and on appeal).

59. Congress intended to negate the effect of *McCarty*, which is why the USFSPA applied retroactively to the date of the *McCarty* decision.

60. 10 U.S.C. § 1408(a)(4), (c)(1) (2000). The definition of disposable retired pay is included *infra* Section III.C.

61. 10 U.S.C. § 1408 (c)(2); *see* Kuenzli, *supra* note 32, at 15-16, 84, nn.106-11; Practice Note, *When is Property Not Really Property?*, ARMY LAW., Sept. 1995, at 28. *See also* S. REP. No. 97-502, at 16, *reprinted in* 1982 U.S.C.C.A.N. 1596, 1611 ("[F]ormer spouse should have no greater interest in the retired or retainer pay of a member than the member has. And a member has no right to transfer his retired or retainer pay on death.").

could not force a service member to retire to initiate retirement benefits to a former spouse.[62] Finally, because of concerns for forum shopping, the USFSPA uses jurisdictional requirements.[63]

While Congress provided many protections for former spouses, the original USFSPA was substantively and procedurally incomplete and inadequate. Congress has remedied many of the oversights through amendments to the USFSPA.

D. Amendments to USFSPA

Since enacting the USFSPA, Congress has continuously amended it to remedy problems in the original law.[64] The most significant amendments include applying the USFSPA to child support and alimony pay-

62. 10 U.S.C. § 1408(c)(3); Kuenzli, *supra* note 32, at 85 (explaining that even though former spouses may be unfairly disadvantaged by delay in retirement after a service member becomes eligible, a state cannot force retirement; some states give the former spouse the option to begin collecting upon eligibility).

63. 10 U.S.C. § 1408(c)(4); Kuenzli, *supra* note 32, at nn.86, 118-21 (noting that the jurisdictional requirements are greater than a "minimum contacts" test).

64. Nearly every Congress has amended the USFSPA. Although many of these are merely updates or technical corrections, some amendments are substantive in nature. Act of Oct. 19, 1984, Pub. L. 98-252, 98 Stat. 2547 (amending the USFSPA to incorporate payment of child support or alimony in the direct payment provision; clarifying the definition of court order to provide that a "division of property" was required to allow payment of disposable retired pay); Act of Nov. 14, 1986, Pub. L. 99-661, 100 Stat. 3887 (amending the definition of disposable retired pay to deduct from inclusion the payments as "government life insurance premiums (not including amounts deducted for supplemental coverage)"); Act of April 21, 1987, Pub. L. 100-26, 101 Stat. 273, 282 (updating a cross-reference to an Internal Revenue Service Code); Act of Nov. 29, 1989, Pub. L. 101-189, 103 Stat. 1462, 1605 (updating cross-references to other sections of the U.S.C.); Act of Nov. 5, 1990, Pub. L. 101-510, 104 Stat. 1569, 1570 (deleting all references to "retainer" as part of retired pay; limiting the applicability of the USFSPA to court actions occurring after 25 June 1981; amending the definition of disposable retired pay); Act of Dec. 5, 1991, Pub. L. 102-190, 105 Stat. 1472 (adding a section heading); Oct. 23, 1992, Pub. L. 102-484, 106 Stat. 2426 (adding section to address the "benefits for dependents who are victims of abuse by members losing right to retired pay"); Act of Nov. 30, 1993, Pub. L. 103-160, 107 Stat. 1666, 1771 (clarifying the section that covers victims of abuse); Act of Feb. 10, 1996, Pub. L. 104-106, 110 Stat. 499 (amending cross reference to another United States Code section); Act of Aug. 22, 1996, Pub. L. 104-193, 110 Stat. 2246, 2249 (clarifying the USFSPA relationship to the Social Security Act; adding a section entitled "certification date"); Act of Sept. 23, 1996, Pub. L. 104-201, 110 Stat. 2579 (updating methods of service of process and service of a court order to the secretary); Act of Nov. 18, 1997, Pub. L. 105-85, 111 Stat. 1901 (making technical corrections). *See generally* WILLICK, *supra* note 7, at 17-22 (providing an overview of USFSPA amendments).

ments,[65] refining the definition of disposable retired pay,[66] and providing for benefits to certain former spouses who are victims of domestic abuse.[67]

On two occasions, Congress requested that DOD review and report on specific USFSPA issues.[68] The first review required the Secretary of Defense to estimate the number of people affected if the section addressing

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65. Act of Oct. 19, 1984, Pub. L. 98-252, 98 Stat. 2547. The implementing regulation defines child support as:

> Periodic payments for the support and maintenance of a child or children, subject to and in accordance with State law under 42 U.S.C. [§]662(b). It includes, but is not limited to payments to provide for health care, education, recreation, and clothing or to meet other specific needs of such a child or children.

32 C.F.R. § 63.3(c) (2000). Alimony is defined as:

> Period payments for the support and maintenance of a spouse or former spouse in accordance with State law under 42 U.S.C. 662(c). It includes but is not limited to, spousal support, separate maintenance, and maintenance. Alimony does not include any payment for the division of property.

32 C.F.R. § 63(a).

66. *See* Act of Nov. 5, 1990, Pub. L. 101-510, 104 Stat. 1569, 1570 (deleting all references to "retainer" as part of retired pay; limiting the applicability of the USFSPA to court actions occurring after 25 June 1981; amending the definition of disposable retired pay to exclude federal income tax withholding). Congress revised the definition of disposable retired pay to exclude federal income tax withholdings to remedy a problem created after they enacted the USFSPA. Former service members were tinkering with their exemption claims. Former service members would claim the fewest exemptions possible so that the government would withhold the maximum amount each month. This act would reduce their disposable income and reduce the amount of money a former spouse would receive each month. Former service members, however, could recover the withheld taxes when they filed their income taxes each year. *See also* Act of Nov. 14, 1986, Pub. L. 99-661, 100 Stat. 3887 (amending the definition of disposable retired pay to deduct from inclusion the payments as "government life insurance premiums (not including amounts deducted for supplemental coverage)").

67. Act of Oct. 23, 1992, Pub. L. 102-484, 106 Stat. 2426 (adding section to address the "benefits for dependents who are victims of abuse by members losing right to retired pay").

68. Act of Nov. 18, 1997, Pub. L. 105-85, 111 Stat. 1799 (requiring the Secretary of Defense to review and report on the protections, benefits and treatment afforded retired uniformed services members compared to retired civilian government employees); Act of Oct. 23, 1992, Pub. L. 102-484, 106 Stat. 2429 (requiring the Secretary of Defense to conduct a study and provide a report to estimate the number of people effected by the section addressing benefits to victims of abuse).

benefits to victims of abuse was retroactive. The most recent review, for which Congress awaits a report from the DOD, involves a more comprehensive review of the USFSPA. Congress specifically asked for a comparison of the protections, benefits, and treatment afforded to retired civilian government-employees vice retired uniformed-services employees.[69]

Despite the numerous amendments, the USFSPA requires additional changes to reach the originally intended congressional balance between the needs of the federal government and the rights of former spouses. Currently, DOD agencies, former service members' organizations, former spouses organizations, and individual congressional representatives have made suggestions to reach "equity" in the USFSPA and related law. Before addressing these attempts for reform, a complete understanding of the current provisions of USFSPA is required. Section III details the USFSPA and its application.

III. The Current USFSPA[70]

A. Jurisdictional Requirements[71]

To alleviate concerns over forum shopping, Congress included prerequisites for jurisdiction to divide military retired pay, beyond the personal jurisdiction requirements typically needed to dissolve a marriage.[72] At the time Congress enacted the USFSPA, some states allowed division of retirement pay and pensions, while others did not.[73] The DOD and Congress were concerned that parties to a divorce

69. Act of Nov. 18, 1997, Pub. L. 105-85, § 643(a), 111 Stat. 1799.

70. In the original USFSPA, Congress provided that the statute was retroactive until one day before the *McCarty* decision. The effect of retroactivity on state laws and individual cases was highly litigated during the early years of the USFSPA. Some states enacted legislation to handle the requests to reopen military divorce cases and even established deadlines for doing so. *See* THOLE & AULT, *supra* note 4, at 23-24. Because retroactivity does not affect divorces that occurred after the USFSPA effective date in 1983, this article does not discuss retroactivity and related issues. *See generally* WILLICK, *supra* note 7, at 15-17 (discussing the window period or "gap" in USFSPA law).

71. 10 U.S.C. § 1408(c)(4) (2000). *See generally* WILLICK, *supra* note 7, at 56-62 (discussing jurisdictional requirements and issues).

72. These are often referred to as minimum contacts or long-arm statutes.

73. *See* discussion *supra* note 48 (explaining the trends in marital property law at the time the USFSPA was proposed and enacted). All states now allow division of military retired pay as marital property. *See supra* note 14 (providing resources that list retired pay division in all fifty states).

would search for the jurisdiction with the most advantageous law and procedures in which to commence a divorce proceeding, even though the most favorable jurisdiction might be a state with which the spouse or service member has had little previous contact.[74] The USFPSA jurisdictional requirements prevent such forum shopping.

Under the USFSPA, a state may exercise jurisdiction over military retired pay provided one of the following requirements exists: (1) domicile in the territorial jurisdiction of the court;[75] (2) residence within the state other than because of military assignment; or (3) consent to jurisdiction.[76] Courts that otherwise have jurisdiction over the divorce may not have subject matter jurisdiction to divide retired pay unless that court has "USFSPA jurisdiction" over both parties. If both personal and subject matter jurisdiction exist, the court can hear the divorce and decide any matters relating to the USFSPA. However, USFSPA jurisdictional requirements do not limit a court's jurisdiction to award a portion of retired pay for child support or alimony purposes.[77]

Despite the added jurisdiction requirements, the USFSPA provides that any court of competent jurisdiction from a state, the District of Colum-

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74. S. REP. No. 97-502, at 8-9 (1982), *reprinted in* 1982 U.S.C.C.A.N. 1555, 1603-04 (expressing DOD's concerns about forum shopping); H.R. CONF. REP. NO. 97-749, 2d. Sess. (1982), *reprinted in* 1982 U.S.C.C.A.N. 1571 (same). *See* Kuenzli, *supra* note 32, at 10 (providing additional information about forum shopping concerns during the review of the original USFSPA).

75. Under the USFSPA, domicile means more than where the service member is currently living. Domicile requires that the party have the intent to remain in that state. A person can demonstrate domicile through evidence of paying state income and property taxes, voting registration, bank accounts, automobile registration and title, driver's license, and ownership of property. *See* Mark Sullivan, *Military Pension Division: Scouting the Terrain*, SILENT PARTNER, at 2-3, *available at* http://www.abanet.org/family/military/home.html (last visited Mar. 8, 2001).

76. 10 U.S.C. § 1408(c) (setting forth these jurisdictional requirements). *See, e.g*, Steel v. United States, 813 F.2d 1545 (9th Cir. 1987) (holding that a court that had jurisdiction of parties is not allowed to invoke powers of the USFSPA unless personal jurisdiction has been acquired by domicile or consent or residence other than by military assignment; careful reading of §1408(c)(1) reveals that provision is limitation on subject-matter, rather than personal jurisdiction).

77. 10 U.S.C. § 1408(c) specifically applies to "the disposable retired pay of a member" as property and does not mention when disposable retired pay is treated as income, that is, for child support or alimony payments. Thus, courts can use the minimum contacts for a divorce hearing to order child support or alimony paid from retired pay.

bia, U.S. territory,[78] or federal court can hear a case under the USFSPA.[79] Under certain circumstances, foreign courts can hear cases under USFSPA as well.[80]

B. Divisibility of Retired Pay

The USFSPA does not give a former spouse the *right* to a certain percentage of military retirement pay. Rather, it grants state courts the authority to treat military retired pay as property[81] and divide it as they would other pensions.[82] The state court can then apply the state marital property law to determine whether to divide the military retired pay and how to divide it.[83] Contrary to the belief of many former service members, a former spouse does not have an automatic right to receive retired pay.[84]

The USFSPA allows state courts to divide military retired pay for three purposes: to enforce child support obligations, to enforce alimony obligations, and to divide for property settlement purposes.[85] Some courts also apply the USFSPA to divide retired pay upon legal separation.[86] While not included in the USFSPA, some state courts use the provisions of the USFSPA by analogy to divide military early retirement separation benefits.[87]

For division of retired pay as property, the USFSPA does not explicitly require vesting of military retired pay at the time of divorce.[88] Most

78. These include: Puerto Rico, Guam, American Samoa, the Virgin Islands, North Mariana Island, and the Trust Territory of the Pacific. *Id.* § 1408(a).

79. *Id.* § 1408(a)(1) (defining court); 32 C.F.R. § 63.3(d) (defining court for the purposes of the USFSPA implementing regulation).

80. For a foreign court to hear USFSPA cases, the United States must have a treaty with that country that specifically requires the United States to honor court orders of such nation. 10 U.S.C. § 1408(a)(1)(C). No such treaty is in force regarding court orders of any nation, however. In *Brown v. Harms*, 863 F. Supp. 278 (E.D. Va. 1994), an action by a former spouse of a retired military officer for partition of the retirement pay was dismissed because the divorce occurred in a German court.

81. Unlike other property, however, retired pay when treated as property cannot be sold or divested. *See* 10 U.S.C. § 1408; THOLE & AULT, *supra* note 4, at 51.

82. 10 U.S.C. § 1408(c). "Today, all 50 states have recognized military retirement benefits as property, belonging to both parties to the extent earned during the marriage. This is in keeping with the treatment by the states of all other federal, state, and private retirement and pension plans." ABA Position Letter, *supra* note 7, at 2. *But see* Delucca v. Colon, 119 P.R. Dec. 720 (1987) (reestablishing retirement pensions as separate property of the spouse in Puerto Rico; however, pensions may be considered in setting child support and alimony obligations).

states allow division of vested or unvested retired pay at divorce.[89] Most recently, North Carolina enacted a law that eliminated vesting requirements.[90] Despite a growing trend toward divisibility of non-vested retired pay, some states will not divide non-vested retired pay.[91]

While the USFSPA allows for division of military retired pay, the actual amount of pay a court should divide has been in controversy since Congress passed the USFSPA. By law, the total amount of disposable

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83. The USFSPA does not provide or require a state to divide disposable retired pay in any particular manner. The parties must look to state law for a "formula" or explanation of the division. Some typical formulas are as follows:

$$1/2 \times \frac{\text{length of overlap of marriage \& service}}{\text{time in service}} \times 100 = \%$$

length of overlap of

$$1/2 \times \frac{\text{marriage \& service}}{\text{length of service at time of separation or divorce}} \times 100 = \%$$

See JA 274, *supra* note 14, at 6. *See generally* Captain Mark E. Henderson, *Dividing Military Retirement Pay and Disability Pay: A More Equitable Approach*, 134 MIL. L. REV. 87 (1991); Practice Note, *Colorado Reinforces the "Time Rule" Formula for Division of Military Pensions*, ARMY LAW., Aug. 1998, at 27.

84. *See infra* Section IV.A discussing former service members concerns about the USFSPA.

85. *See supra* note 14 (providing resources on state law). All states now have clearly ruled that military retired pay is divisible for property settlement purposes. The primary exception is Puerto Rico.

86. *See* Coates v. Coates, 650 S.W.2d 307 (Mo. 1983) (awarding a portion of the former service member's pension to the spouse in a legal separation proceeding in view of the USFSPA).

87. *See infra* Section III.H for a discussion of early retirement separation benefits and the USFSPA.

88. 10 U.S.C. § 1408(c) (2000) (providing authority for a court to treat retired pay as property of the marriage; this section does not include a vesting requirement).

89. *See* FLA. STAT. § 61.075(3)(a)(4) (1988) (stating that as of 1 Oct. 1988, all vested and non-vested pension plans are treated as marital property to the extent that they are accrued during the marriage); KAN. STAT. ANN. § 23-201(b) (1987) (stating that effective 1 July 1987, vested and non-vested military pensions are not marital property); NEB. REV. STAT. § 42-366(8) (1993) (stating that in Nebraska, military pensions are part of the marital estate whether vested or not and may be divided as property or alimony); N.H. REV. STAT. ANN. § 458:16-a (1987) (stating that effective 1 January 1988, all vested and non-vested pensions or other retirement plans are divisible); VA. ANN. CODE § 20-107.3 (1988)

retired pay to the former spouse cannot exceed fifty percent of that pay.[92] However, unlike other marital property, such as a family house,

89. (continued) (defining, in Virginia, that marital property includes all pensions, whether or not vested). *See also* Lang v. Lang, 741 P.2d 649 (Alaska 1987) (holding that in Alaska, non-vested retirement benefits are divisible); Van Loan v. Van Loan, 569 P.2d 214 (Ariz. 1977) (holding that in Arizona, a non-vested military pension is community property); *In re* Brown, 544 P.2d 561 (Cal. 1976) (holding that in California, non-vested pensions are divisible); *In re* Marriage of Beckman & Holm, 800 P.2d 1376 (Colo. 1990) (holding that non-vested military retirement pay benefits constitute marital property subject to division pursuant to state law); Thompson v. Thompson, 438 A.2d 839 (Conn. 1981) (holding that in Connecticut, a non-vested civilian pension is divisible); Smith v. Smith, 458 A.2d 711 (Del. Fam. Ct. 1983) (holding that in Delaware, a non-vested pension is divisible); Barbour v. Barbour, 464 A.2d 915 (D.C. 1983) (holding that in D.C., a vested but not matured civil service pension is divisible; dicta suggests that non-vested pensions are also divisible); Courtney v. Courtney, 344 S.E.2d 421 (Ga. 1986) (holding that in Georgia, non-vested civilian pensions are divisible); *In re* Korper, 475 N.E.2d 1333 (Ill. 1985) (noting that by Illinois statute, a pension is marital property even if it is not vested); Poe v. Poe, 711 S.W.2d 849 (Ky. Ct. App. 1986) (holding that military retirement benefits are marital property even before they vest); Little v. Little, 513 So. 2d 464 (La. Ct. App. 1987) (holding that in Louisiana, non-vested and not matured military retired pay is marital property); Ohm v. Ohm, 541 A.2d 1371 (Md. 1981) (holding that in Maryland, non-vested pensions are divisible); Janssen v. Janssen, 331 N.W.2d 752 (Minn. 1983) (holding that non-vested pensions are divisible in Minnesota); Fairchild v. Fairchild, 747 S.W.2d 641 (Mo. Ct. App. 1988) (holding that in Missouri, both non-vested and not matured retired pay are considered marital property); Forrest v. Forrest, 608 P.2d 275 (Nev. 1983) (holding that in Nevada, all retirement benefits are divisible community property, whether vested or not, and whether matured or not); Whitfield v. Whitfield, 535 A.2d 986 (N.J. Super. Ct. App. Div. 1987) (stating that in New Jersey, non-vested military retired pay is marital property); *In re* Richardson, 769 P.2d 179 (Or. 1989) (holding that in Oregon, non-vested pension plans are marital property); Major v. Major, 518 A.2d 1267 (Pa. Super. Ct. 1986) (holding that in Pennsylvania, non-vested military retired pay is marital property); Ball v. Ball, 430 S.E.2d 533 (S.C. Ct. App. 1993) (holding that in South Carolina, a non-vested pension is subject to equitable division because a service member acquires a vested right to *participate* in a military pension plan when entering the uniformed services); Kendrick v. Kendrick, 902 S.W.2d 918 (Tenn. Ct. App. 1994) (holding that non-vested military pensions can property be characterized as marital property); Greene v. Greene, 751 P.2d 827 (Utah Ct. App. 1988) (holding that under Utah law, a non-vested pension can be divided); Wilder v. Wilder, 534 P.2d 1355 (Wash. 1975) (holding that non-vested pensions are divisible); Butcher v. Butcher, 357 S.E.2d 226 (W. Va. 1987) (holding that vested and non-vested military retired pay is marital property subject to equitable distribution); Leighton v. Leighton, 261 N.W.2d 457 (Wis. 1978) (holding that non-vested pensions are divisible); Parker v. Parker, 750 P.2d 1313 (Wyo. 1988) (holding that in Wyoming, non-vested military retired pay is marital property). Some courts look at non-vested retired pay as divisible, but in a different way. *See* Caughron v. Caughron, 418 N.W.2d 791 (S.D. 1988) (holding that the present cash value of a non-vested retirement benefit is marital property).

90. *See generally* Major Janet Fenton, Practice Note, *North Carolina Changes Vesting Requirements for Division of Pension*, ARMY LAW., Feb. 1998, at 31.

former spouses do not have a right to sell or transfer their interest in the retired pay of the service member.[93]

The USFSPA provides that state courts can only divide "disposable retired pay."[94] However, the definition of disposable retired pay is a source of contention between service members and former spouses. The next section defines disposable retired pay and examines the key issues.

C. Disposable Retired Pay[95]

The stated definition of disposable retired pay[96] includes pre-tax,[97] total monthly retired pay less statutorily defined amounts, including any amounts that the government recoups for previous overpayment, waiver of retired pay adjudged at court-martial, disability pay, and Survivor Benefit Plan (SBP) premiums.[98] Notably, the definition of military retired pay does not include disability pay.[99] Qualifying retired service members can receive disability benefits from the Veterans Administration (VA),[100] but must first waive an equivalent amount of military retired pay.[101] A retired

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91. *See* Messinger v. Messinger, 827 P.2d 865 (Okla. 1992) (holding that in Oklahoma, only a pension vested at the time of the divorce is divisible); Kirkman v. Kirkman, 555 N.E.2d 1293 (Ind. 1990) (holding that in Indiana, the right to receive retired pay must be vested as of the date of divorce petition in order for the spouse to be entitled to a share, but courts should consider the non-vested military retired benefits in adjudging a just and reasonable division of property); Durham v. Durham, 708 S.W.2d 618 (Ark. 1986) (holding that in Arkansas, military retired pay is not divisible where the member had not served twenty years at the time of the divorce, and therefore the military pension had not "vested").

Some courts that require vesting of pensions before division still look to find equity in the property division. *See* Lemon v. Lemon, 537 N.E.2d 246 (Ohio Ct. App. 1988) (holding that nonvested pensions are divisible as marital property *where some evidence of value demonstrated*); Boyd v. Boyd, 323 N.W.2d 553 (Mich. Ct. App. 1982) (holding that in Michigan, where only vested pensions are divisible, a vested right is discussed broadly and discretion over what is marital property is left to the trial court).

92. 10 U.S.C. § 1408(e)1. *See* Smallwood v. Smallwood, 2000 Ala. Civ. App. LEXIS 674 (Nov. 3, 2000) (holding that payments of disposable retired pay are capped at fifty percent, even if the divorce incorporated a voluntary agreement for a greater division of property). However, this limit does not relieve a service member from liability of child support or alimony if such payments exceed the fifty percent cap. 10 U.S.C. § 1408(e)(5-6); 42 U.S.C. § 659 (2000).

93. 10 U.S.C. § 1408(c)(2).

94. *Id.* § 1408(c)(1).

service member benefits from receiving VA disability pay in lieu of retirement pay because disability pay is neither taxable as income nor subject to garnishment by creditors.[102] When a service member qualifies for disabil-

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95. The definition of disposable pay has changed since Congress first enacted the USFSPA. Originally, disposable retired pay included gross non-disability retired pay minus certain deductions, such as federal, state, and local income tax withholdings; federal employment taxes; life insurance; survivor benefit plan premiums in some cases; statutory offsets required by the retiree's receipt of federal civil service employment benefits; and statutory offsets required by the retiree's receipt of disability benefits from the Veterans Administration (VA). *See* 10 U.S.C. § 1408(a)(4) (1988) amended by the National Defense Authorization Act for 1991, Pub. L. No. 101-510, § 555, 104 Stat. 1569-70 (1990) (codified as amended at 10 U.S.C. § 1408(c)(1)(1994)). This well-defined version of disposable pay caused problems when state courts tried to reconcile it with the gross retired pay used in state statutes. Because of the confusion, and seemingly unfair division for the former spouse, many states ignored the USFSPA definition of disposable retired pay and divided gross retired pay. *See* Kuenzli, *supra* note 32, at 13-14 nn.92-95. *See, e.g.*, Casas v. Thompson, 720 P.2d 921 (Cal. 1986); Deliduka v. Deliduka, 347 N.W.2d 52 (Minn. Ct. App. 1984); White v. White, 734 P.2d 1283 (N.M. Ct. App. 1987); Lewis v. Lewis, 350 S.E.2d 587 (N.C. Ct. App. 1986); Bullock v. Bullock, 354 N.W.2d 904 (N.D. 1984); Martin v. Martin, 373 S.E.2d 706 (S.C. 1988); Grier v. Grier, 731 S.W.2d 936 (Tex. 1987); Butcher v. Butcher, 357 S.E.2d 226 (W. Va. 1987). *See generally* WILLICK, *supra* note 7, at 70-79 (explaining the evolving definition of disposable retired pay).

96. 10 U.S.C. § 1408(a)(4) (2000). Disposable retired pay includes pre-tax gross retired pay, minus amounts that:

> (1) are owed by that member to the United States for previous overpayments of retired pay and for recoupments required by law resulting from entitlement to retired pay;
> (2) are deducted from the retired pay of such member as a result of forfeitures of retired pay ordered by a court-martial or as a result of a waiver of retired pay required by law in order to receive compensation under Title 5 or Title 38;
> (3) in the case of a member entitled to retired pay under chapter 61 of this title are equal to the amount of retired pay of the member under that chapter computed under the percentage of the member's disability on the date when the member was retired (or the date on which the member's name was placed on the temporary disability retired list); or
> (4) are deducted because of an election under chapter 73 of this title [10 USC § 1431 *et. seq.*] to provide an annuity to a spouse or former spouse to whom a payment of a portion of such member's retired or retainer pay is being made pursuant to a court order under this section.

Id.

97. Disposable pay for divorces on or after 5 February 1991 is figured pre-income tax. *See* 1991 Defense Authorization Act, Pub. L. 102-484. *See* THOLE & AULT, *supra* note 4, at 195.

ity pay and waives a portion of retired pay, the amount of disposable retired pay subject to division under the USFSPA decreases.

Courts have struggled with interpreting the statutory definition of disposable retired pay. One of the most significant post-*McCarty* court decisions questioned whether disposable retired pay included disability pay. In *Mansell v. Mansell*,[103] the Supreme Court settled the controversy existing among various jurisdictions regarding divisibility of disability benefits received in lieu of retired pay. *Mansell* held that the language of the USFSPA[104] preempts states from dividing the value of waived military

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98. Until it was repealed in 1999, the Dual Compensation Act, 5 U.S.C. § 5532(b) (1994), required retired officers who were employed in the federal government to waive a portion of their retired pay. *See* Bruce D. Callander, *New Rules on Dual Compensation*, A.F. MAG., Jan. 2000 (noting that the Dual Compensation Act was repealed by the Fiscal Year 2000 Defense Authorization Act, signed by President Clinton on 5 Oct. 1999), *available at* http://www.afa.org/magazine/toc/01cont00.html.

99. Disability pay may be awarded to a member when he is so disabled that he cannot perform his duties. *See* 10 U.S.C. § 1212; *see also* R. ROBERTS, THE VETERANS GUIDE TO BENEFITS 129-64 (1989). Once the VA determines that the service member has a qualifying amount of service, he may be placed on the disability retired list and begin receiving disability retired pay. 10 U.S.C. § 1221. Service members may collect disability retirement pay when they have a permanent disability of at least thirty percent, which renders the service members unfit to perform assigned duties and has either served at least eight years on active duty or was disabled while performing active duty. *See* 10 U.S.C. § 1201(b).

100. 38 U.S.C. § 110 (2000).

101. *Id.* § 5301. The relevant part of this section reads:

> Payments of benefits due or to become due under any law administered by the Secretary *shall not be assignable except to the extent authorized by law* . . . shall be exempt from taxation, shall be exempt from the claims of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary.

Id. § 5301(a) (emphasis added). A statutory exemption exists for child support and alimony, but not for awards of military retirement as property. *See Practice Note, Uniformed Services Former Spouses' Protection Act and Veterans' Disability and Dual Compensation Act Awards*, *ARMY LAW. Feb. 1998, at 31. The* purpose of a waiver provision is to permit a retiree to receive retired pay and veterans' benefits, not to exceed the full rate of retired pay, without terminating the status that affords the right to either benefit.

102. Disability pay is nontaxable to the member, and it is protected from certain creditors. *See* 38 U.S.C. § 5301.

103. 490 U.S. 581 (1989).

104. 10 U.S.C. § 1408(c)(1) (2000).

retired pay because it is not "disposable retired pay" as defined by the statute.[105]

In practice, *Mansell* has a significant impact on property awards.[106] *Mansell*'s clear interpretation of disposable retired pay ensures that state courts do not grant former spouses a share of service members' VA disability pay.[107] Thus, when courts award former spouses a percentage of retired pay, they have a smaller pool of money from which to draw that percentage if the service member receives disability pay. Many courts, however, look to circumvent the order in *Mansell* and provide former spouses with an alternate form of support in lieu of the share of retired pay they would have received but for the disability determination.[108]

D. Direct Payment to the Former Spouse[109]

In some circumstances, the USFSPA allows the Defense Finance and Accounting Service (DFAS) to directly pay the former spouse the awarded child support, alimony, or percentage of retired pay.[110] However, for a former spouse to receive direct payment of a percentage of retired pay as a property award, there must be at least ten years of marriage overlapping

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105. The court found that, in light of § 1408(a)(4)(B)'s limiting language as to such waived pay, the plain and precise language established that § 1408(c)(1) granted state courts the authority to treat only disposable retired pay, not total retired pay, as community property. *See also* JA 274, *supra* note 14, at 3.

106. When discussing the issue of disability pay and retired pay, courts cite to the USFSPA and *Mansell* as precedent for non-divisibility of disability pay. Issues surrounding disposable pay and disability pay are found more often than any other issues relating to the USFSPA, based on an electronic search of LEXIS.

107. Robinson v. Robinson, 647 So. 2d 160, 161 (Fla. Dist. Ct. App. 1994) (holding that military disability benefits are not subject to distribution to a former spouse; a former wife has no "continuing special equity" interest in a former husband's military disability benefits).

108. *See infra* Section VI.C discussing the current interpretation of the USFSPA and circumventing the *Mansell* decision.

109. *See generally* Kuenzli, *supra* note 32, at 29-31 (providing a detailed description of "direct payment" and its limitations).

110. 10 U.S.C. § 1408(d) (2000); 32 C.F.R. § 63.6(a) (2000) (explaining eligibility of a former spouse for direct pay of property, child support, or alimony). For all direct-pay orders there must be: (a) a final decree of divorce, dissolution, legal separation, or court approval of a property settlement agreement; and (b) an application for direct payment. 32 C.F.R. § 63.6(b) (a former spouse shall deliver to the designated agent of the service a signed DD Form 2293, Request for Former Spouse Payments from Retired Pay).

with ten years of service creditable toward retirement.[111] No additional requirements are necessary for direct payment of child support or alimony.[112]

If the former spouse meets the USFSPA criteria for direct payment, the maximum amount of money directly payable to the former spouse is fifty percent of the retiree's disposable retired pay.[113] If the direct payment includes an award of child support or alimony, the maximum increases to sixty-five percent.[114] If these caps do not meet the court ordered support, the former service member must still pay the amount, although not directly from DFAS. The direct payments of retired pay are income to the former spouse for tax purposes.[115]

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111. The criteria is commonly known as the "ten-year overlap" requirement. 10 U.S.C. § 1408(d)(2); 32 C.F.R. § 63.6(a)(2). Further, the court order must provide for payment from military retired pay, and the amount must be a specific dollar figure or a specific percentage of disposable retired pay. The order must also show that the court has jurisdiction over the soldier in accordance with the USFSPA provisions. Creditable service is defined as "service counted towards the establishment of any entitlement for retired pay." 32 C.F.R. § 63.3(f).

Where a court orders a USFSPA payment where the ten-year overlap does not exist, the former spouse must rely on the former service member to forward the monthly payments. If the former service member fails to make these payments, a former spouse can return to court for a garnishment order. *See* DEP'T OF DEFENSE, FINANCIAL MANAGEMENT REG., *Military Pay Policy and Procedure—Retired Pay*, ch. 29 (Sept. 1999), *cited in* Kuenzli, *supra* note 32, at 29.

112. 10 U.S.C. § 1408(d)(1); 32 C.F.R. § 63.6(a)(2).

113. 10 U.S.C. § 1408(e)(1). This section of the USFSPA also places a limit on how much retired pay must be paid to satisfy judgments awarding a share of military retired pay as property. Single or multiple judgments awarding military retired pay as property are considered to be fully satisfied by payments that total fifty percent of disposable retired pay. *But see* Blissit v. Blissit, 702 N.E.2d 945 (Ohio Ct. App. 1997) (holding that despite the fifty percent limit on award of disposable retired pay, the statue does not limit the amount which a service member may be ordered to pay for child support or alimony, it merely limits the extent to which the government will make such payments directly to the former spouse). A former service member can be ordered to pay child support or alimony from a source other than retired pay.

114. 32 C.F.R. § 63.6(e)(1)(ii).

115. *See* JA 274, *supra* note 14, at 7. Direct payments of retired pay received from DFAS by the former spouse are subject to federal income tax withholding. Separate tax forms are issued to the retiree and the former spouse.

E. The USFSPA and Domestic Abuse Cases

One of the significant amendments to the USFSPA provides benefits to victims of domestic abuse who lose their entitlements because of the service members' separation from service.[116] If a service member is separated from active service by a punitive or administrative discharge for misconduct, that member loses eligibility for retirement pay and benefits.[117] Under this provision of the USFSPA, former spouses can collect a portion of the retirement as support, as long as the service member would have otherwise been eligible by years to retire but was separated because of committing domestic abuse.[118] These benefits[119] are provided under specific marriage and divorce circumstances to victims[120] of abuse.[121] The USFSPA considers these benefits "support" payments and not "property interest" payments; thus, the payments terminate upon remarriage of the former spouse.[122]

Congress passed this amendment to remedy a concern that loss of retired pay creates a disincentive for a family member to report abuse. Congress "felt compelled to address the plight of victims of spouse and child abuse and the hardship imposed on them by discharge of the member resulting from the abuse."[123] At present there are less than twenty-five former spouses receiving payment under this program.[124]

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116. Act of Oct. 23, 1992, Pub. L. 102-484, 106 Stat. 2426 (adding section to address the "benefits for dependents who are victims of abuse by members losing right to retired pay").

117. *See* Kuenzli, *supra* note 32, at 42-44 (describing the USFSPA provisions for victims of domestic abuse).

118. 10 U.S.C. § 1408(h) (2000).

119. Benefits include the disposable retired pay that the service member would have received if retired upon date eligible, PX privileges, commissary privileges, medical, dental, and legal assistance. *See* JA 274, *supra* note 14, at 10. These benefits terminate upon remarriage, but can be revived by divorce, annulment, or death of the subsequent spouse. *Id.* at 11.

120. 10 U.S.C. § 1408(h)(2) provides that a spouse or former spouse must be the "victim of the abuse and married to the member or former member at the time of that abuse; or a natural or adopted parent of dependent child of the member or former member who was the victim of the abuse."

121. *Id.* 1408(h). *See* JA 274, *supra* note 14, at 10. To qualify, a former spouse must have a court order awarding as *property settlement* a portion of disposable retired pay. The service member must be eligible *by years* for retirement but loses right to retire due to misconduct involving dependent abuse. The date for determining the years of service is the date of final action by the convening authority (if court-martial) or approval authority (if separation action). These provisions do not apply to early retirement programs.

122. 10 U.S.C. § 1408(h)(7)(A).

F. Enrollment as the Beneficiary of the Service Member's Survivor Benefit Plan[125]

The SBP program ensures that a reasonable amount of income is paid to surviving family of service members who die on active duty while eligible for retirement[126] and surviving family of service members who die after retirement.[127] Service members on active duty who are eligible for retirement are automatically enrolled in the SBP. Upon retirement, the SBP applies automatically to a service member who is married or has at least one dependent child at the time the member becomes entitled to retired pay, unless the service member affirmatively elects not to participate in the SBP.[128] A service member can elect to provide the SBP annuity to a former spouse.[129]

The original USFSPA included an amendment to the SBP that authorized service members to designate a former spouse as the beneficiary under the SBP.[130] Courts can now order a retiring service member to des-

123. Kuenzli, *supra* note 32, at 42. *See* Act of Oct. 23, 1992, Pub. L. 102-484, 106 Stat. 2426 (adding section to address the "benefits for dependents who are victims of abuse by members losing right to retired pay").

124. *See* E-mail from Neal W. Nelson, Deputy Assistant General Counsel, Garnishment Operations, Defense Finance and Accounting Service, to Major Mary J. Bradley (Feb. 15, 2001) [hereinafter DFAS E-mail] (on file with author) (providing statistics on USFSPA payments as of October 2000).

125. *See generally* WILLICK, *supra* note 7, at 140-61 (providing history of the SBP and USFSPA interaction and an overview of the benefits and prerequisites of the SBP); LIEUTENANT COLONEL (RETIRED) EDWARD S. GRYCZYNSKI ET AL., SBP MADE EASY: THE SURVIVOR BENEFIT PLAN (1998) (providing a complete discussion of SBP).

126. Service members who are retirement eligible but remain on active duty are automatically enrolled in SBP. Dependents of service members who die on active duty automatically receive an SBP annuity. The qualifying dependents are spouse and children. *See* GRYCZYNSKI ET AL., *supra* note 125, at 6 (describing SBP while on active duty); WILLICK, *supra* note 7, at 151 (noting that under certain circumstances, former spouses can also be beneficiaries of the SBP when the service member dies on active duty). *See also* THOLE & AULT, *supra* note 4, at 149-60.

127. 10 U.S.C. §§ 1447-1460(b).

128. *Id.* § 1448(a)(2). The spouse must consent if the service member: elects not to participate in the SBP, elects an annuity for that spouse at less than the maximum level, or elects an annuity for a dependent child rather than the spouse. *Id.* § 1448 (a)(3)(A). *See generally* WILLICK, *supra* note 7, at 148.

129. Problems can arise when the service member is divorced after retirement and fails to reclassify the spouse as the "former spouse." *See* Section V.J.3 (discussing problems with the one-year deemed election rule).

130. *See* Pub. L. No. 97-252 §§ 1003(b)(1), 1006(c), 96 Stat. 718 (1982) *codified at* 10 U.S.C. § 1447 (designating the former spouses as potential beneficiaries to the SBP).

ignate the former spouse as an SBP beneficiary—the election need not be voluntary.[131] If, however, a retired member fails to make the court-ordered election, the former spouse may make a "deemed election" of SBP by providing written notice to DFAS within one year of the date of the court order.[132] A former spouse who fails to make the "deemed election" within one year may lose entitlement to the SBP annuity.[133]

The current SBP allows for designation of only one beneficiary. Thus, a former service member who has remarried cannot designate both their former spouse and their current spouse as beneficiaries. A former service member can designate a current spouse as beneficiary, provided however, the former spouse was not the court-ordered beneficiary or if the former spouse dies.[134]

G. Additional Benefits

Additional benefits, including commissary and exchange privileges and medical care, are available to certain former spouses in some situations.[135] Eligibility for additional benefits depends on the former spouse's "category." The former spouse's category is a three number sequence. The first number is the years of creditable service by the service

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131. This was a change from the original USFSPA. *See* JA 274, *supra* note 14, at 13. Even if a court order requires that the service member elect the former spouse as beneficiary of the SBP, the election is not automatic. Once a timely request is made, the finance center will flag the service member's records. When the member retires, the former spouse will be designated as an SBP beneficiary.

132. 10 U.S.C. § 1450(f)(3). One confusing issue is, when does the one year begin? The service member must make the election "'within one year after the date of the decree of divorce, dissolution or annulment' whereas the former spouse must make the request 'within one year of the date of the court order or filing involved.'" WILLICK, *supra* note 7, at 154 (quoting 10 U.S.C. § 1448(b)(3)(A)).

133. *See* Dugan v. Childers, 539 S.E.2d 723 (Va. 2001) (holding that a former spouse was not entitled to SBP payments because she failed to file the deemed election paperwork within one year, despite the former service member's civil court contempt conviction for failing to arrange the court-ordered SBP annuity). *See generally* WILLICK, *supra* note 7, at 152-55 (providing information about the one-year deemed election rule).

134. *See* GRYCZYNSKI ET AL., *supra* note 125, at 4 (explaining designation of current wife as new beneficiary). *See also* WILLICK, *supra* note 7, at 150 (noting that the service member must wait at least one year to designate a current wife as the beneficiary).

135. Other benefits include use of morale, welfare, and recreation (MWR) facilities, clubs, libraries, chapels, military golf courses, legal assistance, casualty assistance, and other benefits typically entitled to a military identification card holder. *See* 10 U.S.C. §§ 1062, 1065, 1072; WILLICK, *supra* note 7, at 163.

member, the second number is the length of the marriage, and the third number is the overlap between the first two. Thus, upon retirement, if the military member served twenty years of creditable service, the marriage lasted fifteen years, and the overlap between service and marriage was ten years, the former spouse would be a "20/15/10" spouse. The two categories of former spouses who are eligible for additional benefits are 20/20/20 spouses and 20/20/15 spouses.

Unlike the payment of retired pay, these benefits do not cost the former service member directly or indirectly. Additionally, the former spouse loses these benefits upon remarriage.

1. Commissary and Exchange Privileges[136]

Former spouses in the 20/20/20 category are entitled to continuing commissary and exchange privileges.[137] They must obtain a military identification card to exercise these privileges.[138] The purpose of these benefits is to provide merchandise, food, and certain services available to military personnel at moderate prices and in convenient locations.[139]

2. Medical Benefits[140]

A former spouse can receive different types of medical benefits depending on the length of the marriage and the years that the marriage

136. *See generally* WILLICK, *supra* note 7, at 162-63.

137. 10 U.S.C. § 1062. Authorizes commissary and exchange privileges and care in military medical facilities or under the Civilian Health and Medical Program (CHAMPUS) for unremarried former spouses who were married for at least twenty years during active duty service, if divorced after 1 February 1983. "[A]n unremarried former spouse . . . is entitled to commissary and post exchange privileges to the same extent and on the same basis as the surviving spouse of the retired member of the uniformed services." *Id.* Under this section, unremarried means "unmarried" for these benefits and a termination of a subsequent marriage *does* revive them. For these benefits, the date of divorce is irrelevant.

138. *See* WILLICK, *supra* note 7, at 163 (explaining how a former spouse can obtain a military identification card).

139. *See* 10 U.S.C. §§ 2484-2486.

140. *See generally* WILLICK, *supra* note 7, ch. 6 (providing the history and an overview of the medical benefits; explaining the requirements to receive medical benefits).

overlapped with active military service.[141] The categories for medical benefits include full,[142] transitional,[143] and the Continued Health Care Benefit Program.[144] Otherwise qualified former spouses lose these medical benefits if they remarry, if they are covered by an employer-sponsored heath plan, or if they are eligible due to age for Part A of Medicare.[145]

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141. 10 U.S.C. §§ 1072, 1078, 1086. *See* JA 274, *supra* note 14, at 11. *See also* U.S. DEP'T OF ARMY, REG. 40-3, MEDICAL DENTAL, AND VETERINARY CARE (30 July 1999) (allowing a service secretary to authorize medical care for individuals who are not eligible by law).

142. The full military health care program includes CHAMPUS coverage (to age sixty two) and in-patient and out-patient care at military treatment facilities. To receive full medical benefits, the former spouse must be an unremarried 20/20/20 spouse. A termination of a subsequent marriage by divorce or death of the second spouse does not revive health care benefits, but an annulment does. Further, the former spouse cannot be enrolled in an employer-sponsored health insurance plan. *See* JA 274, *supra* note 14, at 12.

143. The transitional health care program includes full coverage for one year after the divorce, with the possibility of limited coverage for an additional year. To receive transitional health care, the former spouse must be a 20/20/15 spouse and unremarried. A termination of a subsequent marriage by divorce or death of the second spouse does not revive health care benefits, but an annulment does. Additionally, the former spouse must not be enrolled in an employer-sponsored health insurance plan. To qualify for the second year of limited coverage, the spouse must have enrolled in the DOD Continued Health Care Benefit Program (CHCBP). *See* JA 274, *supra* note 14, at 12.

144. The DOD Continued Health Care Benefit Program (CHCBP) insurance plan is available to anyone who loses entitlement to military health care (former spouses, non-career soldiers and their family members, etc.). *See* JA 274, *supra* note 14, at 12. This premium-based temporary health care coverage program is designed to mirror the benefits offered under the basic CHAMPUS program. *See id.* (detailing the concept of CHCBP). This plan provides benefits for specific period, usually eighteen to thirty-six months, to certain unremarried former spouses and emancipated children who enroll and pay quarterly premiums. Eligible individuals must enroll in CHCBP within sixty days from when they lose eligibility for military health care. *Id.*

145. The Medicare exception depends on specific personal factors. Any former spouse who loses medical benefits because of Medicare should seek legal assistance to ensure that the benefits were properly ended.

146. *See* Office of the Secretary of Defense, *Retirement Choice for Those Who Entered after July 1, 1986*, *at* http://pay2000.dtic.mil (last visited Mar. 2, 2001) [hereinafter *REDUX Information*] (explaining the Career Status Bonus or "REDUX" retirement plan). Under this plan, when service members who entered after 1 July 1986 reach their fifteen-

H. Pre-Retirement Bonuses and Separation Incentives

Career Status Bonuses (CSB/REDUX),[146] involuntary separation benefits, voluntary fifteen-year retirements, voluntary separation incentives (VSI), and voluntary lump-sum special separation benefits (SSB) are not considered disposable retired pay under the USFSPA.[147] Nevertheless, some courts have treated VSI and SSB payments similarly to disposable retired pay, while courts have yet to litigate treatment of CSB/REDUX. The CSB/REDUX provides a pre-retirement bonus tied to a certain career service commitment.[148] The VSI program provides variable-length annuities to service members leaving active duty and affiliating with the Reserve Components.[149] The SSB program provides enhanced separation pay benefits for members agreeing to terminate all connections with the military.[150]

Most courts have used the rationale of USFSPA cases and state division of pensions to divide VSI and other separation benefits.[151] A few courts view VSI payments as the separate property of the service

146. (continued) year mark, they have the option of converting to the pre-1986 retirement plan or keeping the new plan and accepting a $30,000 bonus, which carries a commitment to remain on active duty until the twenty-year point. Because of the "bonus" payment while on active duty, these payments can be analogized to enlistment bonuses and judge advocate continuation pay.

147. *See* 10 U.S.C. § 1408 (defining the parameters of the USFSPA to include division of retired or retainer pay only). *See also* Kuenzli, *supra* note 32, at 34-38 (describing how courts treat separation incentives).

148. *See* discussion *supra* note 146.

149. 10 U.S.C. § 1175.

150. *Id.* § 1174a.

151. *See* Lykins v. Lykins, 34 S.W.3d 816 (Ky. Ct. App. 2000) (holding that payments under the VSI were marital property and therefore the former spouse could be awarded a share of the payments); Marsh v. Marsh, 973 P.2d 988 (Ct. App. Utah 1999) (holding that the separation benefit received by the service member was divisible and property of the marriage because it was equivalent to an advance on his retirement pay); Marsh v. Wallace, 924 S.W.2d 423 (Tex. Ct. App. 1996) (holding that a lump sum SSB payment was divisible and granting the former spouse the same percentage of the SSB she would have received of retirement pay). The *Marsh* court found that the SSB was "in the nature of retirement pay, compensating him now for the retirement benefits he would have received in the future." *Id. See also* Kulscar v. Kulscar, 896 P.2d 1206 (Okla. Ct. App. 1995); Blair v. Blair, 894 P.2d 958 (Mont. 1995); Kelson v. Kelson, 675 So. 2d 1370 (Fla. 1996) (holding that VSI payments were not covered by the USFSPA, but finding that as a practical matter VSI payments are the functional equivalent of the retired pay in which the former spouse has an interest); *In re* Marriage of Crawford, 884 P.2d 210 (Ariz. 1994); *In re* Marriage of Babauta, 66 Cal. App. 4th 784 (1998) (holding that VSI pay is divisible).

member.[152] These courts distinguish the VSI payments from retired pay or pension pay because they are similar to "severance payment . . . and compensate a separated service member for future lost wages."[153]

I. Conclusion

After almost twenty years, courts have settled the USFPSA rationale for division of retired pay. The courts now, however, must apply this well-settled rationale to new facts resulting from the changing society. Congress enacted the USFSPA to protect the wife of a long-term service member who devoted her entire married life to supporting the service member at the sacrifice of her own career.[154] Today, former spouses are not exclusively women.[155] Many former spouses now have their own pension plans or retirement savings.[156] In the last twenty years, divorce and remarriage has not declined.[157] The next section demonstrates that the USFSPA has not kept up with these changes in society.

IV. Opposing Views on the Current State of the Law

Many individuals and organizations seek further congressional revision of the USFSPA to accommodate the progressive needs of today's society. The most vocal activists are the former service members who advocate significant substantive changes to the USFSPA. Former spouses, while less vocal as individuals, are well-organized, active lobbyists for procedural reform. Several issues, including terminating USFSPA pay-

152. Mackey v. Mackey, No. 20010, 2001 Ohio App. LEXIS 98 (Ohio Ct. App. Jan. 17, 2001). In *Mackey*, a man who received a VSI payment upon leaving the Air Force after fourteen years of service was not required to divide the payment upon his divorce. The court distinguished the VSI payment from a pension plan because the payment was made after divorce.

153. McClure v. McClure, 647 N.E.2d 832, 841 (1994). Other courts, however, state that an employer's motivation for the payment of benefits and an employee's reason for accepting them are irrelevant considerations in characterizing employment benefits. *See In re* Lehman, 955 P.2d 451 (Cal. Rptr. 1998), *cited in Babauta*, 78 Cal. Rptr. at 283.

154. *See supra* Section II.C.

155. *See* discussion *supra* note 9.

156. *See* THOLE & AULT, *supra* note 4, at 28

157. Lee Borden, Divorce Info, *Divorce Statistics, at* http://www.divorceinfo.com/statistics.htm (last visited Apr. 2, 2001)

ments upon remarriage, serve as battlegrounds for these opposing groups. The following sections present the positions of these parties and the focal points in the USFSPA war.

A. Issues Raised by Service Members

Anyone looking for former service members positions on the USFSPA need only search the Internet to find stories of individuals full of resentment, anger, and outright hostility.[158] Several of the websites are non-profit organizations advocating the positions of former service members.[159] These lobbies began even before Congress enacted the USF-

158. A search of the Internet revealed over fifty websites for former service members, mostly authored by individuals or unregistered organizations. *See* Alliance Against the USFSPA Law (AAUL), *Home Page*, *at* http://www.usfspa.com (last visited Jan. 22, 2001) [hereinafter *AAUL Homepage*] (providing this organization's thoughts on the USFSPA, sample letters to Congress, USFSPA horror stories, and plans of attacking the problem); Gordon Tatro, Master Sergeant (Retired), *The Military No-Fault Divorce and USFPA Law*, *at* http://www.seacoast.com/~gordont/ (last visited Jan. 22, 2001) (compiling lengthy links, forums, chats, horror stories, and AAUL information); Terry Snyder, *Wake Up Congress!! Reform the USFSPA NOW!*, *at* http://www.angelfire.com/ca2/EXTORT/index.html (last visited Jan. 2001); Don Hollar, *If they had only known . . . , at* http://www.geocities.com/ Athens/Atlantis/2070/index.html (last visited Jan. 22, 2001) (providing an individual's horror story with links to other web sites; this site is interesting in that the home page has a photo of the Viet Nam Memorial in Washington, D.C., with the letters USFSPA in bright red across it); John Verburgt, *"Betrayal," at* http://www.members.nbci.com/USFSPA (last visited Jan. 22, 2001) (providing an individual's horror story and links to the AAUL sites).

Some of these hostile feelings are found even on the private organization web sites. One example is a letter to a congressmen reprinted on the American Retirees Association (ARA) web site. This letter includes the following quote:

> This shameful and cowardly act required "VOODOO" legislation in order to enact an unconstitutional "EX POST FACTO" law, that gave "PROPERTY RIGHTS" to our military retired pay to our ex-spouses, when we do not even have a property right to this pay ourselves, and it in effect created a "NEW ENTITLEMENT" by which an ex-spouse earns "LIFETIME PROPERTY RIGHTS" to our military retired pay for her "Valuable Service" of even a very few years, when it requires the service member at least 20 years of service in order to earn retired pay.

Letter from Don Holland to The Honorable Robert C. Byrd (Mar. 14, 1998), *reprinted in* American Retirees Association, *Views from the Charthouse*, *at* http://www.american retirees.com/charths.htm (last visited Jan. 9, 2001) [hereinafter *ARA Views from the Charthouse*].

SPA in 1982.[160] These organizations provide sample letters to Congress,[161] explanations of the current law and proposed legislation, and legal references to assist former service members.

More plentiful than Internet sites of organizations are postings by individuals who voice their negative feelings about the USFSPA and the military retirement system. One such forum is entitled "Horror Stories," which provides a place for individuals to tell their personal USFSPA

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159. *See, e.g.*, American Retirees Association, *Home Page*, *at* http://www.americanretirees.com (last visited Feb. 9, 2001); Fleet Reserve Association (FRA), *Home Page*, *at* http://www.fra.org (last visited Jan. 25, 2001) [hereinafter FRA Home Page]; Women in Search of Equity, *Home Page*, *at* http://members-proxy-2.mmbrprxy.home.net/skays/wise/ (last visited Jan. 23, 2001) [hereinafter *WISE Home Page*] (WISE is an association formed by women who support the rights of service members in divorce and who *are committed to equitable reform* of the "[USFSPA].").

160. Since the USFSPA was proposed, the primary reason that military personnel have so vigorously criticized the USFSPA is their emotional and financial attachment to their military retirement pay. Kuenzli, *supra* note 32, at 8-9, n.65 (referencing FLORENCE W. KASLOW & RICHARD I. RIDENOUR, THE MILITARY FAMILY 217-25 (1984); K.C. JACOBSEN, RETIRING FROM MILITARY SERVICE 222-23 (1990)). *See* S. REP. NO. 97-502, at 50 (1982), *reprinted in* 1982 U.S.C.C.A.N. 1596, 1633.

> Military retired or retainer pay is an integral part of the military compensation system. Many, if not most, career decisions are made based on individual's perceptions of the stability, reliability, and integrity of the retirement system. Most of these groups suggested a ten-year minimum for the duration of the marriage in order for distribution of retirement pay to the former spouse.

Id. at 43, *reprinted in* 1982 U.S.C.C.A.N. at 1626-28 (statement of Sen. Denton).

161. *See* Fleet Reserve Association, *Letter Sent to Members of the House of Representatives Who Have Not Cosponsored H.R. 72*, *at* http://www.fra.org (last visited Jan. 19, 2001); AAUL Homepage, *supra* note 158 (providing fourteen "samples and inspirations" for a letter writing campaign); *WISE Home Page*, *supra* note 159.

> WRITE, WRITE, WRITE!!!! We can't emphasize this enough. You must contact your Congressman, in some form or another, if he/she is going to understand the full ramifications and impact the USFSPA has had, and will continue to have, on not only military retirees and their families, but armed forces morale and retention. They must also fully understand the clear facts of USFSPA reform and what it will and will not do. We need to prove to our members of Congress that military retired pay is not a pension and should not be compared to civilian retirement/pension plans of ANY KIND.

WISE Home Page, *supra* note 159.

encounters.[162] These sites often focus on the bottom line—"it's my money"—and do not review the law or provide suggestions for change.

In addition to Internet postings, some military retirees use the legal system to voice their animosity toward the USFSPA. These former service members persist in frivolous court claims to prevent their former spouses from receiving a portion of their retired pay. The results are generally not favorable to the former service members. For example, in *Goad v. United States*,[163] the U.S. Court of Appeals for the Federal Circuit ordered Goad,

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162. *See* AAUL, Military Betrayed *Horror Stories*, *at* http://www.militarybetrayed.com (last visited Nov. 16, 2000). One of the well-known USFSPA horror stories is that of Colonel Bob Stirm, known for the heart-wrenching photo depicting his return from POW camp into the arms of his family.

> Colonel Stirm was captured as a POW and sent to a North Vietnam POW camp in the Fall of 1967. He was repatriated to the U.S. in 1973. Shortly after returning home, he was served with divorce papers. According to the papers, the court declared that the "date of separation" from the spouse was 1 April 1970, during a time when he was still a POW. The former spouse did not have to repay any pay and allowances she received and spent after the "date of separation." She was entitled to his accrued leave pay; and moneys he received under the War Crimes Act for inhumane treatment. The former spouse was also awarded the home, car, 42.7% of his military retired pay, child support, and spousal support (even though the former spouse had numerous open affairs during the member's incarceration in a POW camp and [married] the attorney who prepared the divorce action on the former spouses' behalf).

Id. See also Gordon Tatro, *USFSPA Horror Stories*, *at* http://www.seacoast.com/~gordont/members.htm (last visited Feb. 5, 2001) (providing a forum for individuals to tell their USFSPA stories).

> In 1990 I moved out of my home in Tucson AZ after 18 years of being married. I had retired with 21 years and 9 months in the USAF. After which my wife's boyfriend moved in. She wanted a divorce and that was that. I moved to a studio apartment. On the divorce decree she got the house and everything with it. She got custody of all three kids. I was suppose [sic] to have dental and medical insurance for the kids. Out of 1100.00 a month she gets about 565.00 a month and then received the other half of the pension for child support. Plus I was suppose to send another 250.00 to the court for the rest of the child support money. This left me a big fat zero to live on. . . . The only reason I did not make the street was because the apartment manager was a nice lady and took pity on me and waited until I went back to work and could pay the rent.

Id.

163. 2000 U.S. App. LEXIS 20189 (Fed. Cir. July 21, 2000).

a former service member, to pay double costs to the government for filing frivolous claims. Further, the court directed the clerk "not to accept for filing any notice of appeal or petition submitted by [Goad]."[164] In his most recent case, Goad presented a unique argument to the court. Because Goad had previously lost a court battle to recoup the money *paid to his former spouse* under the USFSPA, Goad's most recent argument was to recoup the money *not paid to him* because of the USFSPA.[165] This series of cases is an excellent example of the persistence of some former service members to receive their full, retired pay.[166]

Even the legitimate, non-profit organizations, however, often present their information in a slanted fashion. Looking for additional proponents of their cause, these organizations enrage the reader with the inequities of the USFSPA, but do not always provide suggestions for specific change.[167] Common themes elicit hostility toward former spouses' advocacy organizations[168] and emphasize that Congress should revise the USF-

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164. *Id.* Before this court order, Goad had challenged, in various state and federal courts, the payment of a portion of his retired pay to his former spouse. After the divorce court originally ordered payment of the retired pay to his former spouse, Goad refused to pay and was imprisoned for contempt. *Id.* at *1. In an earlier and separate appeal, the Fifth Circuit noted that it was the sixth lawsuit relating to Goad's military benefits. Goad v. Rollins, 921 F.2d 69, 70 (5th Cir. 1991). That suit was also dismissed as being "patently frivolous." Goad had also appealed to the U.S. District Court for the Southern District of Texas. Goad v. United States, 661 F. Supp. 1073 (S.D. Tex.), *affirmed by* 837 F.2d 1096 (Fed. Cir. 1987).

165. *Goad*, 2000 U.S. App. LEXIS 20189 at *3.

166. Goad is not the only former service member barred from filing claims because of a series of frivolous lawsuits. *See* Chandler v. Chandler, 991 S.W.2d 367 (Tex. Ct. App. 1999) (permanently enjoining a former service member from further litigation concerning the validity of his marriage and subsequent division of his military retired pay).

167. *See, e.g.*, *Veterans Legislative Priorities Hearing Before the House Armed Service Comm.*, 107th Cong. (Mar. 1, 2001) (statement by Charles L. Calkins, National Executive Secretary, Fleet Reserve Association). "[The] USFSPA has become a one-way weapon for far too many ex-spouses and their attorneys to financially bleed our military retirees . . . . The current language in the Act is offensive, inequitable and discriminating to many of our Nation's combat veterans." *Id.*

168. In the bullets addressing the problems with the USFSPA, the ARA lists: "Members of Congress continue to be intimidated by the feminist voting bloc;" and "Traditional male gallantry fails to produce a large enough number of female victims of the USFSPA to generate a *feminist* groundswell for a fair and equitable USFSPA." American Retirees Association, *USFPA*, *at* www.americanretirees.com/usfspa.htm (last visited Jan. 9, 2001) [hereinafter *ARA USFSPA Internet Page*] (emphasis in original)

SPA to reflect "the economic and political gains realized by women since 1982."[169]

Despite the propaganda on former service members' websites, some of these organizations, including Women in Search of Equity (WISE),[170] the American Retirees Association (ARA),[171] the Fleet Reserve Association (FRA),[172] and The Retired Officers Association (TROA),[173] have specific suggestions to change the USFSPA. Some of the most important issues are: determining a former spouses' percent of retired pay based on

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169. *Id.*

170. Women in Search of Equity (WISE), *What is the USFSPA?*, *at* http://members.home.come/skays/ theusfspa.htm (last visited Feb. 6, 2000) [hereinafter *WISE USFSPA Internet Page*]. Women in Search of Equity contends that awarding a former spouse a share of military retired pay, *prior to eligibility of the member*, is granting a former spouse a greater right to a lifetime divisible interest in the service member's retired pay than the service member had at time of divorce. Service member eligibility for retirement pay is dependent upon meeting specific requirements, to include twenty creditable years on active duty, which is not the case for a former spouse.

171. *ARA USFSPA Internet Page*, *supra* note 168. The ARA's position is also advocated by the executive director, Captain (Retired) Frank W. Ault, U.S. Navy, in his book *Divorce and the Military II*. While one chapter is designated as the ARA's position, the entire book is slanted towards the arguments of the former service member. *See generally* THOLE & AULT, *supra* note 4, ch. 17. Despite its obvious leanings, this book is an excellent resource for both the former service member and the former spouse because it succinctly and effectively provides information about military divorce.

172. The FRA serves active duty, reserve, and retired enlisted personnel of the Navy, Marine Corps, and Coast Guard. *See FRA Home Page*, *supra* note 159. The average age of an FRA member is sixty-eight; they are all veterans of as many as three wars. *Id.* The FRA has 153,000 members. *Hearings on the National Defense Budget for FY 2001 Before the House Comm. on Appropriations Subcomm. on Defense*, 106th Cong. (May 3, 2000) (statement of Joseph Barnes, Director for Legislative Programs, Fleet Reserve Association). The FRA position on the USFSPA and proposals to amend it is as follows:

> [T]he [USFSPA] made its way through Congress under suspicious circumstances and has become a one-way weapon used by many former spouses, and their attorneys, to financially bleed their military spouses of outrageous sums. . . . The current statute is offensive. It is not equitable to all it serves, and it is discriminating to many. . . . FRA strongly endorses Messrs. Stump and Norwood's proposal, H.R. 72, and urges all members of this Subcommittee to support its proposed amendments to the USFSPA. The Association believes USFSPA should be as fair to the military retiree veteran as it is for his or her spouse.

Hearings on the FY 2001 Department of Veterans Affairs Budget Before the Senate Comm. on Appropriations Subcomm. on VA, HUD and Independent Agencies, 106th Cong. (Apr. 7, 2000) (statement of the Fleet Reserve Association). The same statement was also given to the U.S. House of Representatives on 7 April 2000, but was presented by Master Chief

date of divorce, not date of retirement;[174] revising the SBP; and extending privileges to spouses who meet the 20/20/15 test. This article discusses these specific suggestions at length in Section VI, proposals to change the USFSPA.

Additionally, former service member organizations suggest other, less controversial changes to the USFSPA.[175] These organizations state that the DOD should inform active duty and reserve personnel of the existence and possible consequences of the USFSPA both when they begin military service and during retiree seminars.[176] Further, the DOD should require the service branches' judge advocate general's corps to be familiar with the USFSPA and capable of providing legal advice at legal assistance

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172. (continued) Terry L. Yanette, U.S. Coast Guard (Retired), National Service Officer of the Veterans Affairs Fleet Reserve Association.

The FRA also sponsored a voluntary survey. They received 327 responses from both male and female members of the armed forces, mostly active duty and retired enlisted personnel in pay grades E5 through E9. The survey is available online. *See FRA Home Page*, *supra* note 159. The FRA sent the survey, along with a letter, to most members of Congress and requested congressional support for amending the USFSPA.

173. *See* The Retired Officers Association, Legislative Initiatives, *Uniformed Services Former Spouses Protection Act (USFSPA) Reform* (Jan. 2001) [hereinafter *TROA USFSPA Reform*] (detailing TROA's position on the USFSPA), *available at* http://www.troa.org/legislative/retirement/usfspa.asp. During the 1998 Hearings on garnishment of veterans' benefits for child support and family obligations, TROA presented a detailed statement of proposals and arguments concerning the USFSPA. *See Hearing Before the House Comm. On Veterans' Affairs Regarding Garnishment of Veterans' Benefits for Child Support and Other Court-Ordered Family Obligations*, 105th Cong. (Aug. 5, 1998) [hereinafter *1998 Hearing*] (statement of Patrick J. Kusiak, Legal Consultant, The Retired Officers Association).

174. Service members refer to this as the "windfall" benefit. In their opinion, because a former spouse did not contribute to the service member's career after the date of divorce they receive a monetary windfall in the form of a percentage of the service member's future promotions and longevity pay increases. Ending the windfall benefit has been and continues to be one of the main issues of former service members. *See* THOLE & AULT, *supra* note 4, at 238-39; *WISE USFSPA Internet Page*, *supra* note 170 ("[P]ayments to former military spouses, through the [DFAS], are derived from all post-divorce career advancements and pay increases, allowing former spouses a monetary windfall when the member retires often many years after a divorce."). *See also TROA USFSPA Reform*, *supra* note 173 (supporting the award of retired pay based on the service member's years of service and pay grade at the time of divorce and not on the grade and years of service at retirement).

175. An Open Letter to the Assistant Secretary of Defense from Captain (Retired) Frank W. Ault, U.S. Navy, Executive Director of American Retirees Association (Jan. 25, 1999) [hereinafter ARA Position Letter], *available at* http://www.americanretirees.com/hotspot.

176. *Id.*

offices.[177] While these proposed changes may assist administering the USFSPA, the position of this article is that these changes should not be statutory, but policy.

Former service member organizations have additional suggestions for change that this article does not incorporate into the legislative proposal at the Appendix. These suggestions include: (1) ending distribution of retired pay to former spouses upon their remarriage; (2) instituting a statute of limitations for USFSPA issues; (3) requiring a minimum length of marriage to qualify for benefits; (4) amending the USFSPA to include additional guidance for state courts. The following sections discuss these issues and argue that Congress should not adopt these proposals.

1. Termination of USFSPA Payments upon Remarriage

Terminating payment of retired pay to a former spouse upon remarriage is one of the primary proposals of the Equity Act of 2001.[178] Currently, the USFSPA does not require that property payments of retired pay to former spouses terminate upon remarriage. Because the USFSPA classifies retired pay as marital property, state domestic relations laws apply when dividing military retired pay.[179] In a divorce, the court divides marital property and grants permanent ownership rights to the

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177. *Id.* All Army JAG basic and graduate course officers receive classes on the USFSPA. Interview with Major Michael Boehman, Professor of Legal Assistance, at The Judge Advocate General's School, U.S. Army, Charlottesville, Va. (Feb. 12, 2001).

178. H.R. 1983, 107th Cong. (2001). All of the former service members' organizations support all or part of this proposal. *See 1998 Hearing*, *supra* note 173 (statement of Patrick J. Kusiak, Legal Consultant to The Retired Officers Association); *id.* (statement of C.A. "Mack" McKinney, Legislative Counsel for the Fleet Reserve Association); ARA Position Letter, *supra* note 175; *TROA USFSPA Reform*, *supra* note 173 (supporting the termination of USFSPA payments upon remarriage of the former spouse). *See also WISE USFSPA Internet Page*, *supra* note 170.

> Should the former spouse continue to receive a division of the service member's retirement pay after remarriage, inconsistent with the other federal retirement programs? Should a former spouse be entitled to benefit financially from the member's time served after termination of the marital status? *WISE* emphatically says NO!

Id. This provision of House Bill 1983 has failed in previous attempts to make this statutory reform. *See, e.g.*, H.R. 72, 106th Cong. (1999); H.R. 2200, 105th Cong. (1997); H.R. 572, 101st Cong. (1990). *See generally* THOLE & AULT, *supra* note 4, at 228.

recipient; for example, a spouse or former member is not required to return a house or car to the other party upon remarriage. Thus, by characterizing retired pay as marital property and enforcing state domestic relations laws, USFSPA payments *cannot* terminate upon remarriage.

For service members to succeed in their bid to terminate USFSPA payments upon remarriage of former spouses, Congress must reclassify military retired pay as current compensation rather than retirement pay, which would result in eliminating the marital property designation. Once the marital property designation was removed, former service members could retain retired pay as separate property, which is not divisible upon divorce. The following section of this article explains, but refutes, each of the service members' arguments, provides additional arguments against the proposal, and concludes that USFSPA payments should not terminate upon remarriage of the former spouse.[180]

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179. With respect to domestic relations law, the Supreme Court has held that "state interests . . . in the field of family and family-property arrangements . . . should be overridden . . . only where clear and substantial interests of the National Government . . . will suffer major damage if the state law is applied." United States v. Yazell, 382 U.S. 341, 352 (1966). *See* Dugan v. Childers, 539 S.E.2d 723, 725 (Va. 2001) (holding that federal laws concerning SBP one year deemed election rule preempt the state court contempt holding).

180. In addition to the legal arguments presented in this section, this article mentions a social argument against terminating USFSPA payments upon remarriage. That is, including a remarriage penalty unnecessarily involves the government in the social institution of marriage. In addition to the purely preemption argument, the federal government should not influence whether a citizen marries. If Congress enacts laws that use marriage or remarriage as a trigger for losing a court-ordered entitlement, the federal government will unnecessarily be discouraging marriage. Finally, Congress must consider the effect on individual former spouses if USFSPA payments terminated upon the former spouse's remarriage. If the threat of terminating USFSPA payments upon remarriage existed, it would serve to "continue the pain of divorce as the [military] member would continue to control the life of the former spouse." NMFA Position Letter, *supra* note 7. When faced with the question of how this proposal would affect them, many former spouses said that they would never remarry, or would be forced to return to court for an award of other property in lieu of retired pay. These opinions came in response to the DOD's call for comments in the Federal Register and the DOD's USFSPA Comment Internet site. Department of Defense, *Comments for the Federal Former Spouses Protection Laws Review, at* http://dticaw.dtic.mil/prhome/comments.html (last visited Mar. 30, 2001). *See* E-mail from Mary Ellen Hines to Lieutenant Colonel Thomas K. Emswiler (Feb. 22, 1999) ("I have not remarried and now will never remarry due to the concern that this or subsequent legislation would cause the

a. How do Federal Statutes and State Domestic Relations Laws Interact?

Division of property during divorce has traditionally been a function of state domestic relations law.[181] The underlying theme of this article is that the USFSPA should not interfere with state domestic relations laws.[182] Federal law that instructs states on *how* and *when* to divide marital property unnecessarily infringes on state domestic relations and marital property laws. In all fifty states property allocated pursuant to a divorce decree remains the property of the party, regardless of future marital

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180. (continued) loss of my share of the pension with devastating financial effect."); E-mail from Carol Peterson to Lieutenant Colonel Thomas K. Emswiler (Mar. 2, 1999) ("If the USFSPA was changed, I would seriously consider divorcing my current husband and just living with him so that I could keep the retired pay benefits—I need this money to live on because my current salary as a teacher is low and I never had a vested pension in one place."); Elaine Motyl to Lieutenant Colonel Thomas K. Emswiler (Mar. 30, 1999) [hereinafter Motyl E-mail] ("Many of the remarried former spouses like myself will go back to court to acquire from their former husband's other assets [that] equal financial compensation that was legally awarded to them at the time of the divorce.").

181. *See supra* note 179 (explaining federal preemption of state domestic relations law).

182. One practitioner noted that his service member clients could not believe that they were treated the same by the state court as any other divorcing party was treated; they were sure that they were being treated differently. "Each state makes its decision on how pensions will be divided. The same rules apply to everybody, whether they work for the post office, the FAA, Lucent Technologies, the Teamsters' Union or as a school teacher." Tom Philpott, *Pentagon Report on Ex-Spouse Law Crawls Toward Completion*, NEWPORT NEWS DAILY PRESS, July 14, 2000 (quoting Edward C. Schilling, a retired Air Force colonel and lawyer in Aurora, Colorado).

> When military retiree clients hear this, he said, "they are dumbfounded. They don't believe I'm telling the truth because they've gotten the idea that the military is picked on. But the fact is, if you have a U.S. senator divorcing in one courtroom and an Air Force colonel divorcing in the next, the law gives the colonel more protection." Some of the extra protection, Schilling said, included the law's definition of "disposable" retired pay and its 50 percent limit on retired pay that cannot be divided as property, even when multiple ex-spouses are involved.

Id. (quoting Edward C. Schilling, a retired Air Force colonel and lawyer from Aurora, Colorado).

status.[183] Because the USFSPA classifies retired pay as marital property,[184] state laws limit reallocation after divorce.

While terminating alimony or support payments upon remarriage is fair and logical, terminating the former spouses' interest in retired pay is inconsistent with the property law of a divorce. Because retired pay is "property" of a marriage, similar to a house, car, or contents of a joint bank account, a court cannot require cancellation of that property right. Provided these payments are designated as a "property" division of the divorce, this provision should not change. Former spouses organizations and the American Bar Association support the continued classification of retired pay as property.[185]

Congress should not create federal law that *requires* these payments to end upon remarriage of the former spouse. Military retirement payments should not be restricted in any manner different from other "property" or civilian retirement payments. State courts, not federal statutes, should determine the effect of remarriage upon property interests.

b. Is Military Retired Pay Reduced Pay for Reduced Services?

The primary argument service members make for statutorily terminating USFSPA payments upon remarriage is that military retired pay is not property, it is "reduced pay for reduced service, not a pension earned for services previously rendered."[186] To make the "reduced pay" argument, former service members distinguish military retired pay from civilian pensions.[187] A civilian is not subject to involuntary recall to his private job; a former service member may be involuntarily recalled to active

183. 24 AM. JUR. 2D *Divorce and Separation* §§ 477-606 (2000).

184. 10 U.S.C. § 1408(c) (2000).

185. *See* Position Paper, Ex-Partners of Servicemen(women) for Equality (EX-POSE), *Opposition to the Proposed Legislation H.R. 72* (n.d.) (on file with author) [hereinafter EX-POSE Position Paper]; National Military Family Association, *NMFA Issues and Actions for 2001*, at 2 (Dec. 2000) [hereinafter *NMFA Issues for 2001*], *available at* http://www.nmfa.org/ FactSheets/Issues2001.pdf; Telephonic Interview with Margaret Hallgren, President, National Military Family Association, Inc. (Jan. 19, 2001) [Hallgren Interview] (Hallgren expects to testify during hearings on this and other USFSPA issues before the next Congress); Doris Mozley, Committee for Justice and Equality for the Military Wife, *Military Divorces Should Be Fair, Too*, NAVY TIMES (Jan. 24, 2000), *reprinted in ARA Views from the Charthouse*, *supra* note 158. *See also 1998 Hearing*, *supra* note 173 (testimony of Marshal S. Willick, American Bar Association).

duty.[188] A civilian is not required to continue to comply with the company's by-laws; a former service member must continue to comply with the Uniform Code of Military Justice (UCMJ), or risk recall and court-martial.[189] Civilian pensions are automatically received, cannot be ended, and do not tie the recipient to potential additional responsibilities.[190]

Despite former service members' arguments, the Supreme Court does not consider military retired pay reduced pay for reduced services. In *Barker v. Kansas*,[191] the Supreme Court held that military retirement benefits are deferred pay for past services. In *Barker*, the Court considered the definition of military retired pay for state income tax purposes and held that although retired service members were different from civilian retirees, their pay was not reduced pay for reduced service.[192] To reach this conclu-

186. Former service members' organizations vehemently argue this point. *See* ARA Position Letter, *supra* note 175; *WISE USFSPA Internet Page*, *supra* note 170. In *McCarty*, the Supreme Court agreed that retired pay was reduced pay for reduced service, but did not decide the case on that point. McCarty v. McCarty, 453 U.S. 210, 222 (1981). "[W]e need not decide today whether federal law prohibits a State from characterizing retired pay as deferred compensation, since we agree with appellant's alternative argument . . . ." *Id.* at 223.

187. *See* THOLE & AULT, *supra* note 4, at 34 (listing restrictions on retired military members required to receive retired pay, which are not restrictions on former spouses who receive a property interest in the retired pay); Letter to Editor from Frank Ault, Executive Director of American Retirees Association, NAVY TIMES, Jan. 19, 2000 [hereinafter Ault Letter], *available at ARA Views from the Charthouse*, *supra* note 158.

188. Pub. L. 96-513, § 106, 94 Stat. 2868, *cited in* McCarty v. McCarty, 453 U.S. 210, 221 (1981).

189. 10 U.S.C. § 802(4) (2000).

190. Service members apparently base their argument on the overturned, lower court decision in *Barker*. Barker v. Kansas, 815 P.2d 46, 53 (Kan. 1991), *reversed by* Barker v. Kansas, 503 U.S. 594 (1992).

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

Id. at 53.

191. 503 U.S. 594 (1992).

sion, the Supreme Court considered a number of factors, which can apply beyond the scope of *Barker*'s state taxation issue to refute the service members' "reduced pay" argument.

First, the Court reviewed how military retired pay is calculated, and determined that retired military pay is similar to deferred compensation in that the amount of retired pay actually received is calculated based on the service member's rank and longevity at the time of retirement.[193] If retired pay were reduced pay for reduced services, the amount of compensation would be based on current service, which includes "continuing duties [the service member] actually performs."[194]

Second, the Court reviewed their own precedents defining military retired pay. Citing *Tyler*[195] and *McCarty*,[196] the Court noted that their opinions had never squarely addressed characterization of military retired pay. In *Tyler*, the Supreme Court stated in dicta that retired pay was "effectively indistinguishable from current compensation at a reduced rate" but did not rely on that conclusion to hold that military retired pay should increase at the same cost of living rate that active duty members received.[197] In *McCarty*, the Court did not adopt the *Tyler* explanation of retired pay but reserved characterizing retired pay for a case more squarely on point. The *McCarty* Court did note, however, "that States must tread with caution in this area, lest they disrupt the federal scheme."[198] Despite looking to past precedent, the Supreme Court was unable definitively to answer the *Barker* issue.

Finally, the Court turned to a review of congressional intent.[199] Reviewing the USFSPA, the Court noted that "to extend to states the option of deeming such benefits as part of the marital estate as a matter of state law would be inconsistent with the notion that military retirement pay should be treated as indistinguishable from compensation for reduced

192. *Id.* at 599.

193. *Id.* at 599-600.

194. *Id.* at 600. The Court also noted that military retired pay was calculated similarly to the state public employee retirement system. *Id.*

195. United States v. Tyler, 105 U.S. 244 (1882) (holding that officers retired from active military service were entitled to the same percentage increase in pay that a statue had provided for active officers).

196. McCarty v. McCarty, 453 U.S. 210 (1981).

197. *Tyler*, 105 U.S. at 245-46.

198. *McCarty*, 453 U.S. at 224 n.16.

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

current services."[200] The Court also looked to congressional intent in other federal laws and discovered that some tax laws treat military retired pay as deferred compensation.[201]

Based on these three arguments, the Supreme Court concluded that for taxation purposes,[202] military retired pay is deferred pay for past services. Specifically, characterizing retired pay as "current compensation for reduced current services does not survive analysis in light of the manner in which these benefits are calculated, our prior cases, or congressional intent as expressed in other provisions treating military retirement pay."[203] The Supreme Court's *Barker* holding concerning taxation can be analogized to marital property to refute the service members' "reduced pay" argument.

To change the characterization of retired pay, former service members must lobby Congress to repeal the USFSPA. When enacting the USFSPA, Congress characterized military retired pay as marital property. Such a characterization has withstood court challenges. Despite attempts, former service members have not persuaded the Supreme Court that the USFSPA is unconstitutional.[204] Based on the evolution of the USFSPA and the unsuccessful court challenges, former service members will not succeed in a congressional bid to reclassify military retired pay as separate property of the service member, which is employment income rather than retirement pay.

Congress has preempted state courts from limiting the definition of retired pay. Therefore, state courts must apply their own domestic rela-

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200. *Id.*

201. *Id.* at 604 (citing 26 U.S.C. § 219(f)(1) and noting that military retired pay is deferred compensation for the purposes of making IRA contributions).

202. The Supreme Court focused on interpreting 4 U.S.C. § 111, which discusses taxation of federal pay.

203. *Barker*, 503 U.S. at 605.

204. *See* Fern v. United States, 15 Cl. Ct. 580 (1988), *aff'd*, 908 F.2d 955 (Fed. Cir. 1990). This suit argued that the USFSPA was unconstitutional based on an impermissible "taking" of property, or, in the alternative, that USFSPA was an unconstitutional infringement upon the contract between the service member and the United States. *See generally* WILLICK, *supra* note 7, at 27-30 (explaining the arguments and holdings in *Fern*). Only a new argument to the Supreme Court can trump Congress by opining that USFSPA is an unconstitutional law.

tions, property division laws to military retired pay, as they would any other marital property.

c. Should Military Retired Pay be Treated the Same as Other Federal Pensions?

As a follow-on argument, former service members compare military retired pay to retired pay received by other federal employees and argue that military retired pay should have the same remarriage provisions as other federal retirement programs.[205] Specifically, former service members argument that the retirement rules for the Foreign Service and Central Intelligence Agency (CIA) retirement annuities paid to former spouses terminate if the former spouse remarries before age fifty-five.[206] This argument fails, however, because the former service members fail to compare the remaining federal retirement plans to the military retired pay before distinguishing the USFSPA as unjust.

Other federal retirement plans include Civil Service Retirement System (CSRS), Federal Employee's Retirement System (FERS), Railroad Retirement System, and the Federal Employees' Thrift Savings Plans (TSP). Each of these plans uniquely provides retirement benefits for qualifying employees based on the needs and circumstances of that specific

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205. *WISE USFSPA Internet Page*, *supra* note 170.

> Another invidious aspect of the USFSPA is that the law permits payments to the nonmilitary former spouse for *LIFE*, whether or not he or she has remarried. This is inconsistent with the former spouses protections for all other federal agencies, to include:
>
> - civilian federal employees
> - US Foreign Service
> - Central Intelligence Agency
> - Serviceman's Benefit Program of the [DOD]
> - The widows' pension benefit program (DIC) of the [DOD]
> - and the abused military dependents provisions of the USFSPA.

Id.

206. Foreign Service Retirement and Disability System, 22 U.S.C. §§ 4068, 4069a(6) (2000); Foreign Service Pension System, 22 U.S.C. § 4071j(a)(1)(B); Intelligence Agency Retirement Act, 50 U.S.C. §§ 224(b), 403 (2000).

federal system.[207] Neither the CSRS, FERS, nor Railroad Retirement System (Tier II)[208] contains statutory or regulatory provisions to terminate retired pay to former spouses upon their remarriage.[209] However, state courts can include a remarriage provision in a property settlement or divorce decree.[210] The TSP, which is similar to a private employee's 401K plan, is paid in a lump-sum to a former spouse; remarriage does not effect this payment.[211]

The former service member's comparison of military retired pay to other federal system retirement plans fails. Congress designed each retirement plan to meet the needs of each different federal agency. Former service members cannot successfully claim inequities when Congress created the retirement plans to serve different purposes.

d. Should a Remarriage Penalty Provision Apply Retroactively?

The Equity Act of 2001 proposes terminating payments upon remarriage, with an effective date of 25 June 1981, the day before the *McCarty* decision. If Congress considers such a provision, this article advocates that the amendment not be retroactive for several reasons. First, the state domestic relations courts would be flooded with military divorce litigation, at the great expense of former service members and former spouses.[212] Considering the extent of litigation when Congress made the original USFSPA retroactive to the day before the *McCarty* decision—a window of two years—the number of cases that would be reopened, if this provision were retroactive after twenty years, would flood state courts with

207. Emswiler Interview, *supra* note 8 (relying on information gathered to prepare the DOD Report to Congress Concerning Federal Former Spouse Protection Laws, which has not yet been released).

208. Railroad Retirement System has two "tiers." Tier I benefits terminate upon the remarriage of the former spouse, but can be reinstated in some circumstances. Tier II does not contain a remarriage provision, but one can be supplied by court order. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

212. *See* Motyl E-mail, *supra* note 180 ("Many of the remarried former spouses like myself will go back to court to acquire from their former husband's other assets the equal financial compensation that was legally awarded to them at the time of the divorce.").

military divorce litigation.[213] Second, retroactivity would create a serious inequity to former spouses, especially older women, who exist primarily on the USFSPA payments.[214] While the major proponents of retroactivity are surely those currently affected by a former spouse's remarriage, even one of the leading former service member advocates does not favor retroactive legislation.[215]

Congress should not enact legislation terminating a former spouse's property rights to retired pay upon remarriage. Such a revision may encounter property rights constitutional scrutiny from the Supreme Court. Parties to a divorce would flood state domestic relations courts with motions to reopen finalized divorces, and individuals who relied on this property interest for support would suffer greatly.

2. Impose a Statute of Limitations to Divide Military Retired Pay

The USFSPA does not currently have a statute of limitations. The Equity Act of 2001 proposes a two-year statute of limitations for "appor-

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213. *See* THOLE & AULT, *supra* note 4, at 23. Retroactivity was extensively litigated because the USFSPA did not prohibit reopening cases, it merely permitted state courts to reconsider judgments in light of marital property and procedural laws without the presence of *McCarty.*

214. E-mail from Nola J. Morgan to Lieutenant Colonel Thomas K. Emswiler (Mar. 3, 1999) ("I was aghast to learn that your office is planning some changes to the USFSPA that would seriously affect the financial welfare of former spouses, especially elderly women such as myself."). Mrs. Morgan further states:

> Please do not cut these benefits. This is not a handout but is my fair share of the retirement from the 25 years I devoted to my husband and to the Marine Corps and the additional 13 years we were married after he retired. Women who devoted their adult lives to furthering the military should not be left out in the cold in their old age.

Id.

215. In his book on military divorce, the ARA executive director states that laws should not be retroactive.

> For any law within the United States to be truly valid, it must, first, meet the requirements of the Constitution and become effective only from its actual date of passage. It cannot be postdated. To be fair, it must also be universally applied, nondiscriminatory, consistent in its application and equitable in its considerations.

See THOLE & AULT, *supra* note 4, at 52.

tionment of the retired pay of the [military] member."[216] Former service members' organizations also support having a statute of limitations for all USFSPA issues.[217] "There should be some element of closure in the divorce process. Neither party should be able to persist, indefinitely, with the threat of further action."[218] Most organizations support the Equity Act's proposal of a two-year statute of limitations for a former spouse to claim benefits under the USFSPA.

One complaint by former military organizations is that courts routinely re-open final divorce decrees, sometimes ten or fifteen years after the divorce, for the sole purpose of dividing military retired pay.[219] According to these organizations, civilian federal pension plans include a statute of limitations for dividing retired pay.[220]

Imposing a federal statute of limitations on state domestic relations courts is neither prudent nor necessary. Congress should not preempt state practices in the area of domestic relations unless "clear and substantial

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216. H.R. 1983, sec. 4., 107th Cong. (2001).

217. *See* THOLE & AULT, *supra* note 4, at 16 (noting that because there is no statute of limitations for former spouses to request a property share of retired pay, the service member is left in financial limbo); ARA Position Letter, *supra* note 175; *1998 Hearing*, *supra* note 173 (statement of Master Gunnery Sergeant (Retired) Benjamin H. Butler, U.S. Marine Corps, National Association For Uniformed Services).

> Placing limitations on the jurisdiction of courts to reopen divorce cases would allow fair and equitable settlements and both parties could continue their lives without the fear of cases being reopened long after the divorce and as a consequence, affecting the retiree and the standard of living of his/her subsequent spouse.

Id. See also TROA USFSPA Reform, *supra* note 173 (supporting a statute of limitations provision in the USFSPA).

218. ARA Position Letter, *supra* note 175.

219. *1998 Hearing*, *supra* note 173 (statement of Mrs. Patricia Bruce, National Director, Women in Search of Equity (WISE)). However, especially in community property states, final decree or closure to the property settlement aspect of a divorce may not occur for several years after the divorce occurs. *See* Mueller v. Walker, 167 Cal. App. 3d 600, 605-06 (Cal. Ct. App. 1985) (holding that where a divorce decree does not mention specific community property, the parties own the property as tenants in common and it may be divided in a separate partition action at any point in the future); Henn v. Henn, 26 Cal. 3d 323, 330-32 (Cal. 1980) (same). *See also* Casas v. Thompson, 42 Cal. 3d 131, 141 (Cal. 1986) ("*Henn* implicitly holds . . . that the policy favoring equitable division of marital property outweighs that of stability and finality in the limited context of omitted assets.").

220. *1998 Hearing*, *supra* note 173 (statement of Mrs. Patricia Bruce, National Director, Women in Search of Equity (WISE)).

interests of the National Government . . . will suffer major damage if the state law is applied."[221] When advocating for a federal statute of limitations, former service members have not demonstrated why Congress should enact a law to preempt state domestic relations law. These organizations do not state what federal interest would be harmed if current state statutes of limitation continued.[222] Former service members advocate for the convenience of a federal statute of limitations; however, convenience is not a reason for preempting state domestic relations laws.

Additionally, a federal USFSPA statute of limitations is not necessary; state courts should apply their own statutes of limitations to division of military retired pay based on state property-division laws. Most states have a statute of limitations that applies to division of property in a divorce.[223] In addition to the strict statute of limitations, most states apply the doctrine of laches for equity cases.[224] Because parties must comply with state procedural provisions even when they wish to enforce federal statutes, state statutes of limitation already apply to military retirement pay division. "[W]hether or not a party may modify a prior judgment in order

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221. United States v. Yazell, 382 U.S. 341, 352 (1966). *See* Hisquierdo v. Hisquierdo, 439 U.S. 572, 581 (1979) (noting the states' paramount role in domestic relations law and refusing to preempt that state law unless "positively required by direct [federal] enactment or "the particular law does major damage" to "clear and substantial" federal interests."). *See also* Rose v. Rose, 481 U.S. 619, 625 (1987) (holding that VA disability benefits did not conflict with the enforcement of state child support orders even where disability benefits represented a disabled veteran's only source of income and would thus be necessarily used to pay child support).

222. *See supra* notes 179, 221 (discussing federal preemption).

223. *See, e.g.*, DEL. FAMILY COURT R. 60(b) (providing relief from a final judgment, order, or proceeding); ILL. REV. STAT. 1987, ch. 110, para. 2-141 (providing a two-year statute of limitations governing the modification of divorce judgments); N.M. STAT. ANN. § 37-1-4 (1978) (establishing a four-year statute of limitations that applies to suits to divide personal property in a divorce decree).

224. Laches is defined as unreasonable delay or negligence in pursuing a right or equitable claim in a way that prejudices the party against whom relief is sought. BLACK'S, *supra* note 3, at 879. *See, e.g.*, ALASKA CIV. R. 60(b)(6) (motions to modify property distribution must be made within "reasonable time limits"); Lowe v. Lowe, 817 P.2d 453, 457 (Alaska 1991) (holding that four and a half years is not per se unreasonable, but at some point litigation must be brought to an end).

to incorporate the benefits conferred by the USFSPA depends upon the particular state's law governing the modification of judgments."[225]

Former service members have effectively used state court statutes of limitations to prevent division of military retired pay. In *Vanek*,[226] a two-year statute of limitations prevented a former spouse from modifying the property judgment of her divorce to seek equitable distribution of her husband's military retired pay.[227] In *Pierce*,[228] a one-year statute of limitations prevented the former wife from seeking modification of a property settlement involving military retired pay.[229]

Some courts combine a statute of limitations with the doctrine of laches to bar suit by a former spouse. In *Field v. Redfield*,[230] the Missouri state court barred a former military wife from suing the former service member for a portion of his military retired pay after the divorce was final. In *Field*, the original property settlement failed to address the military retired pay. Missouri has a statute that allows a divorce decree to be reopened within five years if the terms of the property settlement or property distribution failed to address specific property. Here, the former wife waited thirteen years. She mistakenly believed that she had to wait to seek division of the retired pay until it vested.[231] The court barred the former

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225. *In re* Marriage of Vanek, 617 N.E.2d 329, 331 (Ill. App. 1993). *See, e.g.*, *In re* Marriage of Vest, 567 N.E.2d 47, 49 (Ill. App. 1991) (citing Barnes v. Barnes, 743 P.2d 915 (1987), which states that the USFSPA is not intended to restrict state law on the modification of final judgments); Andresen v. Andresen, 564 A.2d 399 (1989) (holding that a petition to reopen a marriage judgment under USFSPA was denied where the petition was filed more than four years after the entry of judgment); *In re* Marriage of Quintard, 691 S.W.2d 950 (1985) (denying a petition to reopen a judgment pursuant to USFSPA for lack of compliance with state law).

226. *In re* the Marriage of Vanek, 617 N.E.2d 329 (Ill. App. 1993).

227. *See id. See also* Dimsdle v. Dimsdle, 1991 Kan. App. LEXIS 692 (Kan. Ct. App. Sept. 13, 1991) (holding that a two-year statute of limitations barred the former wife's suit based in fraud, to receive a portion of her husband's military retired pay that she did not know was divisible at the time of divorce).

228. In the Matter of the Marriage of Pierce, 982 P.2d 995 (Kan. Ct. App. 1999).

229. *Id.* (citing KAN. STAT. ANN. § 60-260(b)).

230. 985 S.W.2d 912 (Mo. App. 1999).

231. Field's failure to file timely demonstrates the legal professions' misunderstanding of the provisions of the USFSPA.

spouse from seeking division both by the statute of limitations and by the equity doctrine of laches.[232]

Many state courts also reserve jurisdiction over the divorce and the marital property "to enforce any orders . . . made and to respond to future changes in the law."[233] A federal USFSPA statute of limitations would not affect the delayed final resolution of divorce decrees where a state court takes and reserves jurisdiction. This theory of continuing jurisdiction also applies when a state court must enforce the terms of the divorce.[234]

If states already have statutes of limitation, why would a federal USFSPA statute of limitations be necessary? Former spouse organizations recognize that a statute of limitations could "forever deny [former spouses] the justice to address . . . inequities [in property settlements]."[235] Can former service members use a federal statute of limitations to prevent post-divorce property awards, which now occur upon suit by former spouses when former service members waive a portion of their retired pay to

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232. *Field*, at 919-20. *See* Porter v. Porter, 542 N.W.2d 448 (S.D. 1996) (holding that a former wife was barred from raising the divisibility of the husband's military retired pay fourteen years after the divorce was final based on the doctrine of laches); Terry v. Lee, 445 S.E.2d 435 (S.C. 1994) (barring suit to divide military retired pay twenty-seven years after the divorce based on a doctrine of laches). *But see* Raphael v. Raphael, 1990 Del. Fam. Ct. LEXIS 67 (Del. Fam. Ct. May 31, 1990) (holding that seven years was not an unreasonable amount of time for waiting to reopen a divorce decree where the military retired pay was not addressed; the doctrine of laches did not apply because the husband will not be prejudiced as a result of the seven year delay).

233. Walters v. Walters, 220 Cal. App. 3d 1062, 1066 (1990). In *Walters*, because the court reserved jurisdiction over the retired pay at the time of divorce, the wife was not barred from requesting reinstatement of her share of retired pay even after the statute of limitations on California Civil Code § 5124 passed.

234. A divorce court has jurisdiction to enforce the terms of its own decree. *See* Ratkowski v. Ratkowski, 769 P.2d 569 (Sup. Ct. Idaho 1989) (referring to IDAHO CODE § 1-1622 (1988)).

235. The argument by former spouses is that a two-year statute of limitations would impose significant hardship on former spouses, especially older women,

> who have poorly written property settlement agreements. These persons were oftentimes unaware at the time of their divorces that they had a "presumption" to a portion of their ex-spouses' retired pay; in the trauma of divorce proceedings they have signed away this presumption which could make the difference between a respectable life style and poverty.

EX-POSE Position Paper, *supra* note 185.

receive VA disability pay?[236] Could a former service member run the statute of limitations by delaying their election to receive VA disability pay for two years? If so, the former spouse would have no mechanism for reapportioning the divorce property division.

Manipulating a federal statue of limitations, however, would be unsuccessful. As this article discusses in Section V.C.1, many courts currently require former service members to provide support or alimony equivalent to the amount of retired pay the former spouse no longer receives based on a breach of contract theory or if the original property settlement included an indemnification clause. The service members could succeed when using a federal statute of limitations to prevent additional property division, but would fail to prevent courts from creating or modifying support payments.

State courts also have specific "change in circumstances" criteria for re-opening divorces to modify support orders; this criteria is different from the statute of limitations.[237] States must allow for modification of property distribution as well.[238] A federal statute of limitations on division of

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236. *See* Clauson v. Clauson, 831 P.2d 1257, 1261 (Alaska 1992) (stating that the financial loss to the wife after her share of the retired pay was waived is not insignificant and likely justifies a redistribution of the parties' marital property).

237. *See* ALASKA STATUTE 25.24.160(a)(4), 170 (1991) (a trial court must "fairly allocate the economic effect of divorce" and one party is entitled to modification of alimony and maintenance under a "change in circumstances"); UTAH CODE ANN. § 30-3-5(3) (1995) (noting that a court has continuing jurisdiction to make subsequent changes to orders for distribution of marital property as is reasonable and necessary, upon a showing that a substantial change in circumstances has occurred since the entry of the divorce decree); Bumgardner v. Bumgardner, 521 So. 2d 668 (La. Ct. App. 1988) (holding that the court retained continuing jurisdiction to partition military retired pay after the divorce); McDonough v. McDonough, 183 Cal. App. 3d 45 (Cal. Ct. App. 1986) (holding that the court had continuing jurisdiction to partition military retired pay. *But see* Tarvin v. Tarvin, 187 Cal. App. 3d 56 (Cal. Ct. App. 1986) (finding no continuing jurisdiction over a nondomiciliary, nonresident retiree to partition military retired pay after the decree is final).

See also Clausen, 831 P.2d at 1257 (vacating a divorce decree and remanding for modification based on a change in circumstances, specifically the husband's waiver of retired pay to receive VA disability). *But see* Toone v. Toone, 952 P.2d 112 (Utah Ct. App. 1998) (holding that recognition of a new legal right, specifically the USFSPA divisibility of military retired pay, does not constitute a change in circumstances sufficient to reopen a divorce decree).

238. *See* ALASKA CIVIL R. 60(b)(6) (a party is entitled to modify the final divorce decree under "extraordinary circumstances" based on four factors: (1) the fundamental, underlying assumption of the dissolution agreement has been destroyed; (2) the parties'

retired pay would not affect motions to modify support aspects of a divorce decree.

Former service members mistakenly believe that a federal USFSPA statute of limitations will bring closure to military divorces and an end to re-opening and re-litigating matters in a military divorce. As long as state courts reserve continuing jurisdiction, re-open divorces because of changes in circumstances, and allow for modification of property distribution under state law, a federal statute of limitations will be ineffective. Congress should not impose an artificial time limit on the state's domestic relations laws that will inhibit the state courts' search for equity.

3. Minimum Length of Marriage to Qualify for Benefits

Another proposal by former service members requires a marriage to have a minimum length for a former spouse to receive *any* percentage of retired pay.[239] Specifically, former service members advocate for an amendment to the USFSPA to require a minimum of ten years of marriage concurrently with military service to qualify for USFSPA payments. This article does not support such an amendment. Courts award retired pay to former spouses to acknowledge their contribution to the military marriage and the military community. Quantifying the number of years of marriage for a spouse to have made a meaningful contribution to a marriage is impossible. The question is too fact-specific and should be left to individual state courts. Consider these two hypothetical marriages:

> *Hypothetical A*: In 1990, Private Smith marries Suzy *A* shortly after he completes Basic Training. After a few months, Suzy *A* deserts Private Smith, leaving no forwarding information. Private Smith, believing that love is not for him, focuses on his career and is selected for the Green to Gold Program[240] in 1992. After college, now Lieutenant Smith excels as an Infantry Officer, pins on for Captain, and is in line for a command. In 2000, Captain Smith meets Ellen Johnson and falls in love. He

238. (continued) property division was poorly thought out; (3) the property division was reached without the benefit of counsel; and (4) the [asset in controversy] was the parties' principal asset). *See also* Lowe v. Lowe, 817 P.2d 453, 456 (Alaska 1991) ("As this is not an initial adjudication of the parties' property rights [in a military pension], relief may be granted only within the parameters of Civil Rule 60(b).").

239. ARA Position Letter, *supra* note 174.

240. This program assists enlisted soldiers to become officers.

realizes he has some unfinished business because he is still married to Suzy *A*. Captain Smith finally obtains a divorce from Suzy *A* after ten years of marriage.

Hypothetical B: Assume the same facts, except that Suzy *B* does not desert Private Smith. Before marriage, Suzy *B* worked in a position where she was licensed only in her home state. She supported Smith during his enlisted time. She moved with him when he received permanent change of station (PCS) orders, forcing her to forgo her own career. Instead, she stayed at home and raised their children. Suzy *B* was a dutiful spouse who attended wives' club meetings and volunteered in charitable organizations on military installations. However, Captain Smith meets Ellen Johnson and falls in love. He divorces Suzy *B* in 1999, after nine years and six months of marriage.

Comparing the hypothetical situations, which spouse should receive a portion of the retired pay? Under the "ten-year minimum" amendment, only Suzy *A* would be considered for a percentage—even though she deserted Smith. Despite Suzy *B*'s support to Smith and the military community, she would not be considered for any percentage share of Smith's military retired pay. While this article does not advocate that Suzy *B* should get a certain percentage of the retirement, this article does advocate that state courts should have the flexibility to determine when a division of the retired pay is appropriate.

The USFSPA as written allows state courts to divide military retired pay, but it is a permissive statute.[241] The USFSPA does not *require* division. State domestic relations courts should review the facts of each divorce and determine whether the military spouse has supported the service member and the military community. Based on these findings, the court should decide whether to divide military retired pay.

B. Issues Raised by Former Spouses

Like former service members, some former spouses are publicly vocal about their positions on the USFSPA. Often former spouses voice

241. 10 U.S.C. § 1408(c) (2000). "A court *may* treat disposable retired pay . . . either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court." *Id.* (emphasis added).

their opinions in letters to the editor.[242] Many of these letters and subsequent responses demonstrate the animosity between the parties.[243] These letters and testimonials reiterate the primary reason that Congress enacted the USFSPA: to protect the former military spouse. The platform of the former spouse focuses on sacrifice, support to the family, and selfless dedication to the military at the expense of their own careers and pensions.[244] Unlike the arguments of the former service members, spouses argue that this role has not significantly changed since Congress enacted the USPSA.[245]

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242. *See, e.g.*, discussion *supra* note 23; Mozley, *supra* note 185.

243. A series of editorials in the *San Antonio Express-News* demonstrates this animosity. *See supra* note 23 (providing editorials debating the USFSPA). The animosity between these groups is apparent also in Mozley's article. Mozley, *supra* note 185. Rather than solely focusing her argument on the legal aspects of property in a divorce, she adds: "Would greed possibly have anything to do with husbands seeking revocation of pension shares upon their ex-wives' remarriage?" *Id.* Mozley's article constantly refers to former spouses as wives and former service members as husbands. Ault's retort to Mozley's comment about greed continues the banter: "Greed is a term more properly applied to an ex-spouse who is being supported by two marital partners (past and present), especially when the second is a well-heeled individual with no military service." Ault Letter, *supra* note 187. "[T]o insist on support from two (or more) [marital partners] is an overt manifestation of greed with, perhaps, just a tinge of revenge." *Id.*

244. *See* NMFA Position Letter, *supra* note 7. "Spouses . . . are often forced to move just at the time they might be in a position to advance in their career and usually must start at the bottom of the economic ladder at each new duty station." *Id.* at 1.

245. Discussions with current spouses of military members resulted in a finding that spouses still fulfill an essential role in the military community. While the days of the white-glove teas may be over, spouses assist the military community through other social interaction, communication networks, and support to the service member. *See* Diane Altenberg & Anne Huffman, Address to The Judge Advocate General's School Wives Club Coffee (Jan. 25, 2001) (noting that spouses are not expected to throw big, organized social events, but are still expected to form a support network). Rather than having a reduced role in the military community, spouses today are expected to do more. "It is harder now because the wife is expected to do it all: have a career, take care of a family, and act as a leader of the military families." This role is essential in today's military service that includes frequent and long-term deployments. *See id.* Spouses take a more active role in the military community during deployments out of necessity. Mrs. Altenberg and Mrs. Huffman explained that during deployments such as Desert Storm, the spouses work together to provide support and communications; some families actually moved in together; single women helped with other women's children. "Once the active duty forces were gone, you were it—and you needed the whole military family to pitch in." *Id.* Some of the spouses even assisted in preparing the troops for deployment.

While former service members fill the Internet with websites proclaiming the unfairness of the USFSPA, the same is not true of former spouses. Former spouses are not informally vocal about their cause,[246] but are organized into several lobbying groups and non-profit organizations. These organizations tend to devote more time defending the USFSPA and rebuffing any suggested revisions, rather than filling cyberspace with horror stories.[247]

One of the more moderate organizations, the National Military Family Association (NMFA)[248] supports issues favorable to the former spouse on USFSPA issues, but primarily supports the interest of military families

246. This is not to say that individual former spouses or advocates for former spouses do not voice their opinions. In response to the DOD request for input, nearly one thousand former spouses responded via e-mail and letter. Emswiler Interview, *supra* note 8. Lieutenant Colonel Emswiler was the designee in the on-line request for input on the USFSPA. He acted as the repository of information that DOD requested via the Federal Register. *Id.*

Edward C. Schilling III, a retired Air Force colonel and lawyer in Aurora, Colorado, is known as an expert on the USFSPA who advises hundred of attorneys and their clients on military divorce and the USFSPA. According to Schilling, the problem with the USFSPA is that the current law allows many former service members to protect their retired pay from divorce settlement division and distribution. For example, former service members can accept VA disability compensation in lieu of retirement pay, thus reducing the amount of disposable retired pay available for division and distribution. *See* Philpott, *supra* note 182. Often the disability compensation is for injuries or illnesses unrelated to combat or even military service. Schilling, who was the former head of the Air Force's legal assistance program, stated that he sees "an enormous volume of cases involving long-term marriages that end when the husband dumps the wife and kids, and runs off with some young skirt." *Id.* Schilling did not clarify, however, which party to the marriage was the service member. He most likely implied that the husband was the service member and left his devoted wife who stood by him for years and years of military life and without the USFSPA would not receive her earned share of the military retired pay. This article suggests that the worse scenario would be if the wife was the service member. She would be forced to share her military retired pay with a man who left her and their children.

247. *See, e.g.*, Ex-Partners of Servicemen(women) for Equality, *Home Page*, *at* http://www.angelfire.com/va /EXPOSE/ (last visited Feb. 5, 2001). Although EX-POSE is an active lobby for former spouses' rights, their website merely provides general information about EX-POSE and how to contact the organization. *See 1998 Hearing*, *supra* note 173 (testimony of Virginia Kay Ward, Board Member of Ex-Partners of Servicemen(women) for Equality).

248. The NMFA's logo contains the phrase: "For Thirty Years—The Voice of the Military Family." *See* National Military Family Association, *Home Page*, *at* http://www.nmfa.org (last visited Feb. 20, 2001). The NMFA provides information on the USFSPA law, but does not present a position paper incorporating their position on changes to the USFSPA. The NMFA is part of The Military Coalition, which also includes the FRA. Hallgren Interview, *supra* note 185 (stating that the members of The Military Coalition work together towards reform, but do not always agree on the issues).

on "appropriate quality of life for active duty and retired members of the uniformed service and their families."[249] The NMFA is a member of The Military Coalition,[250] working on various military and veterans issues.[251]

The NMFA believes that the USFSPA "provides a fair and effective treatment of . . . military retired pay" and advocates primarily for status quo relating to the substance of the USFSPA.[252] The NMFA's most significant issue, as discussed *supra* in Section IV.A.1, is maintaining the "property" designation of military retired pay.[253] In their *Issues* bulletin, the NMFA presents the actions anticipated in 2001. Regarding the USFSPA, it proposes to "promote the protection of the state courts' right to divide retirement pay as marital property upon divorce, which would not be affected by the remarriage of either party" and "evaluate proposals to change the Former Spouses Protection Act with an emphasis on maintaining equity."[254]

In addition to preventing the remarriage penalty, former spouses organizations state positions on issues that include: preservation of SBP benefits,[255] treatment of VA disability pay,[256] date of calculating percentage of retired pay,[257] and providing benefits to 20/20/15 spouses.[258] This article discusses these issues in conjunction with the proposals in Section

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249. *NMFA Issues for 2001*, *supra* note 185.

250. The Military Coalition is comprised of thirty-one organizations representing more than 5.5 million members of the uniformed services—active, reserve, retired, survivors, veterans—and their families. *See* The Military Coalition, *Home Page*, *at* http://www.themilitarycoalition.org (last visited Feb. 12, 2001). Members organizations include TROA, FRA, and NMFA. While the groups advocate different positions on the USFSPA, they work together on other military and veterans issues.

251. The Military Coalition successfully advocated for repealing the Dual Compensation Act. *See* Bruce D. Callander, *New Rules on Dual Compensation*, AIR FORCE MAG., Jan. 2000, *available at* http://www.afa.org/magazine/toc/01cont00.html.

252. *See* NMFA Position Letter, *supra* note 7.

253. *See id.*

254. *NMFA Issues for 2001*, *supra* note 185.

255. *See* NMFA Position Letter, *supra* note 7.

256. *See id.*

257. EX-POSE Position Paper, *supra* note 185 (arguing that making this proposal retroactive would gravely impact the financial security of former spouses; it is patently unjust to award a particular amount of money and to decide at a later date that the money would be allocated differently); Mozley, *supra* note 185.

258. The NMFA supports this proposal. *1998 Hearing*, *supra* note 173 (statement of Joyce Wessel Raezer, Senior Issues Specialist, The National Military Family Association). *See generally* THOLE & AULT, *supra* note 4, at 239-40.

VI.[259] Before the specific proposals are discussed, however, a review of the DOD position on the USFSPA is appropriate.

C. Position of the Department of Defense

When the original USFSPA was proposed, the DOD avoided stating a position on the controversial issues. For example, when Congress originally proposed the USFSPA, DOD recognized that some legislation must protect former spouses, but it did not support the original USFSPA.[260] However, the DOD did not produce an alternate version.[261]

By 1990, DOD showed lukewarm support for the USFSPA. During the 1990 USFSPA hearings, General Jones, U.S. Army, The Deputy Assistant Secretary of Defense (Military Manpower and Personnel Policy) did take a position on a number of the USFSPA issues under consideration. He did not favor repealing the USFSPA and he opposed numerous amendments under consideration.[262]

Based on a congressional mandate to investigate and report on the current state of the USFSPA as compared to other federal agencies, the DOD may propose changes to the USFSPA. Possibly torn between loyalties to the service members and recognition of former spouses' needs, the DOD is several years overdue with this report.[263]

In addition to the working group on the current report, the DOD has several organizations that review the USFSPA in the course of their duties. One such organization is the Armed Forces Tax Council. This Council has

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259. According to one commentator (whose opinions tend to favor service members), former spouses groups advocate for additional reform, including a presumptive entitlement to a pro-rata share of military retired pay and an end to the protection of disability pay now embodied in the USFSPA. *See* THOLE & AULT, *supra* note 4, at 239-40.

260. During the review of the original USFSPA, military representatives testified "in support of an equitable solution to the problems created by the *McCarty* decision." S. REP. NO. 97-502, at 7 (1982), *reprinted in* 1982 U.S.C.C.A.N. 1596, 1601-02.

261. *Id.* at 7. The DOD did not advocate legislative codification of the *McCarty* decision, but stated that a legislative reversal of *McCarty* would have an adverse effect on recruiting and retention and create military personnel assignment problems.

262. H.R. ARMED SERVICES COMM. REP. NO. 101-76 (1990).

263. The DOD report was due on 1 October 1999. *See* Philpott, *supra* note 182.

recommended many changes to the USFSPA, most of which are discussed in this article's proposals.[264]

V. Proposals to Change the USFSPA

As stated in the Introduction of this article, with a few substantive revisions and procedural adjustments, the USFPSA can be an equitable means for dissolving military divorces. As emphasized throughout this article, the USFSPA can be effective if states are free to apply their own domestic relations laws.[265] The continuing role of Congress should be to ensure that the procedural tools are in place to make the state courts' orders effective and enforceable.

The Appendix of this article is draft legislation that includes the proposed revisions, which are statutory in nature. While the ideal goal of the proposals is equity between the parties, in an area of law deep-seeded with emotion, a solution to satisfy all parties may be impossible to attain.

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264. In January 2001, the Armed Forces Tax Council recommended specific changes to the USFSPA. Philpott, *supra* note 182 (discussing the Armed Forces Tax Council proposal to reform the USFSPA). Many of these changes are similar in nature to the proposals in this article. In addition to the Tax Council proposals mentioned elsewhere in this article, the Tax Council recommends amending the USFSPA to allow "Cost of Living Allowances (COLA) for dollar-specific awards." *See* Legislative Initiative for Unified Legislation and Budgeting, originated by the Armed Forces Tax Council, subject: Amend the Uniformed Services Former Spouses Protection Act to Allow COLA's for Dollar-Specific Awards (Jan. 2001) (on file with author). The USFSPA does not include language to permit COLA for dollar amount awards. Because this language is not present, most USFSPA awards in divorce orders are expressed in percentages. *Id.* While this rule limits the flexibility of the parties and the courts in negotiating property settlement agreements, the current system of percentage awards is a main feature of the USFSPA. Courts that determine a specific dollar amount is necessary to "support" a former spouse should be considering alimony, not a property award of retired pay. Percentage awards are ideal if the divorce occurs before retirement and before a disability rating; they are more flexible. Specific dollar amounts can work if the divorce occurs after retirement and after a disability rating, once the exact amount of retired pay is known. The problem with specific dollar amounts is demonstrated by *Longanecker v. Longanecker*, 782 So. 2d 406 (Fla. Dist. Ct. App. 2001), where the dissolution awarded the former spouse $157.76 monthly from the net disposable retired pay from the husband. Over time, all of his disposable retirement benefits had been converted into disability benefits. *Id.* at *2.

265. This position is similar to the stated position of the ABA. *See* ABA Position Letter, *supra* note 7. "[T]he consistent ABA position has been to allow state divorce law to apply to service members and their spouses, as it does to everyone else, with the goal of avoiding any "special classes" of persons who would be wrongly deprived of, or unjustly enriched with, the fruits of a marriage." *Id.* at 2.

Rather, these proposals look toward effective and efficient operation of the USFSPA, attempting to reduce litigation and cost to the parties. The first sections recommend substantive revisions, including eliminating the jurisdictional requirements, and the later sections recommend procedural revisions, including repealing the ten-year overlap requirement for direct payment. Each section presents the current problem, recommends a solution, and explains factors that Congress should consider before enacting the proposal.

A. Repeal the USFSPA Jurisdictional Requirements

1. Current Problem

Congress originally enacted the additional jurisdictional requirements necessary for a state court to divide military retired pay to ensure that parties did not "forum shop."[266] Because Congress enacted the USFSPA when many states did not consider retired pay or pensions as marital property, additional jurisdictional requirements were necessary and effective. Congress did not want the former spouse filing for divorce in a community property state that had jurisdiction over the service member solely because of military service.[267] Now, however, all states treat pensions and retired pay, including federal pensions, as marital property subject to division at the time of divorce. Thus, a provision against forum shopping is no longer necessary.

While jurisdiction issues do arise, they are no longer forum shopping type issues, but confusion in applying the USFSPA requirements and forum *avoidance* by the service member.[268] Rather than finding the most advantageous state to file for divorce, former service members avoid consenting to jurisdiction where the spouse files for divorce. If that state does

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266. *See supra* Section III.A (discussing forum shopping).

267. Congress enacted these jurisdiction requirements at the request of DOD. *See* S. REP. No. 97-502, at 8-9 (1982), *reprinted in* 1982 U.S.C.C.A.N. 1555, 1603-04 (expressing DOD's concerns about forum shopping).

268. One commentator noted that Congress created exactly the type of forum shopping it tried to avoid. *See* WILLICK, *supra* note 7, at 57. Legislative Initiative for Unified Legislation and Budgeting, originated by the Armed Forces Tax Council, subject: Amend the Uniformed Services Former Spouses' Protection Act to Eliminate the Jurisdictional Rule (Jan. 2001) (on file with author). "The concern now is not forum shopping; instead it is 'forum avoidance' by the military spouse. DFAS reports that this usually occurs in cases involving members who are retired at the time of divorce." *Id.*

not have USFSPA jurisdiction over the service member, the state can dissolve the marriage, but cannot divide the military retired pay.[269] The former spouse must sue for property division in a state that would have USFSPA jurisdiction over the service member. The service member can force the spouse to expend the maximum amount of money possible by causing the divorce to occur in one state and the division of retired pay in a second state.[270] This type of "forum avoidance" is within the legal boundaries of the USFSPA.

2. Proposed Solution

Congress should repeal the jurisdictional requirements of the USFSPA. Eliminating the additional requirement will increase flexibility of the parties to file in the most convenient state where both parties either consent or have minimum contacts with that state.[271] Further, without the additional requirement, the parties have one less issue to litigate. Former service members will be less likely to resist jurisdiction, thus reducing the need for dissolution of the marriage in one state and dividing the retired pay in a separate state. Decreased litigation will reduce the costs to all parties and will reduce the expense to state courts.

The only reasonable argument for retaining the jurisdictional requirement is that it protects a service member from unknowingly having his military retired pay divided upon divorce when he is unable to attend the divorce hearing. This jurisdictional "shell" protects the military, and may be the last statutory vestige of protecting the service member.[272] However, service members who are unable to attend court hearings due to duty loca-

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269. *See* WILLICK, *supra* note 7, at 58.

270. *See* Mark Sullivan, *Military Pension Division: The Spouse's Strategy*, SILENT PARTNER, *available at* http://www.abanet.org/family/military/home.html. *See also* WILLICK, *supra* note 7, at 58 (explaining the current forum avoidance problem).

271. Minimum contacts is defined as a nonresident party's forum-state connections, such as business activity or actions foreseeably leading to business activity that are substantial enough to bring the party within the forum-state court's personal jurisdiction without offending traditional notions of fair play and substantial justice. BLACK'S, *supra* note 3, at 1010. *See* Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945). Most states have developed minimum contacts tests that are incorporated into "long-arm" statutes. *See infra* note 276 for a definition of long-arm statutes.

272. This is especially true for the retired service member who is not protected by the Soldiers' and Sailors' Civil Relief Act. Interview with Brigadier General (Retired) Thomas R. Cuthbert in Washington D.C. (2 Feb. 2001) (noting that he is an advocate of keeping the jurisdictional requirement).

tion or deployment have the assistance of the Soldiers' and Sailors' Civil Relief Act,[273] which is designed to prevent default civil court judgments against service members. The USFSPA already contemplates this scenario and requires, in certain situations, that the former spouse certify compliance with the rights of the service member.[274] Because other federal statutes are in place to protect service members who truly cannot participate in court hearings, this argument fails.

3. Factors to Consider

Before enacting this proposal, Congress should consider any potential hardship on the parties. The previous subsection mentions the potential hardship on current and former service members sued for divorce in a jurisdiction where they have minimum contacts.[275] However, reducing cost and litigation outweighs this potential hardship.

This article proposes repealing the jurisdictional requirements because they are outdated, unnecessary, and serve only to make the process more difficult, costly, and time-consuming. Repealing the jurisdictional

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273. Soldiers' and Sailors' Civil Relief Act, 50 U.S.C. §§ 501-591 (2000). This law postpones or suspends certain civil obligations; a member's request for stay of proceeding will be granted *unless* military service does *not* materially affect the member's ability to defend the action. *Id.* § 521, *cited in* WILLICK, *supra* note 7, at 105 (emphasis in original). *See, e.g.*, Hawkins v. Hawkins, 999 S.W.2d 171 (Tex. Ct. App. 1999) (ruling that a divorce, which included division of military retired pay, should be re-opened when a service member was unable to defend himself because of military service).

274. If the court issued the order while the service member was on active duty and the service member was not represented in court, the court order or other court document must certify that the rights of the service member under the SSCRA were complied with. 32 C.F.R. § 63.6(c)(4) (2000). No reported cases exist where a spouse falsely certified compliance with this section; however, false certification under this section would be grounds for a service member to re-open a divorce.

275. An example of the minimum contacts test is that a party is subject to the jurisdiction of the court if: (1) the nonresident party must purposely do some act or consummate some transaction in the forum state; (2) the cause of action between the parties must arise out of that transaction; and (3) the assumption of jurisdiction by the forum state must not offend traditional notions of fair play and substantial justice under the due process clause of the Fourteenth Amendment, bearing in mind the quality, nature and extent of the activity in the forum state, the relative convenience of the parties, and the benefits and protection of the laws of the forum state afforded by the respective parties, and the basic equities of the situation. *See* Southern v. Glenn, 677 S.W.2d 576, 583 (Tex. 1984).

requirements will allow state courts to apply their long-arm statutes[276] for personal jurisdiction, which they apply in every other divorce case.

B. Award of Retired Pay Based on the "Separate Property Date"

1. Current Problem

Often, a divorce occurs before the service member retires. Many courts, however, determine the percentage of retired pay based on the pay grade and length of service eventually attained by the service member.[277] Essentially, these courts consider post-divorce promotions and longevity pay increases earned by the service member as part of the marital property. Courts treating retired pay in this fashion are considering it differently than other marital property.[278]

Using the "time of retirement" method to calculate percentage of retired pay can result in an unfair award to the former spouse. The congressional intent when passing the USFSPA was to acknowledge the spouse's contribution to the military community and individual service member.[279] Typically, however, once the parties are separated or divorced the direct contribution ceases.[280] Accordingly, some courts use the service

276. A long-arm statute provides for jurisdiction over a nonresident party who has had contacts with the state where the statute is in effect. BLACK'S, *supra* note 3, at 953.

277. However, other courts determine the percentage of retired pay based on the pay grade and length of service at the time of divorce. *See, e.g*, Grier v. Grier, 731 S.W.2d 931 (Tex. 1987). *See generally* WILLICK, *supra* note 7, at 120 (detailing enforcement of awards based on particular rank and grade when that status varies from actual retirement).

278. Marital property is that property acquired from the time when a marriage begins until one spouse files for divorce. BLACK'S, *supra* note 3, at 1233. In equitable-distribution states, the phrase marital property is the rough equivalent of community property. *Id.* Community property is property owned in common by husband and wife because it was acquired during the marriage by means other than an inheritance or a gift to one spouse, each spouse holding a one-half interest in the property. *Id.* at 274. Currently, nine states have community property systems: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin.

279. *See* S. REP. No. 97-502, at 7 (1982), *reprinted in* 1982 U.S.C.C.A.N. 1555, 1601-02.

280. Under the separate property date proposal, some former spouses could successfully argue for division of retired pay based on date of retirement rather than date of separation or divorce if they can show a contribution to the rank eventually attained by the service member.

member's pay grade and length of service at the time of divorce, avoiding some of the fairness issues of using the time of retirement.

How to determine the percentage of retired pay to award a former spouse creates significant contention between the parties. Former service member organizations refer to using the date of retirement when determining the percentage award as the "windfall" benefit and advocate strongly for reform.[281] Former spouses organizations argue for status quo, because "but for" the previous contributions of the former spouse, the service member would never have attained the level of success reached by retirement.[282] Current or second spouses of service members, who may have also contributed to the marriage and the military community, advocate for change because using the "time of retirement" method to determine the percent of retired pay awarded to former spouses penalizes current spouses and children.[283]

2. Proposed Solution

Congress should amend the USFSPA to limit the definition of marital property to that portion of the retired pay the parties earned together during the marriage. The language of the proposed legislation should allow state courts to review the facts of the marriage and determine the date at which retired pay ceases to be marital property. This article designates this date as the "separate property date." Courts will use the service member's rank and length of service on the separate property date to determine the former spouse's percentage of retired pay.[284]

In determining the separate property date, the federal USFSPA statute should allow state courts to consider the totality of the circumstances of the marriage.[285] Using the totality of the circumstances test, a state court

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281. *See 1998 Hearing*, *supra* note 173 (testimony of ARA, FRA, and WISE). *See* THOLE & AULT, *supra* note 4, at 31.

282. *See 1998 Hearing*, *supra* note 173 (testimony of NMFA, EX-POSE, the ABA, and the Committee for Justice and Equality for the Military Wife).

283. *See* THOLE & AULT, *supra* note 4, at 31-32; E-mail from Sue Miller to Lieutenant Colonel Thomas K. Emswiler, (May 12, 1999) [hereinafter Miller E-mail] (noting that the income of her military husband's former spouse is triple that of her military husband because of the USFSPA payments). Mrs. Miller also argues that her husband's former wife has an "elevated status" merely because she was the first wife during the military career. "The USFSPA is intent on protecting the wife of my husband's former life, [while] it expresses very little interest in protecting me the wife of my husband's current life." *Id.*

284. The Armed Forces Tax Council supports a proposal based on pay grade and

would have the flexibility to designate the separate property date as the date of divorce, the date of separation, the date of a future promotion, the date of retirement, or a date not tied to any particular event. State courts would consider all facts relevant to the marriage that attest to the degree of partnership in the military career—the court would look at the totality of the circumstances of the marriage. Designating that state courts use a totality of circumstances test, would not limit the courts to specific criteria or an arbitrary separate property date.

In applying a totality of the circumstances test to decide the separate property date, some factors the state courts could consider are date of physical or legal separation of the parties, reason for separation,[286] date of divorce, sacrifice of the spouse towards the marriage, spouse's involvement and support of the military community, eligibility of service member for promotion, potential future success of the service member because of spouse's contributions, and sacrifices of each spouse. The list of potential factors could be as lengthy as the diversity of factors that hold a marriage together and break a marriage apart. For that reason, a federal statute should not limit the state courts to a set standard, test, or criteria for determining the separate property date.

In practice, one method that the state court could use to analyze a separate property date issue is to start with the date the couple physically separated. Using that date as a baseline, the court could look to events after physical separation or before physical separation to adjust the separate property date. This method is used in the following hypothetical situ-

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284. (continued) length of service at the time of divorce. *See* Legislative Initiative for Unified Legislation and Budgeting, originated by the Armed Forces Tax Council, subject: Amend the Uniformed Services Former Spouses' Protection Act to Require Calculation of Benefits Based on Time of Divorce Rather Than Time of Retirement (Jan. 2001) (on file with author). *See also* Philpott, *supra* note 182.

285. Criminal cases commonly use the totality of the circumstances test for evidentiary determinations. The test calls for the court to "focus on the entire situation . . . and not any one factor." BLACK'S, *supra* note 3, at 1498.

286. By considering the reason for the couple's separation, the state court could indirectly consider fault in the marriage. If the couple separated because of one spouse's misconduct, that may confirm the court's decision to use the date of separation as the "separate property date." However, if the reason for the separation was the service member's misconduct, the court may consider pushing the separate property date to a date later in time, such as the date of divorce.

ations, where appropriate. The following examples apply the totality of circumstances test for determining a separate property date.

> Husband, service member, and wife marry before he enters activity duty. They remain married during his entire twenty-year career. The couple moves to each duty assignment together. The wife works, but is not vested in a pension plan. Several years after retirement, they divorce.

Applying the totality of circumstances to this hypothetical military divorce, the separate property date should be the date of retirement. The couple lived and worked together during the husband's military career.

> Wife, service member, married husband before she came on active duty. After a few PCS moves, husband decides that he found a job he wishes to remain with and does not move. When she PCS's without him, they complete a separation agreement. She is promoted a few years after they separate. After her promotion, the wife files for divorce. She remains on active duty until retirement.

To determine a separate property date in this hypothetical divorce, the court may consider several factors, including: the separation date, the divorce date, the husband's contribution to the marriage and the military community between those dates, the level of contribution the husband made to the promotion. Using the physical separation as the baseline, the court could first look at the date of physical separation, and then question whether the husband contributed to the marriage or the military community after that date. Without additional evidence of contribution after the separation, the court may decide that the date of separate property is the date of physical separation or the date of the separation agreement.

> Wife, service member, and husband are married for many years. They work together in the marriage and both support the military community. The wife deploys to a hazardous duty area for one year. During that time, the husband remains near the military installation and takes care of the children. He remains an active member of the family support group and helps other families involved in the deployment. While deployed, the wife is selected for promotion. During their one-year apart, the couple realizes that they no longer wish to be married. The divorce is finalized shortly after she returns, but before her promotion date.

This hypothetical divorce presents many factors for a court to consider when deciding the separate property date. Using the physical separation as the baseline, the court should begin with the date the couple was physically separated, which was the date the wife deployed. However, the husband has a strong argument for the court to consider a date later in time as the separate property date. After the physical separation date, the husband continued to support the marriage and the military community. Because of the husbands continuing contribution to the military community, the court should not consider any date earlier than the date of divorce. However, because the wife was selected for promotion during the deployment, the husband may successfully argue for a separate property date that includes her rank upon promotion. Regardless of the court's final decision, the court should make a detailed findings of fact to explain the factors they considered when making the ruling.

> Husband, service member, and wife are married for many years. Together they have PCS'd and supported the military community. The couple has no children. The husband deploys for six months. Shortly after he deploys, the wife meets a civilian and begins a relationship. She leaves the installation to live with him. When the husband returns from deployment they sign a separation agreement. Because of state law, they must wait one year before the divorce becomes final. The wife continues to live with her boyfriend during this time. The husband is selected for promotion and is promoted during their one year of separation.

In this hypothetical divorce, the court will have many factors to consider when reviewing the totality of the circumstances and deciding the separate property date. Using the physical separation as a baseline, the court begins with the date the husband deploys. While not determinative, the wife's misconduct indicates that she did not support the marriage or the military community once the husband deployed. Without evidence of support to the marriage or the military, the court should consider the physical separation date as the date of separate property. The wife could argue that the date of their separation agreement or date of divorce is more appropriate. However, if a court used either of these dates as the separate property date, the court would be ignoring the purpose of the USFPSA. In this hypothetical divorce, the court should make a detailed findings of fact to inform the

parties which factors were considered when ruling on a separate property date.

> Husband, service member, and wife are married for many years. Together they have PCS'd and supported the military community. The couple has no children. The husband deploys for six months. Shortly after he deploys, he meets a civilian and begins a relationship. When the husband returns from deployment they sign a separation agreement. Because of state law, they must wait one year before the divorce becomes final. The husband is promoted during their one year of separation.

This hypothetical divorce is the opposite of the previous one. Here the court may consider the service member's misconduct when deciding the separate property date. Beginning with the physical separation date as the baseline, the court must consider whether the wife contributed to the marriage or the military community after the physical separation. In this case, the wife has a strong argument for a court-ordered separate property date of the date of the separation agreement or even the date of divorce. To persuade the court to order a separate property date as the date of divorce, the wife should present evidence exemplifying her support and assistance to the husband's promotion.

> Husband, service member, and wife are married for twenty years, all of which while the husband was on active duty. During that time, the couple lives together and supports the military community. The wife is a member of the wives' clubs wherever they are assigned and does volunteer work on each installation. She receives awards for her contributions to the military community. The couple remained physically together until their divorce was final. After they divorce, the husband serves another five years and is promoted during that time.

In this hypothetical case, the wife has a strong argument for using the date of retirement as the separate property date because she supported the marriage and the military community for twenty years. The wife could argue that without her contributions, the husband could not have succeeded in his career, received the final promotion, and remained on active duty for twenty-five years. The court should review any factors after the physical

separation date, which is the date of divorce, and make a final determination about the separate property date.

Because of the variety of factors that a court could consider, this article recommends that when a state divorce court determines a separate property date, the court must also make and record findings of fact[287] to support the ruling. In the event of an appeal, these findings could be used to review the trial court's ruling for abuse of discretion.[288]

Although pay increases because of promotions or longevity after the separate property date should be considered the separate property of the service member, increases because of cost of living allowance (COLA) or pay increases should be reflected in the former spouses' portion of the retired pay. The court order should include such a provision.

3. Factors to Consider

The proposal to designate a separate property date should reduce the animosity between the former service members organizations and former spouses organizations. If applied judiciously, the proposal should end the "windfall" benefit to the former spouse, without ending the importance and relevance of the former spouse's contributions to the marriage and the military community. Despite these beneficial outcomes, Congress must consider two factors before enacting the separate property date proposal. First, Congress must assess the potential for increased litigation. Second, Congress must review the potential difficulty of determining the percentage of retired pay once a court decides the separate property date. As the following demonstrates, neither of these factors will prevent Congress from enacting this proposal.

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287. A judge makes findings of fact, which are supported by the evidence in the record and used to reach a legal conclusion; the findings of fact are usually presented at the trial or hearing. BLACK'S, *supra* note 3, at 646.

288. The standard "abuse of discretion" is used when a higher court reviews a trial court's factual or legal decision-making. Typically, an appellate court will find that a trial court abused their discretion if they fail to exercise sound, reasonable, and legal decision-making. *Id.* at 10.

If the parties draft a separation agreement or property settlement, deciding on the separate property date can be an issue bargained during the process. In divorces without separation agreements, determining a separate property date may increase litigation at the time of divorce. Determining a separate property date requires that the parties present evidence during a trial court hearing. Additional witnesses and documentation may be necessary to support each party's proposed separate property date. Further, if an individual is not satisfied with the court's finding, that party may appeal the trial court's ruling in a case that otherwise would be a final divorce.

This article cannot predict the actual increase of hearings and appeals because of this proposal. Arguably, the additional litigation may be insignificant. Divorces that are already contentious enough to require a hearing may simply add one more issue to litigate. Amicably divorcing parties would only have another issue to include in a property settlement. Finally, additional litigation would be minimal when the service member of a divorce is already retired.

If litigation does increase when Congress enacts this proposal, however, this higher level of litigation may decline over time. As state courts develop their own totality of the circumstances tests and routinely consider certain factors when deciding the separate property date, parties to a divorce may be less willing to litigate if the outcome is foreseeable.

Congress should also consider the potential difficulty of calculating the percentage of retired pay when using the separate property date proposal. While calculating the former spouse's share of the retired pay under this method may initially sound complicated, state courts can use current methods or formulas for dividing pensions and retired pay with simple adjustments. To use a current formula to divide retired pay based on the separate property date proposal, the state trial court need only make three findings: the separate property date; the overlap of service and marriage on the separate property date; and the service member's rank and years of service on the separate property date.

To demonstrate how these three findings could be used to modify a current formula, consider this formula currently used by many state courts,

hereinafter referred to as the length of overlap of marriage and service formula:

$$1/2 \times \frac{\text{length of overlap of marriage \& service}}{\text{time in service at vesting}}[289] \times 100 = \%\text{ of total retired pay}$$

Using the findings in the separate property date proposal, the court could redraft this current formula as follows, with the separate property information in italics:

$$1/2 \times \frac{\textit{length of overlap of marriage \& service at separate property date}}{\text{time in service at vesting}} \times 100 = \%\text{ of total retired pay}$$

Courts already using the length of overlap of marriage and service formula should have no difficulty modifying and using a formula based on the separate property date proposal. Consider the following example to demonstrate the use of a separate property date formula.

Assume that the parties were married on 1 January 1980. On this date, the service member also entered active duty service. The parties separated on 1 January 1985. The parties were divorced on 1 January 1990. The marriage lasted ten years, all of which overlapped with military service. The service member retires on 1 January 2000 as an Army colonel (O-6) with twenty years of service. Assume first that the court set the date

289. Some courts use "time in service at retirement." For this example, the difference between time in service at vesting and time in service at retirement is irrelevant because the service member had twenty years of service at vesting and at retirement.

of divorce as the separate property date. On the separate property date, the service member was an Army captain (O-3) with ten years of service.

First, consider the division of retired pay using the current USFSPA and a length of overlap of marriage and service formula.[290]

$$1/2 \times \frac{\text{10 years of overlap of marriage \& service}}{\text{20 years of service at vesting}} \times 100 = \text{\% of total retired pay}$$

The court would determine that the spouse was entitled to twenty-five percent of the retired pay of a colonel.[291] Applying the separate property date formula,

$$1/2 \times \frac{\text{10 years of overlap of marriage \& service at separate property date}}{\text{20 years time in service at vesting}} \times 100 = \text{25\% of O-3 pay with 10 years of service}$$

the court would determine that the spouse was entitled to twenty-five percent of the retired pay of captain (O-3) with ten years of service.

For a slightly more complicated scenario, assume now that the state court fixed the separate property date as the date the parties separated, 1 January 1985. At that time, the overlap between marriage and service is

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290. *See supra* note 83 for additional examples of current military retired pay division formulas.

291. Information about how to determine the specific dollar amount of retired pay can be found using DEFENSE FINANCE AND ACCOUNTING SERVICE, PREPARING FOR YOUR RETIREMENT ch. 2 (June 2000), *available at* http://www.dfas.mil/money/retired/PERRET00.pdf. *See generally* WILLICK, *supra* note 7, at 2 (providing information and charts to assist in dividing retired pay); THOLE & AULT, *supra* note 4, at 113-15 (explaining how retired pay is calculated).

five years, and the service member was a first lieutenant with five years of service. Using an adjusted formula based on separate property date,

$$1/2 \times \frac{\text{5 years of overlap of marriage \& service at separate property date}}{\text{20 years in service at vesting}} \times 100 = \text{12.5\% of O-2 pay with 5 years of service}$$

the former spouse would only be entitled to 12.5% of the retired pay of a first lieutenant (O-2) with five years of service. In this scenario, the marriage and service overlap was only five years because of the court's designation of the separate property date, even though the divorce occurred after ten years of service.

When the service member retires, DFAS would use the court's findings to calculate the dollar amount, and begin direct payment.[292] Awards based on information other than the service member's rank and length of service at the time of divorce are known as "hypothetical" awards or formulas.[293] According to DFAS, hypothetical awards are currently processed and honored.[294] Once DFAS makes the initial calculation, it would only be required to adjust the amount directly paid to the former spouse based on percentage adjustments of congressional pay increases and COLA increases.[295]

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292. *See infra* Section V.G (proposing expanding DFAS direct payment of retired pay).

293. An example of a hypothetical award is: "The former spouse is awarded _____ % of the disposable retired pay of the member had the member retired on ____ (date—usually the divorce date) at the rank of ____ with ___ years of creditable service." DFAS E-mail, *supra* note 124.

294. *See id.* (acknowledging that this type of award is routinely paid by DFAS provided it complies with the proposed rule to 32 C.F.R. §§ 63.1-63.6 (1995)). While the USFSPA specifically states that the award must be in a percentage or fixed amount, it does not affirmatively reject formulas.

295. The Armed Forces also supports a version of this proposal. Legislative Initiative for Unified Legislation and Budgeting, originated by the Armed Forces Tax Council, subject: Amend the Uniformed Services Former Spouses' Protection Act to Require Calculation of Benefits Based on Time of Divorce Rather than Time of Retirement (Jan. 2001) (on file with author).

While many former service members support a change to the way a spouse's percentage of the retired pay is calculated,[296] they would not be satisfied with this amendment unless it applied retroactively. However, applying this proposal retroactively would force "recalculation of tens of thousands of divorce settlements."[297]

While this article is reluctant to propose a change to the USFSPA that may result in additional litigation, this proposal answers the concerns of the parties without preempting the state court's discretion in property division. Despite the lack of retroactivity in this proposal, this change would have a significant impact on equity in future military divorces. Congress should enact this proposal as recommended in the legislation at the Appendix.

C. Allow for Concurrent Receipt of VA Disability Pay and Military Retired Pay

1. The Current Problem

As discussed in Section III.C, disability pay is not included in the definition of disposable retired pay.[298] Service members who are entitled to VA disability pay must waive a portion of their retired pay to receive the

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296. Former service members refer to this as the former spouses "windfall." This issue is one of the former spouses groups main fights in the USFSPA battle. *See* discussion *supra* Section IV.B.

297. Legislative Initiative for Unified Legislation and Budgeting, originated by the Armed Forces, subject: Amend the Uniformed Services Former Spouses' Protection Act to Require Calculation of Benefits Based on Time of Divorce Rather than Time of Retirement (Jan. 2001) (on file with author); *see also* Philpott, *supra* note 182.

298. 10 U.S.C. § 1408(a)(4)(B) (2000) (excepting VA disability pay); *id.* § 1408(a)(4)(C) (excepting DOD disability pay). The difference between VA disability pay and DOD disability pay is the source of the funds and the taxability. *See* THOLE & AULT, *supra* note 4, at 32-33 (explaining disability benefits).

299. Former service members argue against the required off-set.

> Another issue of great concern to military retired veterans is the fact that they must offset their retirement pays dollar for dollar to the amount of VA disability they receive. This issue, commonly called Concurrent Receipt, places military retirees in a class of their own when it comes to receiving VA disability. Unfortunately, this is a class that is punished for twenty or more years of military service, not rewarded for it. No other veteran, whether a federal employee or private sector employee, has their retirement offset if they receive VA disability. According to the Depart-

tax-free disability pay.[299] The purpose of the required waiver is to prevent the concurrent receipt of disability-retired pay from the DOD and VA compensation for the same disability.[300] Often, the VA disability rating increases as the former service member ages.[301] As the disability rating increases, the service member must waive additional retired pay, which results in a reduction of disposable retired pay. The former spouse retains a property interest in a percentage of the disposable retired pay, but the actual dollar amount decreases as the disposable retired pay decreases. Thus, if a service member receives a disability rating of one hundred percent, the former spouse would be entitled to a court ordered percentage of nearly zero disposable retired pay.[302]

The Supreme Court predicted this current problem in *Mansell*,[303] the case interpreting the USFSPA statutory definition of disposable retired pay as excluding VA disability pay. The Court acknowledged that the USFSPA definition of disposable retired pay greatly reduces the amount of pay

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299. (continued)

> ment of Defense, there are presently over 400,000 retired enlisted members of the uniformed services who are forced to offset their retirement. Often, these disabled veterans are unable to work due to conditions, which are connected, to the military service. The reward that these veterans receive is a deduction in their retirement. It is imperative that something be done to assist these veterans' live better lives . . . . It is also important to remember that the payment received from the Department of Veterans Affairs is not retired pay, but compensation for a disability sustained in service to our country.

Hearing Before the House and Senate Veterans' Affairs Comms. on Veterans Legislative Priorities, 107th Cong. (Mar. 1, 2001) [hereinafter *Hearing on Legislative Priorities*] (testimony by Vincent B. Niski, Senior Master Sergeant, U.S. Air Force (Retired), National President of the Retired Enlisted Association).

300. *See* 38 U.S.C. §§ 5304-5305 (2000). Most members elect to receive VA disability rather than DOD disability because VA disability is not included in income tax, while DOD disability is included in income tax.

301. *See, e.g.*, *Ex parte* Billeck, 777 So. 2d 105 (Ala. 2000); Ashley v. Ashley, 990 S.W.2d 507 (Ark. 1999); *In re* Marriage of Krempin, 83 Cal. Rptr. 2d 134 (Cal. 1999); In the Matter of the Marriage of Pierce, 982 P.2d 995 (Kan. Ct. App. 1999); Scheidel v. Scheidel, 4 P.3d 670 (N.M. Ct. App. 2000); Johnson v. Johnson, No. 02A01-9901-CV-00015, 1999 Tenn. App. LEXIS 625 (Tenn. Ct. App. Sept. 14, 1999); *In re* the Marriage of Harper, No. 22092-0-II, 2000 Wash. App. LEXIS 333 (Wash. Ct. App. Feb. 25, 2000).

available for distribution as property when a disabled member is involved. The dissent in *Mansell r*ecognized the potential harm to former spouses if the disabled former service member was allowed to unilaterally shift money away from consideration as property.[304] The dissent argued that the majority's interpretation of "disposable retired pay" was too narrow and inconsistent with congressional intent to completely overrule *McCarty* and protect former spouses.[305] The original congressional intent was to restore to states the full authority to divide military benefits in any appro-

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302. EX-POSE provides a good example of this:

> Let us suppose that the amount of the retired pay is $2,000 and the former spouse is awarded 50% of that retired pay; let us further suppose that after the divorce decree is finalized and he has retired the service member contacts the VA and is awarded 30% VA disability (which is, of course, tax free). The calculation is now as follows:
>
> $2,000 – (30% VA disability or $279) x 50% = $861
>
> Therefore, instead of the original amount awarded ($1,000), the former spouse now receives $861 and the member now receives only $721 of his former retirement pay from Defense Finance Center PLUS $279 (tax free) from the VA.
>
> *Thus, the former spouse is subsidizing a VA disability claim which was not in effect at the time of their divorce!!*
>
> Additionally, the amount of this VA disability may be increased again and again over the time of the member's retirement, until it reaches 100%, or $1,964.

EX-POSE Position Paper, *supra* note 185.

303. Mansell v. Mansell, 490 U.S. 581 (1989). Major (MAJ) Mansell divorced his wife in California, before the *McCarty* decision, after twenty-three years of marriage and service. The state trial court divided Mansell's retired pay equally. However, when MAJ Mansell retired, he elected to receive VA disability pay, and therefore he waived a portion of his military retired pay. Following the USFSPA, MAJ Mansell successfully returned to court to limit the amount paid to his former spouse.

304. *Mansell*, 490 U.S. at 595 (O'Connor, J., dissenting). "The harsh reality of this holding is that former spouses . . . can, without their consent, be denied a fair share of their ex-spouse's military retirement pay simply because he elects to increase his after-tax income by converting a portion of that pay into disability benefits." *Id.*

305. *Id.* at 596-97 (O'Connor, J., dissenting).

priate manner.[306] Despite the harm to former spouses, *Mansell* is the current law.

The equity problem with *Mansell* diminishes if the service member is retired or has a VA disability rating at the time of divorce. Under these facts, a court is more likely to equitably divide property because the court can consider the disability compensation as income of the former service member, but not a property of the marriage. In many of these cases, courts grant former spouses a form of support or property in lieu of what their share of the retired pay would have been if not for the disability determination. Most divorces, however, occur before retirement and before VA disability determinations.[307] If the divorce occurs after the disability determination, the limitations of the USFSPA apply.[308]

Mansell and the USFSPA definition of disposable pay began a new source of litigation in state domestic relations courts. Some courts simply refer to the former spouse's decrease in retired pay as an "award of an asset which has significantly declined in value."[309] These courts hold that a party to a divorce should not be allowed to reopen a divorce decree simply because the value of the property is less than expected.[310]

Inaction in state courts, however, is not the norm. In most states, if a former service member unilaterally waives retired pay to receive VA disability pay, the courts will not stand idly by. While state courts recognize that *Mansell* prevents actual division of disability pay, it does not prevent

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306. *See supra* Section II.C (discussing congressional intent in passing the USFSPA).

307. *See* JA 274, *supra* note 14, at 9.

308. The USFSPA does not preclude state courts from considering former spouse's military disability benefits received in lieu of waived retirement pay when making equitable division of marital assets. Clauson v. Clauson, 831 P.2d 1257 (Alaska 1992).

309. In the Matter of the Marriage of Pierce, 982 P.2d 995, 999 (Kan. Ct. App. 1999) (holding that the wife was barred by the statute of limitations from reopening the property settlement of the divorce decree after the husband began to take his military retired pay as disability pay).

310. *See Pierce*, 982 P.2d at 999; *see also* Marriage of Jennings, 958 P.2d 358 (Wash. Ct. App. 1998); Matter of Marriage of Reinauer, 946 S.W.2d 853 (Tex. Ct. App. 1997). The Kansas appellate court in *Pierce* noted that a majority of state courts grant relief in military retired pay offset by disability pay cases, but that rationale was inconsistent with Kansas state law. *Pierce*, 982 P.2d at 1000.

311. The *Clauson* court stated:

> We are persuaded that neither the USFSPA nor prior Supreme Court decisions required our courts to completely ignore the economic conse-

the courts from "taking into account veterans' disability benefits when making an equitable allocation of property."[311]

Extending this argument, some courts look to circumvent the *Mansell* restrictions by awarding "alimony" to the former spouse in an equivalent amount of the property award they would otherwise have received. A former service member must pay an award of alimony regardless of the amount of disposable retired pay available to the service member after recharacterizing the VA disability compensation. The alimony payment need not come from retired pay or disability pay, however.

Many of these courts, concerned about the harm to the former spouse,[312] look for a legal reason to make an additional or alternate award to the former spouse by using the terms of the original divorce; specifically, they look for an indemnity clause[313] or a property settlement agreement.[314] By including an indemnity clause in a property settlement, the service member agrees not to take action to convert or change the interest of the retired pay without indemnifying the former spouse.[315] If a divorce includes such an indemnity clause, the court may order the service

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311. (continued)

> quences of a military retiree's decision to waive retirement pay in order to collect disability pay. The statute merely speaks to a state court's power to "treat" this type of military benefit "either as property solely of the [armed forces] member or as property of the member and his spouse."

Clauson, 831 P.2d at 1257 (citing 10 U.S.C. § 1408(c)).

312. "[T]he rule established in [*Mansell*] allows the retiree to unilaterally make an election that diminishes the former spouse's share of marital property. This is patently unfair to former spouses, especially when retirees have designated them as beneficiaries under their Survivor Benefits Plan, as in this case." *Pierce*, 982 P.2d at 1000-01 (Green, J., dissenting). *See generally* JA 274, *supra* note 14, at 9.

313. Indemnity is defined as the duty to make good any loss incurred by another. BLACK'S, *supra* note 4, at 772.

314. A property settlement is a judgment in a divorce case determining the distribution of the marital property between the divorcing parties. *Id.* at 1234.

315. This is also known as the "constructive trust" theory. Under the constructive trust theory, once the divorce is final the service member essentially holds in constructive trust that portion awarded to the former spouse and cannot take action to convert or change that interest without indemnifying the former spouse. *See* JA 274, *supra* note 14, at 9; *see, e.g*, *In re* Strassner, 895 S.W.2d 614 (Mo. Ct. App. 1995).

member to pay support or alimony in an equivalent amount to what the USFSPA payment would have been.[316]

Under the contract theory, where there is a separation agreement between the parties forming the basis for the property settlement, courts impose a contractual obligation to essentially make whole the former spouse for portions of retirement waived to receive disability payments.[317] Courts recognize that although a former spouse cannot receive that portion of retired pay, the original intent of the parties was for the former spouse to receive a certain amount of support each month. The court recharacterizes this amount as alimony rather than retired pay.[318] "Federal law does not prevent a husband and wife from entering into an agreement to provide a set level of payments, the amount of which

316. *See, e.g.*, Owen v. Owen, 419 S.E.2d 267 (Va. Ct. App. 1992) (holding that although the former wife could not receive a property share of the retired pay because of disability offset, because of an indemnity agreement in the separation agreement the court could order support payments in an amount equivalent to the percentage of retired pay).

317. *See* Abernethy v. Fishkin, 699 So. 2d 235 (Fla. 1997) (holding that although a former wife cannot receive the percentage of retired pay agreed upon in a separation agreement because the former husband is now receiving his retired pay as disability pay, she could receive the amount as alimony because the intent of the parties was to maintain a monthly level of payments); Longanecker v. Longanecker, 782 So. 2d 406 (Fla. Dist. Ct. App. 2001) (holding that although the retired pay was waived because of VA disability pay, because of a property settlement agreement the former wife is still entitled to receive that portion of disability pay as alimony); McHugh v. McHugh, 861 P.2d 113 (Idaho Ct. App. 1993) (holding that a separation agreement is a contractual obligation between the parties; the service member must make whole the former spouse for portions of retirement waived to receive disability payments); Dexter v. Dexter, 661 A.2d 171 (Md. 1995) (holding that a separation agreement is a contractual obligation between the parties; the service member must make whole the former spouse for portions of retirement waived to receive disability payments); *In re* the Marriage of Stone, 908 P.2d 670 (Mont. 1995) (holding that a separation agreement is a contractual obligation between the parties; the service member must make whole the former spouse for portions of retirement waived to receive disability payments). *But see* Kutzke v. Kutzke, No. 95 CA66, 1996 Ohio App. LEXIS 1480 (Ohio Ct. App. Apr. 12, 1996):

> We realize that reading the statute literally may inflict economic harm on many former spouses. But we decline to misread the statute in order to reach a sympathetic result when such a reading requires us to do violence to the plain language of the statute and to ignore much of the legislative history. Congress chose the language that requires us to decide as we do, and Congress is free to change it.

Id.

is determined by considering disability benefits as well as retirement benefits."[319]

One example of the contract theory involving a separation agreement is *McLellan v. McLellan*.[320] The divorce occurred after the husband was retired and receiving disability pay. The separation agreement incorporated division of military pay, where the wife was to receive "42% of the Husband's monthly retirement pay, . . . Said percentage of the monthly payment currently totals $ 699.00. Husband agrees to . . . [make payments] directly to the Wife at his expense."[321] The separation agreement included and divided the disability pay, without distinguishing it from any retired pay. The court held that the separation agreement showed a clear intent that the parties wished the former wife to receive certain payments monthly. The court enforced the provision of the separation agreement.[322]

Although some courts divide VA disability pay, irrespective of *Mansell*, most courts carefully write these rulings.[323] They cannot simply

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318. *See Abernethy*, 699 So. 2d at 235 (holding that the former wife could receive the retired pay amount as alimony). The court did not note, however, that an award of alimony does not carry the absolute ownership of a property award. Most states require alimony to terminate upon the remarriage of the recipient. *See also* Choat v. Choat, 2000 Wash. App. LEXIS 1288 (Wash. Ct. App. July 3, 2000). "We affirm the trial court's orders imposing a direct obligation . . . to pay . . . her one-half share of the combined total of the military retired pay and disability pay." *Id.* The *Choat* court enforced the original property settlement agreement, even though the former service member was now receiving disability benefits after waiving a portion of his retired pay. The court ordered that Mr. Choat pay the amount due out of money other than his disability benefits.

319. *Owen*, 419 S.E.2d at 270. *See also* Holmes v. Holmes, 375 S.E.2d 387 (1988). "The judge did not specify that the payments had to come from the husband's excluded disability benefits. . . . [T]he husband is free to satisfy his obligation to his former wife by using other available assets." *Id.* at 395.

320. 533 S.E.2d 635 (Va. Ct. App. 2000).

321. *Id.* at 636. The court also noted that the parties agreed to a payment from husband to wife rather than directly from DFAS, arguably because they knew the agreement would not be approved by DFAS.

322. *Id.* at 639. The *McLellan* court should have converted this payment to "support" or "alimony" and should have clearly indicated that this payment was not a percentage of disability pay. Without this qualifying language, the court arguably violated the USFSPA.

323. THOLE & AULT, *supra* note 4, at 17 n.2. California and New Mexico courts have divided VA disability pay in violation of *Mansell* and the USFSPA. Other courts order alimony payments even if VA disability compensation is the former service member's only source of income.

grant the former spouse a share of the VA disability benefits.[324] Some courts acknowledge that the service member must necessarily pay spousal support from the VA disability benefits because that is the only source of income for the member.[325] Courts justify these awards using the Supreme Court's family support logic in *Rose v. Rose*,[326] a child support case. In *Rose*, the Supreme Court noted that VA disability benefits are "intended to support not only the veteran, but the veteran's family as well."[327]

Former service members organizations believe that the USFSPA does not sufficiently protect disability compensation,[328] and that courts are ignoring or circumventing Congress's prioritizing of disability pay using awards for alimony or spousal support.[329] One suggestion for change is to limit the garnishment of retired pay to child support only, not alimony as the USFSPA currently provides.[330] Second spouses of former service members also believe that the USFSPA does not protect the VA disability benefits and that a service member's first spouse receives a protected status, even if the second marriage lasted longer.[331]

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324. The *Clauson* court noted:

> We are aware of the risk that our holding today might lead trial courts to simply shift an amount of property equivalent to the waived retirement pay from the military spouse's side of the ledger to the other spouse's side. This is unacceptable. In arriving at an equitable distribution of martial assets, courts should only consider a party's military disability benefits as they affect the financial circumstances of both parties. Disability benefits should not, either in form or substance, be treated as marital property subject to division upon the dissolution of marriage.

Clauson v. Clauson, 831 P.2d 1257, 1264 (Alaska 1992).

325. *See* 10 U.S.C. § 1408(e)(6) (2000).

> Nothing in this section shall be construed to relieve a member of liability for the payment of alimony, child support, or other payments required by a court order on the grounds that payments made out of disposable retired pay under this section have been made in the maximum amount permitted.

Id. See, e.g., *Clauson*, 831 P.2d at 1257.

326. 481 U.S. 619 (1987).
327. *Id.* at 634.

Former spouses organizations are also not satisfied with the current state of the law, and some organizations advocate repealing the VA disability protection.[332] Many former spouses must re-litigate property awards or request alimony in lieu of their diminished property award, at a great expense and emotional burden. Even if successful in receiving alimony, the former spouse loses a property interest in the retired pay.[333] For every former spouse that seeks modification of a court order after a unilateral

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328. The president of the Retired Enlisted Association recently stated:

> [J]udges have failed to recognize the fact that VA disability compensation is not retirement pay. Disability compensation should not be garnished to pay court-ordered obligations. Now, military retirees who are disabled, the more severely disabled the worse situation, are forced to surrender up to all of their already reduced retirement pay and a portion of their disability pension. This in spite of the fact that the USFSPA is supposed to protect disability pay from being garnished and that the United States Supreme Court reinforced this fact in its ruling in *Mansel vs. Mansel* in May, 1989. . . . [Congress should] pass legislation, which will strengthen the protections of VA disability compensation because it is obvious that they are being ignored today.

Hearing on Legislative Priorities, *supra* note 299 (testimony by Vincent B. Niski, Senior Master Sergeant, U.S. Air Force (Retired), National President of the Retired Enlisted Association).

329. Despite evidence that courts circumvent *Mansell*, the number of direct alimony payments do not support that a widespread problem exists. Of the 62,046 USFSPA cases that DFAS currently makes, only 3813 are alimony payments. *See* DFAS E-mail, *supra* note 124 (providing statistics on USFSPA payments as of October 2000).

330. ARA Position Letter, *supra* note 175.

331. Miller E-mail, *supra* note 283 (noting her husband's former wife has an "elevated status" merely because she was the first wife during the military career.). "The USFSPA is intent on protecting the wife of my husband's former life, [while] it expresses very little interest in protecting me the wife of my husband's current life." *Id.*

332. *See* THOLE & AULT, *supra* note 4, at 33.

333. The value of having a property interest in the retired pay, rather than just receiving alimony payments was explained by the ABA as follows:

> Different state courts have described the distinction (between property division and alimony) in different ways, but typically they consider the distribution of property at divorce as a permanent division of assets created by efforts during the marriage, while alimony is discretionary, is dependent upon the need and abilities of the parties, and is subject to review upon changed circumstances after divorce.

ABA Position Letter, *supra* note 7, at 3.

waiver of retired pay, there are countless spouses who cannot afford to reopen their divorce or are unaware of their right to fight for their share.

2. Proposed Solution

Congress could easily remedy this problem by amending the USFSPA to change the definition of disposable retired pay to include VA disability payments received in lieu of military retired pay.[334] Currently, federal statutes allow for payments of child support and alimony from VA disability pay.[335] Congress could allow former spouses to receive their share of retired pay from VA disability as well. If enacted, a service member who waived a portion of retired pay as VA disability compensation could receive the income tax benefits, but the VA disability amount would still be considered as part of disposable retired pay.

While revising the definition of disposable retired pay would easily resolve the USFSPA problem, Congress is not likely to pass such a proposal. When enacting the VA disability compensation statutes,[336] Congress prioritized VA disability benefits ahead of former spouses benefits. Congress has historically treated compensation owed to service members who were injured or disabled while serving their country as a high priority. For example, VA disability benefits are not subject to federal income tax or claims of creditors.[337]

While Congress has allowed claims for spousal and child support against VA disability compensation, USFSPA benefits are deemed "property" of the marriage rather than spousal support. While the designation as property has given former spouses greater entitlement in many ways, such

334. Amending the USFSPA to include VA disability payments as part of disposable retired pay would require repealing 10 U.S.C. § 1408(a)(4)(C).

335. Social Security Act, 42 U.S.C. § 659 (2000) (stating that VA disability pay can be garnished to provide child support or alimony payments).

336. *See* 38 U.S.C. § 5301 (2000). This statute requires a specific exemption exist for assignment of VA disability benefits; such an exemption exists for child support and alimony, but not for distribution as marital property. Thus, Congress treats VA disability as a higher priority than former spouses' rights to military retirement.

337. Disability pay is nontaxable to the member and is protected from certain creditors. *See id.*

a designation has reduced the priority of the property award to below that of disability pay.

For all of these reasons, the interrelationship of VA disability compensation laws and the USFSPA must be re-prioritized through congressional action to both statutes. The question becomes how to ensure that former spouses receive the benefits to which they are entitled, without lowering the priority of VA disability compensation.

The recommended solution eliminates the service member's requirement to waive a portion of retired pay to receive the VA disability compensation. Thus, a former service member who is entitled to receive VA disability benefits would concurrently receive that full benefit and their retired pay. Perhaps this seems like the proverbial "windfall" in favor of the former service member; however, with congressional emphasis on the importance of these benefits to veterans of combat who were injured while fighting the wars of this country, such a windfall does not seem to be out of line. This solution would then allow a former spouse to receive a percentage of the military retired pay without interfering with the VA disability benefits to the former service member.

Congress is currently considering several forms of concurrent receipt of these benefits. During the first week of the 107th Congress,[338] Congressmen Bilirakis and Norwood introduced a bill that would "allow military retirees to receive full military retired pay concurrently with VA disability compensation."[339] Specifically, House Bill 303 would allow receipt of VA disability compensation without reduction in the former service member's retired pay if the retired pay is based on twenty or more years of service. It would not apply to DOD disability retired pay.[340] Thus, VA disability, DOD disability, and retired pay would be paid concurrently. If House Bill 303 were enacted, the former spouse could

338. House Bill 65 was reintroduced on 11 January 2001. House Bill 303, and its companion Senate Bill 170, were reintroduced in January 2001. These bills are slightly different than the similar bills that were introduced in the 106th Congress in that the new bills include retirees who were retired for disability and those who retired with fifteen to nineteen years of service as a result of military downsizing (for example, Temporary Early Retirement Authority). *See* Fleet Reserve Association, *News-Bytes 01-18-01*, *at* http://www.fra.org/news [hereinafter *FRA News-Bytes 01-18-01*]; Fleet Reserve Association, *News-Bytes 01-25-01*, *at* http://www.fra.org/news.

339. *See FRA News-Bytes 01-18-01*, *supra* note 338.

340. H.R. 303, 107th Cong. (2001).

receive their court-ordered allocation of retired pay without an initial reduction in the former service member's disposable retired pay.

An alternate concurrent receipt bill, House Bill 65, would permit retirees to receive retired pay and VA disability compensation without a full corresponding reduction in retired pay.[341] Under House Bill 65, as a former service member's disability rating increased, the amount of the reduction in retired pay would be proportionately decreased.[342]

If Congress passed concurrent receipt legislation, former spouses could receive most or all of the marital property awarded by state courts, without interfering with the former service member's VA disability compensation. One commentator believes, however, that concurrent receipt would just result in "declaration of an open season on an ex-spouse's share of *both* payments."[343]

3. Factors to Consider

The most significant factor Congress must consider before passing any concurrent receipt legislation is the government expense. When reviewing the cost of concurrent receipt, Congress must consider the current cost to the parties of litigating and re-litigating VA disability issues. At present, the most frequently reported cases concerning the USFSPA involve inequities to former spouses concerning waiver of retired pay in lieu of VA disability compensation.[344] Congress has routinely advocated

341. H.R. 65, 107th Cong. (2001).

342. As House Bill 65 explains, the former service member's retired pay would not be reduced "dollar for dollar." The bill suggested a proportionate decrease in retired pay based on the disability rating percentage. If a service member has a 10% disability rating, then the retired pay would have their retired pay reduced by 90% of the dollar amount of disability pay. For example, a service member with a 10% disability rating who is entitled to $100 per month in disability pay would reduce their retired pay by $90.

As the disability rating increased, the percentage of that pay reduced from retired pay would decrease. For example, the retired pay would be reduced "if . . . the disability is rated 20%, by the amount equal to 80% of the amount of the disability compensation paid such person." *Id.* The bill explains that "[t]he retired pay of a person entitled to disability compensation may not be reduced . . . if and while the disability of such person is rated as total." *Id.*

343. THOLE & AULT, *supra* note 4.

for the disabled Veteran; however, that same Veteran is expending significant amounts of money litigating this issue simply to retain their statutory right to receive and retain disability compensation.

While Congress contemplates the various concurrent receipt proposals, courts should apply an equity standard to these cases. Ideally, when parties prepare a separation agreement or property settlement, they should contemplate the eventual receipt of VA disability compensation and create provisions for property distribution and spousal support.

However, if a former service member unilaterally elects to receive VA disability pay in lieu of retired pay, the former spouse should petition the court for review of the property determination (if within the statute of limitations for such modifications) or request spousal support or alimony. The state trial court could then review the circumstances of the parties, including any indemnity clauses or property-settlement contracts in the original divorce, and modify the divorce decree as warranted. While this solution would not decrease litigation on USFSPA issues, it is a realistic, equitable, interim solution.

Congress should enact the proposed legislation for concurrent payment of military retired pay and VA disability compensation. As concurrent receipt legislation is currently pending before Congress, this article does not include concurrent receipt language in the proposed legislation at the Appendix.

D. Include Separation Bonuses and Incentives in the Definition of Disposable Retired Pay

1. Current Problem

At present, the USFSPA only controls military retired pay as divisible upon divorce. The USFSPA does not address early separation benefits and pre-retirement benefits such as Career Status Bonus (CSB/REDUX),[345]

344. In a LEXIS search of cases decided in the last two years, eleven out of twenty-six state and federal USFSPA cases involved VA disability compensation. The LEXIS search database included all federal and state cases between 1 April 1999 and 1 April 2001. Using this database, the terms "USFSPA" and "FSPA" yielded twenty-seven cases, one of which was a bankruptcy case. Of the twenty-six USFSPA cases, disability awards were at issue in eleven cases.

Variable Separation Incentive (VSI), and Special Separation Bonus (SSB).[346] Service members receive these bonuses and incentives based on length of service; these separation benefits are paid either at specific career points, at separation, or upon early retirement as an annuity.

Courts, however, are inconsistent in their treatment of early separation benefits and lump-sum bonuses. Some courts view separation benefits as the separate property of the service member.[347] These courts distinguish separation benefits from retired pay or pension pay because they are similar to "severance payment . . . and compensate a separated service member for future lost wages."[348] Many of these courts hold that separation benefits should be the separate property of the service member if received after divorce.[349]

However, most courts have used the rationale of USFSPA cases and state division of pensions to divide VSI and other separation benefits.[350] The rationale of these courts is that the separation benefit received by the service member are divisible as marital property because these benefits are equivalent to an advance on retired pay or present compensation in lieu of future retirement benefits.[351] Courts have not yet

345. *See REDUX Information*, *supra* note 146 (explaining the Career Status Bonus or "REDUX" retirement plan). Under this plan, when service members who entered after 1 July 1986 reach their fifteen-year mark, they have the option of converting to the pre-1986 retirement plan or keeping the new plan and accepting a $30,000 bonus, which carries a commitment to remain on active duty until the twenty-year point. Because of the "bonus" payment while on active duty, these payment can be analogized to enlistment bonuses and judge advocate continuation pay.

346. These programs are explained *supra* Section III.H. *See generally* WILLICK, *supra* note 7, at 95-99 (detailing separation benefits and early retirement programs).

347. *See, e.g.*, Mackey v. Mackey, No. 20,010, 2001 Ohio App. LEXIS 98 (Ohio Ct. App. Jan. 17, 2001) (holding that VSI payment was separate property of the service member).

348. McClure v. McClure, 647 N.E.2d 832, 841 (1994).

349. *See, e.g.*, *Mackey*, 2001 Ohio App. LEXIS at 98. In *Mackey*, a man who received a VSI payment upon leaving the Air Force after fourteen years of service was not required to divide the payment upon his divorce. The court distinguished the VSI payment from a pension plan because the payment was made after divorce.

350. *See In re* Marriage of Crawford, 884 P.2d 210 (Ariz. 1994); *In re* Marriage of Babauta, 66 Cal. App. 4th 784 (1998) (holding that VSI pay is divisible); *In re* Marriage of Heupel, 936 P.2d 561 (Colo. 1997) (holding that a lump sum SSB payment is divisible as marital property); Kelson v. Kelson, 675 So. 2d 1370 (Fla. 1996) (holding that VSI payments were not covered by the USFSPA, but finding that as a practical matter VSI payments are the functional equivalent of the retired pay in which the former spouse has an interest); Lykins v. Lykins, 34 S.W.3d 816 (Ky. Ct. App. 2000) (holding that payments under the VSI

reviewed the interaction between the USFSPA and the recently approved CSB/REDUX retirement plan to determine whether the bonus as well as the actual retirement pay are divisible upon divorce.

2. Proposed Solution

Pre-retirement bonuses, separation benefits, and early retirement incentives should be included in the statutory definition of disposable retired pay because they are similar to retired pay in key aspects.[352] Service members are only eligible for these benefits after serving a specific time. The DFAS distributes these benefits; VSI annuities are distributed similarly to retired pay. Because of the eligibility for and the distribution of bonuses and incentives, the USFSPA should consider these benefits analogous to military retired pay. Many state courts already treat civilian severance pay as marital property.[353]

Both courts and DFAS should treat separation benefits the same as retired pay to prevent a prospective award of retired pay from being considered worthless.[354] For example, if a divorce occurs before the service member is retired, the court should divide retired pay where appropriate. Because the proposal to amend the USFSPA contemplates separation ben-

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350. (continued) were marital property and therefore the former spouse could be awarded a share of the payments); Blair v. Blair, 894 P.2d 958 (Mont. 1995); Kulscar v. Kulscar, 896 P.2d 1206 (Okla. Ct. App. 1995); Marsh v. Wallace, 924 S.W.2d 423 (Tex. Ct. App. 1996) (holding that a lump sum SSB payment was divisible and granting the former spouse the same percentage of the SSB she would have received of retirement pay. The court found that the SSB was "in the nature of retirement pay, compensating him now for the retirement benefits he would have received in the future."); Marsh v. Marsh, 973 P.2d 988 (Utah Ct. App. 1999) (holding that the separation benefit received by the service member was divisible and property of the marriage because it was equivalent to an advance on his retirement pay).

351. *See Wallace*, 924 S.W.2d at 423 (holding that SSB was "in the nature of retirement pay, compensating him now for the retirement benefits he would have received in the future."); *Marsh*, 973 P.2d at 988 (holding that the separation benefit were equivalent to an advance on his retirement pay).

352. *But see* THOLE & AULT, *supra* note 4, at 42. Separation bonuses are subject to the domestic family laws of each state. As such, Congress does not need to pass new legislation when judges now have the authority to divide such an asset according to state law. *Id.*

353. *See id.*

354. Currently, the court order to divide retired pay as part of a property settlement becomes worthless to the former spouse if the military member elects early retirement. *See id.* at 41.

efits in the definition of retired pay, that separation benefit will be divided by DFAS if the service member elects an early retirement, receives separation benefits, or receives a retirement-linked bonus. Currently, because early retirement benefits are not contemplated by definition of disposable retired pay, parties must re-litigate division of separation benefits if the divorce is already final.

One argument against including separation benefits in the USFSPA definition of disposable retired pay is that Congress did not include these benefits in the original USFSPA. That is, if Congress intended to define separation benefits as marital property, Congress would have included such language. This argument fails, however, because separation benefits and pre-retirement awards such as VSI, SSB, and CSB/REDUX were not statutorily available at the time Congress enacted the USFSPA.[355] In the 1990s alone, three such programs were created to "prune the military population" without unnecessarily harsh outcomes.[356] Thus, Congress could not include in the definition of disposable retired pay a benefit that did not exist.

Former spouses organizations agree with this proposal. "Since both the [VSI] and [SSB] are based on the years of service of the member, and were used to more fairly separate service members who otherwise might have served to retirement, . . . it [is] rational to allow courts to treat such entities as property."[357] The ABA also supports this proposal.[358]

3. Factors to Consider

Congress should consider any difficulty administering this program. Theoretically, the DFAS can treat VSI annuity payments as they treat retired pay. The more difficult scenario is the SSB lump-sum payments and the CSB/REDUX pre-retirement bonus. If a court awarded division of a lump-sum payment, DFAS could only divide and directly make the pay-

355. These are relatively new programs resulting from downsizing the military. *See* WILLICK, *supra* note 7, at 94; THOLE & AULT, *supra* note 4, at 41-42.

356. *See* WILLICK, *supra* note 7, at 95.

357. NMFA Position Letter, *supra* note 7.

358. ABA Position Letter, *supra* note 7. The ABA would extend benefits further and argues that the "the same medical, exchange and commissary benefits should be provided to former spouses of members that would be enjoyed by members who have taken VSI or SSB, and their current spouses." *Id.*

ment if the court order was sufficiently in advance of government payment of the SSB benefits.[359]

The CSB/REDUX bonus contains an even more complicated problem because the bonus is paid at fifteen years of service, but is contingent upon the service member completing the full twenty years of service for retirement. If the service member does not complete the commitment, the bonus must be repaid to the government. If a court orders division of the CSB/REDUX bonus, the court must include the repayment contingency in the court order. One feasible solution is order the former spouse's portion be placed in escrow until the service member completes the commitment period.

Congress must also consider the interplay between division of these benefits and use of the separate property date formula for dividing retired pay.[360] Although this proposal would allow for division of these benefits, such division is not mandatory. Once the court determined a separate property date, the court could determine whether benefits are separate property or marital property. If the court determines that separation benefits and pre-retirement incentives are marital property, they could be divided using the same formulas as retired pay.

Because a system is in place for dispersing direct payment of these funds,[361] costs to the government would be minimal. Congress should enact this provision of the article legislation that proposes including separation benefits and pre-retirement awards in the definition of USFSPA disposable pay.

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359. DFAS currently has ninety days to process court orders and arrange for direct payment. 10 U.S.C. § 1408(d)(1) (2000).

360. *See supra* Section V.B for a complete discussion of the proposed use of separate property date for dividing military retired pay.

361. Section V.G *infra* proposes direct payment for all divisions of retired pay without the "ten-year overlap" requirement.

E. Granting Benefits to 20/20/15 Category Spouses[362]

1. Current Problem

Currently 20/20/20 spouses are entitled to certain benefits including commissary and exchange privileges and medical care.[363] Many consider this rule too restrictive; these benefits should be extended to 20/20/15 spouses.[364] One government agency explained that the 20/20/20 requirement was too "harsh [because] enlisted members typically don't get married until a year or two after entering service. Most retire, however, at [twenty]. That pattern keeps too many enlisted ex-spouses from qualifying for full benefits, which they likely need more than do longer-serving officer wives."[365]

2. Proposed Solution

This article recommends changing federal law to allow certain benefits to spouses who were married for at least twenty years to a service member who served at least twenty years, even though only fifteen years of the marriage overlapped with the service, that is 20/20/15 former spouses.[366] The benefits they receive would be identical to those benefits currently received by 20/20/20 spouses, and would include commissary and post-exchange (PX) and medical benefits.[367]

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362. A 20/20/15 spouse is married to a service member for at least twenty years and the service member has at least twenty years of active service, but only fifteen of those years overlap. *See* discussion *supra* Section III.G.

363. 10 U.S.C. § 1072(2)(F)(1). *See* discussion *supra* Section III.G.2.

364. *See* ABA Position Letter, *supra* note 7. *See* Legislative Initiative for Unified Legislation and Budgeting, originated by the Armed Forces Tax Council, subject: Amend the Uniformed Services Former Spouses' Protection Act to Grant Benefits to Certain 20/20/15 Spouses (Jan. 2001) [hereinafter Tax Council Proposal to Grant Benefits to 20/20/15 Spouses] (on file with author).

365. *See* Tax Council Proposal to Grant Benefits to 20/20/15 Spouses, *supra* note 364 (discussing a recommended change to the USFSPA); *see also* Philpott, *supra* note 182.

366. This recommendation would require a change to 10 U.S.C. § 1072(2)(F).

367. The Tax Council's proposal is slightly different on the medical benefits eligibility requirements. They recommend: "medical benefits by having each month of marriage after the member's retirement count toward satisfaction of the 20-year marriage/service overlap." *See* Tax Council Proposal to Grant Benefits to 20/20/15 Spouses, *supra* note 364.

This 20/20/15 solution is the most logical way to resolve the problem. While the requirement of twenty years of active service cannot be changed because of retirement eligibility, the overlap period can be reduced. A feasible option is to require twenty years of marriage, but require a shorter "overlap" period to include those marriages occurring before active service or extending after active service.[368] This option acknowledges that these spouses contribute to the military during the majority of the active service.

The benefits to 20/20/15 former spouses would be significant. Currently, 20/20/15 spouses have transitional medical benefits from the military, but are later forced to find health insurance. If they do not have their own careers, they have a difficult time finding reasonable health insurance, especially if they have pre-existing health problems. An additional benefit is shopping at the post-exchange and commissary. If this shopping is available, these facilities offer twenty to twenty-five percent savings over civilian retailers.

This proposed revision to former spouses benefits does not cause significant controversy. Former service member organizations, former wives organizations, and DOD working groups,[369] support this proposal.

3. Factors to Consider

Currently, approximately 220 un-remarried 20/20/15 spouses would benefit from this amendment.[370] This number, however, does not distinguish which 20/20/15 spouses have employer health insurance and would not be entitled to military health care benefits. Even assuming 2200 former spouses would qualify, the cost of this amendment would be relatively low. Further, because one of the purposes of the exchange system is to "generate earnings to supplement appropriated funds for the support of

368. This proposal had been unsuccessfully introduced during the 98th Congress. A House report at that time suggested that the reason that many military marriages never reach the 20/20/20 requirement is that many service members do not marry until after they enter the armed forces, but retire promptly at twenty years of service. H.R. REP. 98-1080, at 299-300, 98th Cong. (1985).

369. *See* Tax Council Proposal to Grant Benefits to 20/20/15 Spouses, *supra* note 364; *see also* Philpott, *supra* note 182.

370. *See* Tax Council Proposal to Grant Benefits to 20/20/15 Spouses, *supra* note 364.

the DOD's morale, welfare, and recreation programs,"[371] the cost to the DOD may be indirectly paid by those former spouses who use the exchange services.

Because of the wide support for this proposal[372] and the relative low cost, Congress should introduce and pass legislation to effect this change. Proposed legislation to make this revision is found at the Appendix to this article.

F. Amend the Language of the Dependent Victims of Abuse Provision

1. Current Problem

Congress enacted the Dependent Victims of Abuse provision in October 1992[373] to ensure that victims of domestic abuse were not stifled in reporting the abuse because of fears of losing financial support.[374] However, a spouse is eligible for these support payments only if the service member is retirement-eligible based on years of creditable service before the convening authority takes action on the case. Any imprisonment, including pretrial confinement, is not creditable service towards retirement. What should the trial counsel do when the service member is nearly retirement eligible, but safety of the victim warrants confinement before action? The statute does not allow for a waiver of creditable service requirement or a provision counting confinement as creditable service solely for UFSPA support payments. "In these cases former spouses have lost the opportunity to receive an allocation of retired pay because the members were confined prior to convening authority action on their case."[375]

Currently in situations where decision-making authorities are aware of the USFSPA provisions and the effect of confinement on retirement eligibility, those authorities may need to choose between the short-term

371. *See* 10 U.S.C. § 1065(e).

372. Emswiler Interview, *supra* note 8.

373. 10 U.S.C. § 1408(h).

374. *See* discussion *supra* Section III.

375. Legislative Initiative for Unified Legislation and Budgeting, originated by the Armed Forces Tax Council, subject: Amend the Uniformed Services Former Spouses' Protection Act Dependent Victims of Abuse Provisions (Jan. 2001) [hereinafter Tax Council Victims of Abuse Proposal] (on file with author). Confinement is not considered creditable service for the purpose of retirement.

safety of the victims and the victims' long-term support needs. In one case, the court-martial safely ordered restriction less than confinement to ensure that the service member reached retirement eligibility before the convening authority took action.[376] While the decision-making authorities in that case could provide for current safety of the victims *and* future USFSPA payments, not all decision-making authorities will have such flexibility. This difficult decision is not in the spirit of the Dependent Victims of Abuse provision of the USFSPA.

2. Proposed Solution

Congress should amend the Dependent Victims of Abuse provisions of the USFSPA to expand eligibility to those former spouses of service members who would have been eligible to retire at the time of losing retirement eligibility because of the abuse—with periods of confinement before convening authority action considered creditable service.[377] This amendment should be retroactive to the date Congress enacted the Dependent Victims of Abuse provisions to provide for any former spouses who were previously deemed ineligible because of this gap in the law. Although the current loophole in the USFSPA may affect only a handful of former spouses, it is an amendment to the USFSPA that is uncontroversial and completely within the spirit of the provisions already in place. Further, this proposal should be effective retroactively to the date Congress enacted the Dependent Victims of Abuse provisions.[378]

3. Factors to Consider

Congress should consider the cost of this revision. However, this change will effect very few former spouses; the cost to the government will

376. E-mail from Kenneth Asher, Senior Associate Counsel, Defense Finance and Accounting Service, to Major Mary J. Bradley (Feb. 26, 2001) [hereinafter Asher E-mail] (on file with author).

377. Tax Council Victims of Abuse Proposal, *supra* note 375.

378. *Id.*

be nominal.[379] Congress should enact this proposal as presented in the legislation in the Appendix of this article.

G. Revise the Requirements and Procedure for Direct Payment of Retired Pay Allocations

1. Current Problem

Currently, DFAS will make direct payment of property awards to former spouses only if they meet the "ten-year-overlap" rule, which requires that at least ten years of marriage overlapped with ten years of service creditable toward retirement.[380] Former spouses that do not qualify for direct payment do not have a mechanism to enforce court ordered retired pay. An additional restriction on direct payment is that only the former spouse can apply to DFAS for direct payment. The confusion, lack of enforcement, and application requirements have caused problems that result in costly litigation for parties. This section provides a detailed explanation of each of these problems.

The ten-year-overlap rule often confuses parties, and even courts, into believing that a ten-year overlap is necessary for *any* division of military retired pay as property.[381] Service members have made this argument to trial and appellate courts. Courts still address service members' positions as serious arguments and are compelled to examine and explain fully the

379. The actual number of former spouses this amendment will affect is difficult to predict. Because there are fewer than twenty-five former spouses in the entire program, Asher E-mail, *supra* note 376, this amendment will not likely affect more than a handful of people.

380. 10 U.S.C. § 1408(d)(1) (2000). The USFSPA does not require the ten-year overlap for direct payment of child support payments or alimony. *See generally* discussion *supra* Section III.D.

381. *See* THOLE & AULT, *supra* note 4, at 13-14 (stating that one common misconception about the USFSPA is that the parties must be married for ten years to qualify for benefits); WILLICK, *supra* note 7, at 81 (noting that the 20/10/10 requirement is not a limitation on subject matter jurisdiction). During a "letter to the editor" debate in the San Antonio Express-News, a former spouse wrote a letter correcting the facts of an editorial about the horrors of the USFSPA. However, she incorrectly stated that "the couple must have been married at least ten years before the act will award any portion of the service member's retirement to the spouse." *See* Karen Silvers, *Get the Facts Straight* (Editorial), SAN ANTONIO EXPRESS-NEWS, July 18, 2000, at 4B (responding to Verburgt's letter of 8 July).

ten-year-overlap provision of the USFSPA.[382] One court correctly stated: "Although husband and wife have not met the ten-year requirement, that is 'not a barrier' to a court's division of the former spouse's military retirement pay. It is but a 'factor in determining how the entitlement is to be collected.'"[383]

State courts continue to struggle with the requirements for direct payment.[384] Some courts saw an ambiguity in the language of the direct payment provision, and contemplated congressional intent and legislative history to reach their conclusion.[385] As recently as June 2000, a state appellate court overturned a trial court decision that failed to allow divi-

382. *See, e.g.*, Bryant v. Bryant, 762 P.2d 1289 (Alaska 1988) (holding that the retired pay was divisible, despite the service member's argument that they had not been married ten years; however, the court stopped the garnishment order for the property award because the ten-year-overlap rule had not been met); Beltran v. Beltran, 183 Cal. App. 3d 292 (1986) (noting that the service member argued that the ten-year rule applied to whether retired pay was divisible as marital property); Pacheco v. Quintana, 730 P.2d 1 (N.M. Ct. App. 1985) (rejecting the service member's argument that his former wife should not be entitled to any of his retired pay because they were married less than ten years); In the Matter of the Marriage of Wood, 676 P.2d 338 (Or. Ct. App. 1984) (holding that the service member's interpretation of the ten-year rule was "totally lacking in merit"); Cook v. Cook, 446 S.E.2d 894 (Va. Ct. App. 1994) (noting that the service member's argument was that his former wife should not receive a share of his retired pay because they hadn't been married ten years); Parker v. Parker, 750 P.2d 1313 (Wyo. 1988) (holding that despite the service member's argument, the ten-year rule applied only to the direct-pay process).

383. *Cook*, 446 S.E.2d at 896 (Va. Ct. App. 1994) (citing Carranza v. Carranza, 765 S.W.2d 32, 33-34 (Ky. Ct. App. 1989)).

384. *See, e.g.*, Stone v. Stone, 725 S.W.2d 145 (Mo. Ct. App. 1987) (holding that the trial court incorrectly concluded that "federal statute imposes a ten-year marriage requirement as a pre-condition to distributing a military pension as marital property").

385. *See, e.g.*, *Beltran*, 183 Cal. App. 3d at 296 (reviewing the legislative history of the USFSPA before deciding that the ten-year rule applied to direct-pay rather than whether retired pay was divisible as marital property); In the Matter of the Marriage of Konzen, 693 P.2d 97 (Wash. 1985) (Brachtenbach, J., dissenting) (concluding that the term "section" in 10 U.S.C. § 1408(d)(2) meant the entire § 1408, not just § 1408(d)(2) and thus the ten year overlap was required for any division of retired pay as marital property); *Parker*, 750 P.2d at 1313 (reviewing legislative history of the USFSPA before ruling that the ten-year rule applied only to the direct-pay process).

sion of retired pay because the marriage did not have a ten-year overlap with service.[386]

Even when courts correctly apply the ten-year overlap rule and award retired pay to spouses who were married less than ten years, the direct payment restriction causes enforcement problems.[387] Some service members agree to a voluntary allotment, to create a direct payment-like situation.[388] Such allotments, however, can be modified or discontinued at the will of the service member. In the absence of direct payment from DFAS, former service members can thwart the system by refusing to give former spouses their portion of retired pay. Civil hearings for contempt can follow,[389] which make the process more time-consuming and costly for the government and the parties. Some former service members will endure prison rather than pay their retired pay directly to a former spouse.[390] Other former service members live overseas where former spouses may have difficulty collecting their portion of retired pay. One commentator explained this enforcement problem best: "These awkward enforcement mechanisms often led to extended games of cat-and-mouse for embittered ex-spouses, where members executed allotments to get out of jail and then revoked or reduced the allotments once released, effec-

386. *In re* Marriage of Deason, 611 N.W.2d 369 (Minn. Ct. App. 2000). "The district court erred in concluding that 10 U.S.C. § 1408(d)(2) (1994) precludes the division of military pensions in dissolution actions where the party with a military pension did not complete ten years of creditable service during the marriage." *Id.*

387. One commentator advises attorneys how to handle this situation. WILLICK, *supra* note 7, at 84-86. One suggestion he provides is to offset the retirement award; use the present value of the spouses interest in the retired pay and offset against other marital property, or cash to be paid off. Another suggestion is to request permanent alimony rather than a share of marital property; he recommends agreeing to a lesser amount of alimony to have the service member agree. This settlement would be an irrevocable, unmodifiable alimony in an amount measured by the military retired benefits, in exchange for a waiver by the former spouse of any property interest in the retirement benefits themselves.

388. *See generally* WILLICK, *supra* note 7, at 121-22 (discussing voluntary allotments).

389. *See* Goad v. United States, No. 00-5063, 2000 U.S. App. LEXIS 20189 (Fed. Cir. July 21, 2000) (noting that in an earlier court case, Goad had been found in contempt of court for failure to pay his former spouse her share of his retired pay).

390. *See id.* (noting that in an earlier court case, Goad had been imprisoned following a ruling that he was in contempt of court for failure to pay his former spouse her share of his retired pay).

tively daring the former spouse to spend the time and money to start the process over again."[391]

While enforcing payment of retired pay without direct payment is a problem for former spouses, failure to apply for direct payment is a problem for former service members. When a state court orders a property award of retired pay that meets the ten-year-overlap rule, the former spouse must submit an application to DFAS for direct payment.[392] Currently, service members cannot submit this application, even if the court orders direct payment or if they prefer direct payment. Many service members prefer direct payment to ensure compliance with the court order and to prevent having to interact with their former spouses. Further, direct payment ensures accuracy in payments as the cost of living allowances occasionally increase the total divisible retired pay. Service members do not wish to risk inaccurately determining actual dollar amounts based on federal taxes, occasional increases in allowances, and court formulas.

However, if former spouses wish to avoid direct withholding of federal taxes on their percentage of retired pay, they can refuse to apply for direct payment. Thus, DFAS deducts the total federal taxes from the former service member's portion and the entire amount is taxable income to the former service member.[393] Some former spouses escape federal taxation of their property interest because the federal government does not have a direct report of former spouses' taxes paid and withheld.

2. Proposed Solution

This article proposes repealing the ten-year overlap requirement for direct payment from DFAS.[394] Eliminating this rule would serve several

391. *Id.* at 123.

392. 10 U.S.C. § 1408(d) (2000).

393. *See* Jordan v. Jordan, No. 99-CA-64, 2000 Ohio App. LEXIS 1048 (Ohio Ct. App. Mar. 17, 2000) (resolving in favor of the former spouse the issue of whether the dollar amount of a former spouse's percentage of retired pay should be determined before or after the federal government withholds taxes).

394. 10 U.S.C. § 1408(d)(2). *See* Legislative Initiative for Unified Legislation and Budgeting, originated by the Armed Forces Tax Council, subject: Amend the Uniformed Services Former Spouses' Protection Act to Allow Either Members or Former Spouses to Submit an Application for Direct Payment of Benefits (Jan. 2001) (on file with author).

purposes.[395] It would end confusion about the applicability of the USFSPA to former spouses who were married less than ten years. Processing applications for retired pay would be easier and more efficient for DFAS because they would not need to review and reject applications that do not meet the direct pay requirements.[396]

Additionally, the federal government would have better accounting for income tax purposes.[397] While a court order requires each party to pay all federal, state, and local income tax on their specific allocations of the retired pay, DFAS does not account for specific amounts unless the spouse is receiving direct payment. When DFAS makes direct payment, it withholds federal income tax from each party's payments in accordance with Internal Revenue Service (IRS) schedules and reports the payments directly to the IRS.[398] As current tax provisions stand, alimony is not included as income to the former spouse, but retired pay is income.

This proposal is further justified because no other federal or private retirement plan includes a direct payment limitation.[399] Based on the congressional request to study the USFSPA as compared to the other federal agencies and civilian sector,[400] Congress intends to ensure that treatment of military retired pay is comparable to other federal agencies.

In addition to repealing the ten-year overlap requirement for direct payment from DFAS, the direct payment procedures should be amended to allow either party to apply for direct payment. This proposal would benefit all parties involved and ensure that any party could initiate the benefits of

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395. The Armed Forces Tax Council supports this proposal. Philpott, *supra* note 182.

396. Defense Finance and Accounting Service currently reviews and rejects applications that do not meet the ten-year overlap rule. DFAS E-mail, *supra* note 124.

397. Defense Finance and Accounting Service could not report the former spouse's military retired pay income to IRS. This change could aide accounting for DFAS, retirees, and ex-spouses when divorce court orders involve spouses married to members for less than ten years. Philpott, *supra* note 182.

398. Reporting is typically done on an IRS Form 1099-R.

399. Emswiler Interview, *supra* note 8 (noting that based on information compiled for the DOD Report, other federal and private retirement plans do not include a direct payment limitation); Legislative Initiative for Unified Legislation and Budgeting, originated by the Armed Forces Tax Council, subject: Amend the Uniform Services Former Spouses' Protection Act to Repeal the "10-year Rule" for Direct Payment of Retired Pay Allocations (Jan. 2001) (on file with author).

400. Act of Nov. 18, 1997, Pub. L. 105-85, 111 Stat. 1799 (requiring the Secretary of Defense to review and report on the protections, benefits and treatment afforded retired uniformed services members compared to retired civilian government employees).

direct payment without having to rely on the other party. The result would be that DFAS rather than individual parties could manage income tax withholding and accounting.

3. Factors to Consider

While DFAS would incur costs of processing the additional applications generated by this revision, because the system for direct payments is already in place, the administrative costs would likely be nominal.[401] The cost to the federal government as a whole may be reduced because the IRS would have a better reporting record of these former spouses' income. If DFAS cannot make direct payment to the former spouse, the service member receives all of the retired pay from DFAS and is taxed on the full amount.[402]

Allowing either the former service member or the former spouse to submit an application for direct payment of benefits would remedy the secondary issue. Because DFAS already has an application process in place, the cost of allowing either party to apply for direct payment would be nominal. If both parties filed, DFAS may be burdened with unnecessary applications, however.

Congress should repeal the ten-year overlap rule for direct payment from DFAS and allow either party to submit an application for direct payment of benefits. These proposals are reflected in the legislation in the Appendix of this article.

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401. *But see* DFAS E-mail, *supra* note 124 (noting that there is no way to determine the additional volume of court orders or the additional cost).

402. *See id.* (noting that DFAS withholds income tax from retired pay).

H. Waiver of Recoupment from Former Spouses Overpayment Resulting from Retroactive Disability Determinations[403]

1. Current Problem

The VA often makes retroactive disability determinations.[404] In the same procedure as receipt of current disability pay, a former member who receives a retroactive disability determination must waive retired pay to receive VA disability pay. When a service member waives retired pay based on a retroactive disability determination, DFAS recomputes the USFSPA payment from the effective date of the disability, and adjusts the amount of money that the former spouse is entitled to receive.[405] Then, DFAS posts the amount of retroactive VA disability payment overpaid to a former spouse as a debt to the former spouse's account. At the same time, DFAS credits the former service member for the total amount of the overpayments to the former spouse.[406]

Next, DFAS notifies the former spouse of the debt, in accordance with debt collection procedures.[407] The standard debt notice letter also informs the former spouse about requesting a waiver of the debt.[408] Recoupment can be waived "when collection of the erroneous payment would be against equity and good conscience, and not in the best interest of the United States."[409]

2. Proposed Solution

If a court properly ordered the original USFSPA award, DFAS should automatically waive former spouses' debt from retroactive VA disability determinations. Currently, DFAS cannot automatically waive these debts,

403. Legislative Initiative for Unified Legislation and Budgeting, originated by the Armed Forces Tax Council, subject: Amend the Uniformed Services Former Spouses' Protection Act to Waive Recoupment of Overpayment to Former Spouses Resulting from Retroactive VA Disability Determinations) (Jan. 2001) [hereinafter Tax Council Recoupment Waiver Proposal] (on file with author).

404. *See, e.g.*, Kramer v. Kramer, 567 N.W.2d 100 (Neb. 1997) (noting that a service member's 1995 disability rating was made retroactive to 1992).

405. *See* DFAS E-mail, *supra* note 124.

406. *See id.*

407. *See id.*

408. *See* 10 U.S.C. § 2774 (2000).

409. Tax Council Recoupment Waiver Proposal, *supra* note 403.

but the waiver requests are routinely granted when the payment was properly made to the former spouse at the time of the award.[410] Proper payments are those that when initially made to former spouses were correctly computed based on information available at the time. Thus, the payments were not "erroneous."[411] To prevent penalizing either the former member or the former spouse, the government should not attempt to collect overpayments.

3. Factors to Consider

Because DFAS routinely grants waivers, implementing this proposal would not result in costs to the government not already contemplated.[412] Further, automatic waivers would save DFAS the administrative burden of notifying the former spouse and processing the waiver. Congress should enact this proposal, included in the legislation at the Appendix.

I. Mandating a Reduction in DFAS Processing Time and Efficiency

1. Current Problem

The USFSPA provides that DFAS has ninety days to process applications for direct payment based on court awards of property, alimony, and child support.[413] This delay in processing results in the service member accumulating arrears before the direct payment begins. Thus, the former service member is in arrears even though all parties have complied with the court order. If the service member does not willingly pay these arrears, the former spouse may return to court to enforce the arrears. Upon a court order for arrears, DFAS can garnish the service member's retired pay; DFAS will not garnish arrears of property awards.

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410. Emswiler Interview, *supra* note 8 (noting that DFAS typically grants waivers of debt if the original award was properly made).

411. Tax Council Recoupment Waiver Proposal, *supra* note 403.

412. *Id.*

413. 10 U.S.C. § 1408(d)(1); 32 C.F.R. § 63.6(c)(2) (2000).

Former service members and former spouses complain that DFAS processes USFSPA applications slowly.[414] Several solutions have been recommended to remedy this problem. The Armed Forces Tax Council recommended that the service member should be allowed to waive the thirty-day response period.[415] State bar associations suggested that Congress enact legislation to permit DFAS to make retroactive payments to former spouses when arrearages result from the time expended in processing the order.[416] The ABA recommended that DFAS withhold the former spouse's share pending its final approval of the order and that once the application was approved the withheld funds would be forwarded to the former spouse.[417] Both the ABA and several bars recommended that DFAS conduct preliminary reviews of proposed court orders for administrative sufficiency.[418] If DFAS found the court order insufficient, errors or omissions could be corrected before the order was executed and filed.[419]

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414. Emswiler Interview, *supra* note 8. In response to requests for comment on the USFSPA, the working group on the DOD report received numerous complaints about DFAS processing time. These complaints came from both former spouses and former service members.

415. Legislative Initiative for Unified Legislation and Budgeting, originated by the Armed Forces Tax Council, subject: Amend the Uniformed Services Former Spouses' Protection Act Protection Rules Pertaining to Notification of Members (Jan. 2001) (on file with author).

> Members occasionally request that payments start immediately. Amending the statute will clarify the member's rights in this respect. The proposal would also amend the USFSPA to delete the requirement that a copy of the court order be sent to the member. DFAS will instead notify the member that, upon request, it will send the member a copy of the order.

Id. The Tax Council provides an example of how this provision has worked for child support. Since the child support waiver provision took effect, DFAS has processed approximately 10,000 orders but received only approximately 300 requests for copies of the court order. The Tax Council's recommendation would reduce DFAS's administrative costs and ensure prompt payment of USFSPA payments to former spouses.

416. Emswiler Interview, *supra* note 8.

417. *Id.* This process is similar to the process that the IRS and ERISA require for private retirement plans.

418. *Id.* Currently, pre-approval of court awards is not allowed by statute or the implementing regulation. However, DFAS is planning to provide "standard" approved formats for formulas and hypothetical awards, which will be available to the public. *See* DFAS E-mail, *supra* note 124.

419. Parties can return to court to obtain clarifying orders. *See* WILLICK, *supra* note 7, at 24.

2. Proposed Solution

Before analyzing a solution to the statutorily authorized delay in processing of USFSPA applications, the actual processing of USFSPA applications must be reviewed. Currently, when DFAS receives an application for payment of retired pay, along with a court order, DFAS attorneys conduct a legal review. If the application meets the requirements of the statute and the regulation, DFAS sends a notification to the former spouse and the member stating that the case will be honored. Although the USFSPA allows DFAS thirty days, it typically takes only eight to twelve days to conduct the legal review and send the "honor letter," which states that DFAS will honor the application for USFSPA payments.[420] The service member then has thirty days from receipt of the "honor letter" to respond to the application.[421] The USFSPA provides thirty days for DFAS to hold its determination in abeyance for the member to demonstrate irregularity in the order.[422] After the thirty days, DFAS initiates the USFSPA payment as soon as possible based on pay system monthly deadlines.[423] The actual processing time plus the deadlines in the pay system often push the start of USFSPA payments to the second month following the receipt of an application.

Further, an understanding of the number of applications that DFAS processes is necessary before discussing remedial action. As of October 2000, DFAS was making 62,046 USFSPA payments.[424] Property awards made up 56,359, while child support and alimony were 1874 and 3813, respectively.[425] Every year, DFAS processes between 18,000 and 20,000 applications for award of retired pay.[426] After legal review, DFAS rejects

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420. *See* DFAS E-mail, *supra* note 124.

421. 10 U.S.C. § 1408(g) (2000). "A person receiving effective service of a court order . . . shall, as soon as possible, but not later than 30 days after the date on which effective service is made, send a written notice of such court order . . . to the member affected by the court order . . . ." *Id.*

422. *Id.*

423. Specific "cut-off" dates for processing retired pay garnishment each month trigger when the actual payment will start. *See* DFAS E-mail, *supra* note 124 (explaining the legal review of USFSPA applications and court orders).

424. *See id.*

425. *See id.*

426. *See id.* Some of these applications are those that were previously rejected submissions that are re-submitted with further documentation or a clarifying order. *Id.*

approximately twenty-three percent of the applications for a variety of administrative and legal reasons.[427]

This article supports policies that will decrease processing time, and thus, decrease litigation over arrears. However, such revisions should not be statutory in nature. At most, changes in processing should be regulatory.[428] Any regulatory changes must be flexible guidance, which includes DFAS review and comment. Because of its direct work with the USFSPA process, DFAS understands the needs of the parties and the economic feasibility of any proposed policy that may improve processing.

Policy-makers at DFAS recommend changes to the implementing regulations that will decrease processing time. In the past, DFAS has recommended a process to allow electronic applications and recognizes that electronic applications could streamline the process.[429] In the child support collection arena, DFAS recently developed a process that allows states to send wage withholding orders to DFAS via the Internet.[430]

Further, DFAS looks to internal mechanisms to increase efficiency and assist the parties. Soon, DFAS will implement a new interface between the garnishment department and the retired pay system, called Integrated Garnishment System (IGS).[431] According to DFAS, IGS will dramatically speed up the process of implementing the withholding into the service member's pay.[432] The DFAS website provides information to assist parties when preparing applications and property settlements.[433] In the future, DFAS will be putting out guidance on formats for "formula" and "hypothetical" awards.[434]

Additional regulatory changes are required. First, to decrease processing time, the service member should be able to waive the thirty-day

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427. *See id.* The rejected applications are not categorized by "reason for rejecting." However, many are rejected for incomplete or unclear applications. Others are rejected because the former spouse does not qualify for direct payment or because the jurisdictional requirement was not met.

428. The DFAS implementing regulation is 32 CFR pt. 63 (2000).

429. *See* DFAS E-mail, *supra* note 124.

430. *See id.*

431. *See id.*

432. *See id.*

433. Defense Finance and Accounting Service, *Garnishment*, *at* http://www.dfas.mil/money/garnish/ (last modified Mar. 21, 2001) (providing a fact sheet, frequently asked questions, and DD Form 2293).

434. *See* DFAS E-mail, *supra* note 124.

notice and response period. Arguably, a waiver provision could be problematic for DFAS to implement because it changes a well-functioning process. This article contends, however, that a waiver contained directly on the application for retired pay would actually ease the review. The application for retired pay should contain a provision that allows a service member to waive notice and the thirty-day response time. The current DD Form 2293, Request for Former Spouse Payments from Retired Pay,[435] does not contain a block for the service member to waive notice rights. If a signed waiver is contained on the application, DFAS can quickly and easily separate those applications that need notice and a thirty-day response and those that do not. The DOD should modify this form.

In addition to modifying DD Form 2293 to include a waiver provision, this form should also become an electronically transmittable application. With increased technological advances, such as digital signatures, DFAS should work to establish a means of receiving electronic applications and court orders.[436] Electronic service of process will increase the efficiency of the USFSPA process.

3. Factors to Consider

While critics can provide logical solutions to the delay in processing time, only DFAS can understand what their organization can support. Further, DFAS works with former service members and former spouses every day, and is the only organization that can provide a realistic solution that can be implemented with as minimal cost as possible. Rather than detail specific statutory rules for DFAS to follow, Congress should allow DFAS the flexibility to continuously review and improve processing of USFSPA applications.

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435. DD Form 2293, Application for Former Spouse Payments from Retired Pay (Jan. 1999).

436. A similar proposal is made by the Armed Forces Tax Council. *See* Legislative Initiative for Unified Legislation and Budgeting, originated by the Armed Forces Tax Council, subject: Amend the Uniformed Services Former Spouses' Protection Act to Allow for Electronic Transmission of Court Orders and Applications for Payments (Jan. 2001) (on file with author).

J. Amend the Survivor Benefits Plan

1. Current Problems

The SBP and the USFSPA programs are discussed together because both USFSPA payments and SBP premiums are typically taken from military retired pay.[437] While the SBP program runs smoothly, several changes can improve its efficiency as well as compatibility with today's society where multiple marriages are common.

Specifically, Congress should make two amendments to the SBP. First, more than one spouse should be eligible to receive the SBP benefits. Second, Congress should repeal the one-year deemed election rule, which limits the time to designate a former spouse as SBP beneficiary.[438] Former

437. The USFSPA implementing regulation also discusses the SBP. *See* 32 C.F.R. pt. 63 (2000).

438. The Armed Forces Tax Council has recommended an additional change to the SBP. *See* Legislative Initiative for Unified Legislation and Budgeting, originated by the Armed Forces Tax Council, subject: Amend the Uniformed Services Former Spouses' Protection Act to Allow Automatic "Cash-out" of "Small Benefits" and Optional "Cash-out" of SBP and "Large Benefits" (Jan. 2001) (on file with author). The primary aspect of this recommendation is to decrease the DFAS workload created by many small monthly payments to former spouses. These benefits could be automatically cashed out as a lump-sum payments to former spouses. An additional plan could be established for larger lump-sum payments. A discussion of this Armed Forces Tax Council proposal is beyond the scope of this article.

439. One former spouses' organization recommends changing the method of premium payments. NMFA Position Letter, *supra* note 7. Currently, former members have SBP premiums for current or former spouses deducted from disposable retired pay. According to NMFA, this has lead to inequities.

> Current law does not allow the former spouse to pay the SBP premium directly, even when the ratified agreement includes the provision that the former spouse is responsible for the payment. NMFA believes that both parties in the divorce would be better served if, in these situations, the former spouse could pay the premium directly to DFAS. In almost all cases, DFAS would be able to deduct the premium from the amount provided by DFAS to the former spouse.

spouse organizations,[439] former service member organizations,[440] and government working groups,[441] all support amending the SBP.

2. Allow More than One SBP Beneficiary

a. Proposed Solution

Currently, a service member can designate only one SBP beneficiary. If a service member remarries, his second spouse cannot receive an annuity interest in SBP.[442] Service members and their second spouses advocate for

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439. (continued)

Id. This article does not disagree with NMFA's position on this issue; however, no evidence exists that would warrant this change.

440. The ARA supports changes to the SBP. *See* ARA Position Letter, *supra* note 175.

441. The Armed Forces Tax Council supports changes to the SBP. *See* Legislative Initiative for Unified Legislation and Budgeting, originated by the Armed Forces Tax Council, subject: Amend the Survivor Benefit Plan Rules (Jan. 2001) [hereinafter Tax Council SBP Proposal] (on file with author). The Tax Council specifically recommends amending the SBP to: permit the designation of multiple SBP beneficiaries; establish a presumption that multiple beneficiary designations and related allocations of SBP benefits must be proportionate to the allocation of retired pay; permit the courts to establish and designate responsibility for payment of premiums related to SBP coverage; repeal the one-year deemed election period requirement. *Id.*

442. Second spouses are a vocal proponent of reforming the SBP. *See* E-mail from Diane M. Ungvarsky to Lieutenant Colonel Thomas K. Emswiler (Feb. 19, 1999) [hereinafter Ungvarsky E-mail] (noting that if husband dies on active duty, his SBP will go to ex-wife). "The USFSPA hurts too many second spouses. The new spouse is left without coverage and support." *Id.* Miller E-mail, *supra* note 283 (noting that even though she was with her husband during most of his military career and ended up making significant PCS moves, his first wife is awarded an "elevated status merely because she was my husband's first wife during his military career"). Former service members also support this amendment. *See* E-Mail from John L. Milliken, U.S. Navy (Retired), to Lieutenant Colonel Thomas K. Emswiler (Feb. 20, 1999) [hereinafter Milliken E-mail] (supporting SBP to more than one spouse). Some individual former spouses, however, disagree with multiple beneficiaries. *See, e.g.*, E-mail from Nancy R. Jones to Lieutenant Colonel Thomas K. Emswiler (Mar. 2, 1999) [hereinafter Jones E-mail].

this change based on fundamental fairness, especially where the current spouse is married to the service member longer than the former spouse.[443]

Congress should amend the SBP statute to allow for multiple beneficiaries of SBP annuities. The statute should contain a presumption that multiple beneficiary designations and related allocations of SBP benefits are proportionate to the allocation of retired pay.[444]

b. Factors to Consider

As with all changes involving pay and benefits, Congress must consider the cost to implement this plan. These changes will not likely incur any additional costs to the government, other than administrative expenses.[445] Further, because SBP payments are based on actuarial tables similar to insurance rates, tables must be developed to determine appropriate premiums for multiple beneficiaries.

One foreseeable problem with allowing multiple beneficiaries is the impact on the initial property settlement and state court division of marital property. The potential for multiple beneficiaries devalues the SBP annuity; it becomes less of a bargaining tool. State courts must also ensure that parties properly implement the change and provide that the pro rata share

443. Changing the SBP to allow for more than one beneficiary was frequently mentioned in letters and e-mails the DOD received in response to its request for input on revising the USFPSA. *See* Ungvarsky E-mail, *supra* note 442 (noting that her husband's ex-wife will receive the full SBP if her husband dies while on active duty); Milliken E-mail, *supra* note 442 (noting that the SBP should change to "allow more than one spouse" as beneficiary). *But see* Jones E-mail, *supra* note 442 ("According to my divorce decree I get all of the SBP and I want it to stay that way!").

444. This presumption should be built into the statute, but allow the parties to agree otherwise. The Tax Council made a similar recommendation. Tax Council SBP Proposal, *supra* note 441. *See* ARA Position Letter, *supra* note 175 (supporting a pro rata share of SBP annuity equal to the percentage share of retired pay). Some former spouses also agree that current spouses should receive pro-rata share of the SBP annuity. *See, e.g.*, Letter from Janelle G. Macdonald to Lieutenant Colonel Thomas K. Emswiler (Feb. 21, 1999) (stating that the SBP pro-rata share should occur in the same manner as the monetary division of the retirement, based on the length of the marriage for each spouse leading up to retirement; however, "if a current spouse has married after the retirement of the former military person then no SBP entitlement should be granted to the current spouse, as that was not married to the individual during the military career").

445. The Armed Forces Tax Council supports changes to the SBP. *See* Tax Council SBP Proposal, *supra* note 441.

presumption takes effect *only* if the service member designates a second beneficiary.

3. Repeal the One-Year Deemed Election Rule

a. Proposed Solution

If a court designates a former spouse as beneficiary of the SBP, the service member must notify DFAS of the election. If the service member who is required to make an SBP election fails or refuses to make that election, the member is "deemed" to have made the election if DFAS receives both a written request from the former spouse and a copy of the court order.[446] The current law requires the former spouse to make the election within one year of the date of the court order, or the election is not effective.

The one-year deemed election rule is complicated and illogical. The harsh results of this rule are demonstrated in this example:

> Assume three identical divorces on the same day: In the first case, the lawyer, who knew almost nothing about military retirement benefits law, did not even know there was an SBP to allocate. The second knew that something had to be done, and so put a statement in the order verifying that the former spouse was the irrevocable beneficiary of the benefit. The third not only knew to secure the right, but knew about the deemed election procedure, sent the required notice, and so on.
>
> One year and one day after the divorce, the third former spouse's rights would be secure. The first former spouse could go back to court at any time (before the member's death) to get a valid order for SBP beneficiary status, and then serve the pay center. The second former spouse, however, whose rights were supposed to be "secured" by the judgment, would be entirely without a remedy (except a malpractice claim against the divorce lawyer).[447]

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446. *See supra* Section III.F (providing a complete discussion of the one-year deemed election rule).

447. WILLICK, *supra* note 7, at 154-55.

Any law that benefits the party who is most ignorant of the law over another party who secures rights upon divorce, must be reconsidered and revised. The DOD has also recognized the harsh results that the current law produces.[448]

Unfortunately, the harshness of the one-year deemed election rule is found beyond hypothetical situations. In *Dugan v. Childers*,[449] a former spouse failed to make the deemed election within one year. The court order designated the former spouse as the beneficiary in the divorce decree ending the thirty-six-year marriage.[450] The service member did not comply with the court order, and the former spouse failed to make the deemed election within one year.[451] When the service member remarried seven years later, he changed his SBP beneficiary to his new wife.[452] When the former service member died, his current wife received the SBP annuity.[453] The inequitable conclusion in *Dugan* was the correct legal outcome based on the law.

Many former spouses are unaware that they must make a deemed election within one year of divorce where they were previously designated as the "spouse beneficiary." The beneficiary status does not "carry over" to the former spouse status. In the recent case, *Woll v. United States*,[454] a spouse of twenty-three years who failed to make a deemed election lost entitlement to the SBP annuity. Woll argued that the Army should have notified her that her status as the SBP beneficiary changed upon divorce

448. *See id.* at 155 n.72 (citing DEPARTMENT OF DEFENSE REP. ON THE SURVIVOR BENEFIT PLAN (Aug. 1991)).

449. Dugan v. Childers, 539 S.E.2d 723 (Va. 2001).

450. The couple was married in 1951. The service member retired in 1975, at which time he designated his wife as the beneficiary of the SBP annuity. Upon their divorce in 1987, the former service member agreed that his former wife was entitled to one-half of the retirement benefits and the SBP annuity. *See id.* at 723-24.

451. *See id.* at 727.

452. The former service member remarried in 1994 and changed his SBP beneficiary to his current wife. In 1996, the former service member was found guilty of contempt and directed to change his SBP beneficiary back to his former spouse. However, he died before he complied with the court order. *See id.*

453. The state court's contempt holding was preempted by 10 U.S.C. § 1450, which governs the subject of former spouse's entitlement to the survivor's benefits of a military retiree. *See id.* at 725. Concerning pre-emption in general, the Supreme Court has said that "if Congress evidences an intent to occupy a given field, any state law falling within that field is pre-empted." Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984). Because Congress has occupied the field of military retirement benefits, state courts cannot make laws that contradict the federal laws.

454. 41 Fed. Cl. 371 (1998).

and that the one-year deemed election rule applied to her situation. In dicta, the court stated: "The elaborate statutory scheme for SBP insurance does not place [a] burden on the Army, and makes it incumbent on the spouse to trigger modification for a deemed election of former spouse benefits."[455] Congress should not place the burden of an "elaborate statutory scheme" on former spouses. Congress should repeal the one-year deemed election period requirement.

b. Factors to Consider

If Congress repeals the one-year deemed election rule, a former spouse should still be required to complete the beneficiary election before the service member dies. Even though a current or second spouse is on notice of the former spouse's interest in the SBP because of the court order, the current spouse who begins to receive benefits must be able to rely on those benefits. Once the service member dies, the designated beneficiary should not change.

Repealing the one-year deemed election rule may also reduce litigation. While not prevalent in reported cases, former spouses and current spouses litigate beneficiary status before and after the service member's death.[456] Repealing the one-year deemed election rule should not cost the government any additional money. Any additional cost, specifically overdue or unpaid premiums, would fall to the party designated by the original court order requiring the former spouse to be the SBP beneficiary. Currently, DFAS processes SBP elections by service members and deemed elections by former spouses.

VI. Conclusion

Individually, each proposal in this article improves the equity of the USFSPA and military divorces. Combining these proposals, however, realizes that potential for equitable resolution of division of military retired pay upon divorce. While Congress must consider each proposal sepa-

455. *Id.* at 375.

456. *See, e.g.*, *Woll*, 41 Fed. Cl. at 371; Nicholas v. United States, No. 96-394, 1999 U.S. Claims LEXIS 99 (Fed. Cl. Apr. 22, 1999); Sumakeris v. United States, No. 96-5069, 1996 U.S. App. LEXIS 16170 (Fed. Cir. July 8, 1996); Wise v. Wise, 765 So. 2d 898 (Fla. Dist. Ct. App. 2000); King v. King, 483 S.E.2d 379 (Ga. App. 1997); Silva v. Silva, 509 S.E.2d 483 (S.C. Ct. App. 1998); *Dugan*, 539 S.E.2d at 723.

rately, presenting the combined effect of all of these proposals emphasizes the importance of continuing the legislative effort toward total reform. The following hypothetical emphasizes this point. The hypothetical is analyzed using the current USFSPA law to review the potential litigation and financial outcome for the parties. Then, the same review is conducted using the proposed changes.

> 1990: John and Anne are married in Colorado, which is John's domicile, where he votes, and where he owns property. In that same year, John enters military service as a second lieutenant.
>
> 1997: John is assigned a one-year unaccompanied tour.
>
> 1998: John and Anne file for separation, John is a captain.
>
> John's next duty assignment is in California; John has lived in California only because of military service. Anne returns to her parents' home in California.
>
> 1999: Anne files for divorce. John and Anne divorce just before John is promoted to major.
>
> Anne is awarded a share of John's retired pay; the court orders John to elect Anne as the SBP beneficiary. Neither John nor Anne file for the deemed election of SBP within one year.
>
> 2001: Anne learns that John did not designate her as beneficiary of the SBP.
>
> 2004: John has a training accident that injures his knee and hip.
>
> 2005: John accepts a lump-sum payment of $30,000 from the CSB/ REDUX retirement plan.
>
> 2008: John marries Sally.
>
> 2010: John retires as a colonel. Upon retirement, John elects Sally as the SBP beneficiary. John does not make a

> voluntary allotment of Anne's percentage of retired pay; John refuses to pay Anne any of the retired pay.
>
> 2015: John receives a VA disability rating of 30%, which the VA determines should have been retroactive to the date of John's retirement. As John gets older, his injury causes increased hardship and he is unable to work. The VA gradually increases his disability rating over the years until it is 100%.
>
> 2025: John dies.[457]

A. Applying the Current USFSPA

Applying the current USFSPA and SBP laws, John and Anne could enter court numerous times before and after their divorce. At the time of the divorce, neither party can contemplate what the future may hold either personally or professionally. Could Anne predict that John would be injured and elect to receive VA disability rather than retired pay? Could John predict that he would retire as a colonel and that he would remarry? The current USFSPA does not contemplate personal or professional variables after divorce, and requires parties to re-litigate issues to preserve their original interests in retired pay. As this hypothetical military divorce demonstrates, controversy can arise at every stage of litigation under the current USFSPA.

The USFSPA jurisdictional requirements are the first problem for Anne. Because of these requirements, Anne could not file for divorce in California if she wished to have the court divide the military retired pay. Anne could dissolve the marriage in California, but would have to go to another jurisdiction, such as Colorado, to divide the retired pay. John could force Anne to litigate in two states or force her to file for divorce and property division in Colorado.

At divorce, the Colorado court may divide John's military retired pay based on a formula that will incorporate John's rank and time in service at

457. This hypothetical military divorce is unable to capture all of the proposed changes to the USFSPA. This hypothetical involves a marriage that lasts less than ten years. Thus, certain changes are automatically excluded from consideration. Proposals not addressed include: granting benefits to 20/20/15 spouses, the Dependent Victims of Abuse Provision, and the improved DFAS processing and efficiency.

retirement. Even though John and Anne were apart for the last two years of their nine-year marriage, the court determines that the marriage lasted nine years, all of which overlapped with military service. The court determines that Anne is entitled to 22% of John's retired pay (as a colonel with twenty years in service).

In 2005, Anne sues John for a share of the lump-sum payment under the CSB/REDUX plan. The court orders John to give Anne 22% of the payment. When John retires, he refuses to make a voluntary allotment or give Anne the court-ordered 22% of his disposable retired pay. Because Anne does not qualify for direct payment of retired pay, she has no means to enforce the court-ordered 22%. Anne files a civil suit for contempt. John refuses to pay; John remains in prison until he creates an allotment.

The amount of the allotment, however, is not the amount Anne originally contemplated. John gives Anne 22% of his disposable retired pay, which is reduced because of his disability rating. As his disability rating increases and Anne's allotment decreases, Anne returns to court for a modification of property settlement. The court orders John to pay Anne alimony in the amount that she originally would have received before the disability rating. Anne files an application with DFAS for direct payment of alimony. By the time the application is processed, John is already two months in arrears. Anne sues John for alimony arrears.

Finally, because neither John nor Anne elected Anne as the beneficiary of the SBP, Anne does not receive an annuity upon John's death. Anne files a claim against the United States to receive the SBP. Anne also sues Sally to prevent her receipt of the SBP.

Under the current USFSPA, despite their divorce, John and Anne remain tied in costly litigation until and after John's death. John is not happy with how the court divided his retired pay, ordered payment of his CSB/REDUX bonus to Anne, and ordered payment of alimony. Anne is not happy that she had to file for divorce in Colorado, that she cannot enforce the court order, and that she did not receive the court-ordered SBP annuity.

B. Applying the Article Proposals

The theme of the individual and collective article proposals is to provide states with the means to effectively and efficiently adjudicate military

divorces, through federal administrative, procedural, and enforcement mechanisms. With these mechanisms in place, parties to a military divorce should not need to re-litigate issues after the original divorce is final.[458] To demonstrate the combined effect of the article proposals, consider how the proposals apply to the hypothetical military divorce.

With the jurisdictional prerequisites repealed, Anne could file for divorce in California, where John and Anne are currently living. California could dissolve the marriage and divide the retired pay.

At divorce, the court would divide John's military retired pay based on the separate property date. John and Anne would litigate this issue during the divorce hearing. John would argue that the separate property date should be the date he left for his unaccompanied tour; Anne would argue for the date of John's promotion to major. The court would review the totality of the circumstances of the marriage, and would likely decide that the date of legal separation should be the separate property date. Using the separate property date in a formula, the court would award Anne 20% of the retired pay of a captain with eight years of service.[459] Because the separate property date was set as 1998, Anne would not be entitled to any share of John's CSB/REDUX bonus.

At John's retirement, Anne begins to receive direct payment of her share of the retired pay. When John receives his VA disability rating, DFAS does not recoup the overpayments previously paid to Anne. John is

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458. The exception being "changes in circumstances" for alimony or child support modifications, which are outside the scope of this article.

459. The court could use the following formula:

$$1/2 \times \frac{\text{length of overlap of marriage \& service}}{\text{separate property date time in service at vesting}} \times 100 = \text{\% of pay based on rank/longevity on separate property}$$

and insert the hypothetical information into the formula,

$$1/2 \times \frac{8}{20} \times 100 = \text{20\% of O-3 with 8 years service}$$

the court would determine that Anne is entitled to 20% of the retired pay of a captain (O-3) with eight years service.

not required to waive a portion of his retired pay to receive the VA disability compensation. Anne continues to receive her 20% share of John's retired pay, that is as a captain with eight years of service.

When Anne discovered that John failed to elect her as beneficiary under the SBP, she made the election with DFAS in 2001. After John married Sally, he followed the requirements to make her a second beneficiary. Anne and Sally each received a pro-rata share of the SBP annuity.

If Congress adopts all of the proposals in this article, John and Anne would only litigate USFSPA and SBP issues once: at their divorce. After that date, the procedural and enforcement mechanisms would accommodate all of the changes in circumstances suggested in this hypothetical. With the end of costly litigation, hopefully, the animosity between John and Anne would decrease. At the time of divorce, both would know the continuing terms and conditions of the property division.

Regardless of legislative changes, however, parties to a divorce may never be content. Will John and Anne ever be "happy" with the outcome? John is still required to give Anne a portion of his retired pay; Anne will not benefit from John's future promotions and longevity. While Congress, lobbyists, private organizations, and scholars have spent the last twenty years searching, a solution that will satisfy all parties to every military divorce may not exist. Despite reforms in the law, nothing can change the emotional aspects of military divorce. A service member should reap the benefits after twenty hard years, which could have included difficult duty and combat experiences; a military spouse who sacrificed a lucrative career to support a spouse, a unit, and a nation, should also be rewarded and considered an equal partner.

Perhaps all Congress can do is search for a solution that will be the most fair to the most people. This article proposed several changes to the USFSPA, which are supported by law and practice. Individually, each proposal will move military divorce one step closer to equity. Together, these proposals will make proceedings under the USFSPA more equitable for all parties to a military divorce.

APPENDIX

107th CONGRESS
1st Session
H.R. XX, S. XX

To amend title 10, United States Code, to revise the rules relating to the court-ordered apportionment of the retired pay of members of the Armed Forces to former spouses, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES/SENATE

A BILL

To amend title 10, United States Code, to revise the rules relating to the court-ordered apportionment of the retired pay of members of the Armed Forces to former spouses, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.

SECTION 1. SHORT TITLE.

This Act may be cited as the 'Uniformed Services Former Spouses Reform Act of 2001'.

SECTION 2. REPEAL JURISDICTION REQUIREMENT.

(a) IN GENERAL- Section 1408(c)(4) of title 10, United States Code, is repealed.

(b) EFFECTIVE DATE- The amendment made by subsection (a) shall apply with respect to marriages terminated by court orders issued on or after the date of the enactment of this Act.

SECTION 3. AWARD OF RETIRED PAY BASED ON LENGTH OF SERVICE AND PAY GRADE ON THE SEPARATE PROPERTY DATE.

(a) Section 1408(c) of title 10, United States Code, as amended by section 2, is further amended by adding at the end the following new paragraph:

'(4) In the case of a member as to whom a final decree of divorce, dissolution, annulment, or legal separation is issued before the date on which the member begins to receive retired pay, the disposable retired pay of the member that a court may treat in the manner described in paragraph (1) shall be computed based on the pay grade, and the length of service of the member while married, that are creditable toward entitlement to basic pay and to retired pay as of the separate property date. Amounts so calculated shall be increased by the cumulative percentage of increases in retired pay between the date of the final decree and the effective date of the member's retirement.'

(b) Section 1408(a) of title 10, United States Code is amended by adding the following new paragraph:

'(8) The term "separate property date" means the date upon which the parties cease to contribute to the marriage. To determine the separate property date, the court will use a totality of the circumstances test and consider all relevant aspects of the marriage.'

(c) EFFECTIVE DATE- The amendment made by subsection (a) shall apply with respect to court orders issued on or after the date of the enactment of this Act.

SECTION 4. INCLUDE RETIREMENT, PRE-RETIREMENT, OR SEPARATION BENEFITS IN THE DEFINITION OF DISPOSABLE RETIRED PAY.

(a) Section 1408(a(4) of title 10, United States Code is amended by inserting after 'total monthly pay' the following: 'including any benefits or bonuses tied to retirement, early retirement, or separation'.

(b) EFFECTIVE DATE- The amendment made by subsection (a) shall apply with respect to court orders issued on or after the date of the enactment of this Act.

SECTION 5. REPEAL THE DIRECT PAYMENT LIMITATIONS.

(a) Section 1408(d)(2) of title 10, United States Code is repealed.

(b) EFFECTIVE DATE- The amendment made by subsection (a) shall apply with respect to court orders issued on or after June 25, 1981.

SECTION 6. AMEND THE LANGUAGE OF THE DEPENDENT VICTIM OF ABUSE PROVISION.

(a) Section 1408(h)(A) of title 10, United States Code is amended by inserting after 'while a member of the armed forces and after' the following: 'either (i) and after the 'basis of years of service' the following: 'or would be eligible to retire from the armed forces on the basis of years but for noncreditable retired time due to confinement direcly related to the misconduct.'

(b) EFFECTIVE DATE- The amendment made by subsection (a) shall apply with respect to court orders issued on or after the date specified in Section 1408(h) of title 10, United States Code.

SECTION 7. EXTEND BENEFITS TO 20/20/15 SPOUSES.

(a) Sections 1072(F) and (G) of title 10, United States Code are repealed.

(b) Redesignated Section 1072(F) of title 10, United States Code is added as the following new paragraph:

'(F) The unremarried former spouse of a member or former member who (i) on the date of the final decree of divorce, dissolution, or annulment, had been married to the member or former member for a period of at least 20 years, at least 15 of which were during the period the member or former member performed service creditable in determining the member or former member's eligibility for retired or retainer pay (ii) does not have medical coverage under an employer-sponsored health plan;'

(c) Section 1072(H) of title 10, United States Code is redesignated as Section 1072(G) of title 10 United States Code.

(d) Section 1072(I) of title 10, United States Code is redesignated as Section 1072(H) of title 10 United States Code.

(e) EFFECTIVE DATE- The amendment made by subsections (a)-(e) shall apply with respect to court orders issued on or after the date of the enactment of this Act.

SECTION 8. REPEAL THE ONE-YEAR DEEMED ELECTION PERIOD FOR FORMER SPOUSES TO FILE AS SURVIVOR BENEFIT PLAN BENEFICIARIES.

(a) Section 1450(f)(3)(c) of title 10, United States Code is repealed.

(b) EFFECTIVE DATE- The amendment made by subsection (a) shall apply with respect to court orders issued on or after the date of the enactment of this Act.

A VERDICT WORTHY OF CONFIDENCE?[1] PETITIONING FOR A NEW TRIAL BEFORE AUTHENTICATION BASED ON NEW EVIDENCE

MAJOR MICHAEL R. STAHLMAN[2]

Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream.

—Judge Learned Hand[3]

Captain (CPT) Wood broke out in a cold sweat as he listened to the unfamiliar voice on the other end of the phone. He was overjoyed but

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1. Kyles v. Whitley, 514 U.S. 419, 434 (1995). Although *Kyles* involved the failure of the prosecution to reveal favorable evidence to the defense, a key aspect of the Court's analysis was the effect the absence of the favorable evidence had on the trial. This article will not look at the prosecution's duty regarding *disclosure* of favorable evidence. However, this article will address whether evidence discovered after trial would produce a more favorable result for the accused, like in *Kyles*. A major focus in cases involving new evidence is whether the accused received a fair trial (absent the favorable evidence). *See* United States v. Singleton, 41 M.J. 200, 207 (C.M.A. 1994) (concluding that the appellant did not enjoy a full and complete trial based on the trial judge's denial of his petition for a new trial).

2. Judge Advocate, United States Marine Corps. Presently assigned to The Judge Advocate General's School, United States Army, Charlottesville, Virginia. B.S., *with distinction*, 1985, United States Naval Academy, Annapolis, Maryland; J.D., 1993, California Western School of Law, San Diego, California; LL.M., 2000, Judge Advocate Officer Graduate Course, The Judge Advocate General's School, Charlottesville, Virginia. Formerly assigned as Senior Defense Counsel, 1997-99, and Chief Review Officer, 1996-97, Legal Services Support Section, Second Force Service Support Group, Camp Lejeune, North Carolina; Deputy Staff Judge Advocate, 1996, Third Force Service Support Group, Okinawa, Japan; Chief Trial Counsel, 1994-96, and Officer-in-Charge, Legal Assistance, 1993-94, Legal Services Support Section, Third Force Service Support Group, Okinawa, Japan; RF-4B Reconnaissance System Operator and Aviation Maintenance Officer, 1988-90, VMFP-3, Marine Aircraft Group 11, Third Marine Aircraft Wing, El Toro, California; RF-4C Weapon Systems Operator, 1987-88, 45th Tactical Reconnaissance Training Squadron, Bergstrom Air Force Base, Austin, Texas. This article was submitted in partial completion of the Master of Laws degree requirements of the 48th Judge Advocate Officer Graduate Course.

3. United States v. Garsson, 291 F. 646, 649 (S.D.N.Y. 1923).

unsure what to do so he just took notes as he listened. He was speaking with the only eyewitness in a case CPT Wood thought was over more than a month ago. The eyewitness had not testified at trial and no one knew he even existed, until now.

Captain Wood defended the accused at trial. The victim was stabbed numerous times with a knife in a parking lot near a popular bar. The victim's identification of the accused at trial was the only evidence connecting the accused to the crime. From the day he was arrested and interrogated, the accused denied any involvement but acknowledged he was in the area of the assault at about the same time. The trial ended in a finding of guilty and a hefty sentence.

The eyewitness called because he saw an article in the local newspaper describing the facts of the trial and the result. He never came forward because he did not want to get involved. After several sleepless nights, he decided to call. What the eyewitness saw that night was exactly what the accused told CPT Wood. He did not know the accused, but he knew the real assailant very well and clearly saw him stab the victim multiple times. He remembered that night clearly. Stunned, CPT Wood hung up the phone. It seemed like an unreal dream . . . .

Captain Wood quickly regained his senses and cracked open his dog-eared *Manual for Courts-Martial* (*MCM*). In seconds he found Rule for Courts-Martial (RCM) 1210 in the index under "new trial" but saw that it did not apply until after the convening authority took action. After looking at case law, he became even more confused. Dismayed, CPT Wood asked himself, "Where do I go now?"[4]

I. Introduction

As a whole, the military justice system is fair and effective.[5] Although some commentators have expressed concern about certain aspects of the system, most believe it works.[6] However, there will always be room for improvement.[7] The fictional fact-pattern above depicts one such area. CPT Wood will soon discover he can submit a petition for a new

4. Captain Wood has several other options. Depending on the credibility of the eyewitness and other corroborating evidence, the convening authority could disapprove findings or provide other relief. Captain Wood could also request to reopen the case or ask for a rehearing. However, the focus of this article is the "new trial" route; other options will not be discussed in detail.

trial to the military judge. However, he will also discover there is little case law to assist him on his "new trial" journey. Even worse, the case law that does exist lacks any meaningful guidance to practitioners in the field.[8]

Applying RCM 1210(f) to new evidence discovered during this period—after trial and before authentication of the record of trial—is not the solution.[9] It would be contrary to both the intent of the drafters of the UCMJ and the text of the current rule, and it has led to error in a large number of cases. In short, RCM 1210(f) should not be applied during this period because it will negatively impact upon the fairness of the military justice system.

The accused carries a heavy burden when petitioning for a new trial based on newly discovered evidence.[10] This is true even when the petition is filed before the convening authority takes action under RCM 1107.[11]

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5. *See* United States v. Weiss, 510 U.S. 163, 194 (1994) (Ginsberg, J., concurring) (commenting on the current military justice system that is more sensitive to due process concerns); Professor David A. Schlueter, *Military Justice in the 1990's: A Legal System Looking for Respect*, 133 MIL. L. REV. 1, 6 (1991) (stating that the military justice system is fair and just).

6. *See* Brigadier General (Retired) John S. Cooke, *Military Justice and the Uniform Code of Military Justice*, ARMY LAW., Mar. 2000, at 4 (commenting on military justice challenges for the Judge Advocate General's Corps in the new century but noting that the system overall "is working reasonably well"); Major Guy P. Glazier, *He Called for His Pipe, and He Called for His Bowl, and He Called for His Members Three—Selection of Military Juries by the Sovereign: Impediment to Military Justice*, 157 MIL. L. REV. 1, 107 (1998) (criticizing the military for stubbornly clinging to selection of members by the sovereign but acknowledging that military justice "exceeds the expectations of traditional civilian justice" and it "provides greater due process than many civilian jurisdictions").

7. One prominent commentator believes the military justice system as a whole is effective but it "is not perfect, [and] there is room for change—for improvement." Schlueter, *supra* note 5, at 9.

8. See *infra* Part IV.A for discussion of the result. In short, error has been committed in a significant number of cases involving application of RCM 1210(f) to new evidence discovered after trial.

9. Although this article focuses on the period ending with authentication, the period from authentication to action by the convening authority could be included. The only practical difference between the two periods relates to who has the power or authority to act on a request for relief based on the discovery of new evidence.

10. United States v. Niles, 45 M.J. 455, 456 (1996). *See* United States v. Bacon, 12 M.J. 489, 491 (C.M.A. 1982) (stating that "the burden is heavier than that borne by an appellant during the normal course of appellate review").

11. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000) [hereinafter MCM].

Although the *MCM* does not address petitions filed before action is taken, military courts have looked to RCM 1210 for the standard to apply.[12]

When a petition is submitted before authentication of the record of trial, the military judge has the authority to conduct a post-trial hearing.[13] After authentication of the record of trial, the convening authority has "[t]he power to order a rehearing, or to take other corrective action."[14] Regardless of when or to whom the petition is made, military appellate courts have consistently expressed the opinion that "requests for a new trial . . . are generally disfavored."[15] This is for good reason. The cost, time, and effort associated with trying a case again can be enormous. However, these concerns must be balanced against the interests in guaranteeing an accused a fair trial.

The current evidentiary standard for the decision to grant (or deny) a new trial can be difficult to apply since there has been little direction from military appellate courts. This has led to a wide variety of results. Despite the apparent confusion with application of the rule, military appellate courts have been reluctant to give clear guidance.[16]

This article first examines the history of the new trial standard under Article 73 and RCM 1210(f). It then discusses the method by which the new trial standard is currently applied and the problems associated with its application. Next, the article shows that the drafters of the UCMJ did not intend the standard to apply before the convening authority's action, that courts in a significant number of cases have misapplied the standard, and that specific reasons have caused courts to misapply the standard. Finally, this article proposes a solution. It articulates why the proposed solution is

12. *See, e.g.*, United States v. Scaff, 29 M.J. 60, 64-65 (C.M.A. 1989).

13. *Id.*; MCM, *supra* note 11, R.C.M. 1102(a) and (b)(2).

14. MCM, *supra* note 11, R.C.M. 1107(c)(2) discussion.

15. United States v. Williams, 37 M.J. 352, 356 (C.M.A. 1993).

16. *See, e.g.*, United States v. Fisiorek, 43 M.J. 244, 248 (1995) (stating that "[w]e decline the opportunity, however, to fashion a particular rule to guide military judges in exercising discretion on whether to permit a party to reopen his or her case [to consider newly discovered evidence]"). This case is a good example of why there is confusion in applying RCM 1210(f) to newly discovered evidence. *See* discussion *infra* Part IV.A.

better than the current standard, explains what military judges think of the solution, and explores potential problems with the change.[17]

II. Petition for a New Trial Standard: An Overview

A. Origins of RCM 1210 and Legislative History

The military justice system is unique.[18] Its roots pre-date the Constitution by more than several centuries. However, only in the last half-century has it become more aligned with civilian criminal courts. Although there are critics on each side of the debate over the "civilianization" of the military justice system, all would agree that there has been a dramatic change in the system over the last fifty years.[19] In a "due process" sense, this change has greatly improved the rights of an accused. The petition for new trial based on newly discovered evidence is just one of the many new rights codified following the end of the last World War.

The end of World War II and the return of many who served in the armed forces during the war began a new period of reform in the military justice system. Many war veterans, disgruntled by their experience with the system, brought their concerns before Congress.[20] The result was a code of military justice for all services and a manual for practitioners. Specifically, the new uniform code included Article 73, dealing with newly discovered evidence, which was applied through rules found in a manual

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17. The proposed solution is to not apply RCM 1210(f) to new evidence discovered after trial and before authentication of the record or before action is taken by the convening authority on the sentence. The proposed solution, however, would apply the guidance from the CAAF in *Fisiorek*, 43 M.J. at 248.

18. *See* DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURES 2-5 (5th ed. 1999) (providing a concise discussion of why the military justice system is unique).

19. *See generally* Cooke, *supra* note 6, at 2-4 (providing a concise history of the UCMJ over the last half century which has been marked by "balancing the role of the commander with an increasingly independent and sophisticated judicial system"); Schlueter, *supra* note 5, at 6-11 (discussing problem areas that need greater scrutiny but acknowledging that there have been significant improvements in the military system since the unification of military justice); Glazier, *supra* note 6, at 107-08 n.433 (discussing the civilianization of military law with examples of changes in the military system from 1806 to the present).

20. *See* JONATHAN LURIE, ARMING MILITARY JUSTICE: THE ORIGINS OF THE UNITED STATES COURT OF MILITARY APPEALS, 1775-1950, 127-49 (1992) (discussing the groundswell of support to change the military justice system following World War II, particularly in the Navy).

for courts-martial. The rules eventually led to RCM 1210, the current provision for new trial petitions.

Rule for Courts-Martial 1210 is based on paragraphs 109 and 110 of the 1969 *Manual for Courts-Martial*[21] and Article 73 of the Uniform Code of Military Justice (UCMJ).[22] The concept of a "new trial" based on newly discovered evidence first appeared in the Articles of War in 1949.[23] That same year, the House Committee on Armed Services was holding hearings on the UCMJ. The major focus of the hearings was to produce a code that would apply to all the services.[24]

The hearings show that Congress intended that the provisions of the code mirror practice in federal civilian courts.[25] This included Article 73. One of the drafters of the code, Mr. Larkin, commented as follows:

> I think the newly discovered evidence will be surrounded by the practices and procedures in the Federal court that govern that motion [sic] such as—oh, that the newly discovered evidence is not cumulative; that if it had been presented to the jury it at least would have changed its mind; and various other rules that circumscribe the use of that type of motion.[26]

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21. MANUAL FOR COURTS-MARTIAL, UNITED STATES, ¶¶ 109, 110 (1969) [hereinafter 1969 MANUAL].

22. MCM, *supra* note 11, R.C.M. 1210 analysis, app. 21, at A21-89. Uniform Code of Military Justice Article 73 was first codified in 1950 and read:

> At any time within one year after approval by the convening authority of a court-martial sentence which extends to death, dismissal, dishonorable or bad-conduct discharge, or confinement for one year or more, the accused may petition The Judge Advocate General for a new trial on grounds of newly discovered evidence or fraud on the court. If the accused's case is pending before the board of review or before the Court of Military Appeals, The Judge Advocate General shall refer the petition to the board or court, respectively, for action. Otherwise The Judge Advocate General shall act upon the petition.

UCMJ art. 73 (1950).

23. LEE S. TILLOTSON, THE ARTICLES OF WAR, ANNOTATED 177 (5th ed. 1949). In a note following the full text of Article 53 of the Articles of War, there is a comment that "[t]he former code contained no provision for a Petition for New Trial." *Id.*

24. S. REP. NO. 81-486, at 1-2 (1949), *reprinted in* 1950 U.S. Code Cong. Serv. 2222-23.

A good example of this intent to mirror federal practice was the removal of the "good cause" requirement under Article 53 of the Articles of War. The purpose was two-fold. First, "good cause" had no counterpart in the civilian criminal system. Second, the drafters wanted an appellate system that was "tight, comprehensive and efficient."[27] The "good cause" showing was too broad for the drafters. They wanted to limit the grounds for granting a new trial to cases involving fraud on the court or for newly discovered evidence. Otherwise, a petition could be filed for any purpose as long as there was a showing of good cause. This focus on fraud and newly discovered evidence as grounds for a new trial was consistent with civilian practice at the time.[28]

The drafters were very concerned about the finality of courts-martial. They adopted the one-year requirement for submission of a new trial petition from Article 53, Articles of War (as amended in 1948). The concern was that, without an appropriate time limit, evidence and witnesses would be hard to obtain.[29] This could be an unnecessary windfall for the petitioner and would not serve any valid purpose. In addition, the new one-year limit ran from the date of approval of the sentence by the convening authority. Under the Articles of War, the limit was for one year from final

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25. United States v. Williams, 37 M.J. 352, 356 (C.M.A. 1993). *See* UCMJ art. 36 (2000) (stating that the President may prescribe rules "which shall . . . apply the principles of law and rules of evidence generally recognized in the trial of criminal cases in the United States district courts"). An extensive analysis of the federal criminal justice system is beyond the scope of this article. At some points in the article, current federal law regarding new trials will be discussed, briefly. Generally, RCM 1210(f) is consistent with its federal counterpart, FED. R. CRIM. PROC. 33. Each rule provides a mechanism to petition for a new trial based on newly discovered evidence discovered after trial. They both require the defense to raise the issue and to carry the burden of proof. Each requires the defense to show the evidence was discovered after trial, and that the evidence would not have otherwise been discovered before the end of trial by the exercise of due diligence. Finally, both rules impose a very high burden to show that the newly discovered evidence would have produced a substantially more favorable result for the accused had the evidence been presented at trial. The major differences between the rules concern their application rather than substantive law.

26. *Hearings on H.R. 2498 Before the Subcomm. of the House Armed Services Comm. on the Uniform Code of Military Justice*, 81st Cong., 1st Sess. 1201, 1212 (1949) [hereinafter *Hearings on H.R. 2498*].

27. *Id.* at 1210 (comment by Mr. Larkin).

28. *Id.* at 1211 (comments by Mr. de Graffenried and Mr. Larkin).

29. *Id.* at 1215 (comment by Mr. Smart).

disposition of the case after initial appellate review. The drafters did not discuss the reasons for this change.

One significant problem with Article 73 remains today. Neither Article 73 nor RCM 1210 address whether a new trial petition can be filed before the convening authority's action. The legislative history is also silent. The closest the drafters came to talking about the period from the end of trial to the convening authority's action was in their discussion of collateral attacks on a conviction.[30] A related problem is the continuing use of the last sentence of the original Article 73. In short, the last sentence implies that a petition can only be made to the Judge Advocate General when the case is not pending before an appellate court.[31] This adds to the confusion regarding when and to whom a petition may be made.

B. The Current Rule

Except for minor changes to the rule, grounds for a new trial based on newly discovered evidence have remained the same since the 1968 Military Justice Act.[32] There were two major changes to Article 73. The one-year limit on filing a petition was changed to two years and the right to file a petition was extended to all cases.[33] Although the legislative history does not specifically address the reasons for these changes to Article 73, the

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30. *See id*. at 1211. The drafters were concerned with allowing post-trial attacks only in cases of fraud and newly discovered evidence. They apparently wanted a mechanism to raise these issues outside of the normal appellate review process. Mr. Larkin commented that Article 73 was meant to combine the old English writ of *coram nobis* with the *motion* for a new trial on newly discovered evidence. *Id*. (emphasis added). Assuming that he meant a "motion" in the sense of normal trial court practice, it seems that the drafters may have intended to allow such a motion to be made to the trial court (instead of just to the Judge Advocate General after the convening authority's action). Regardless, the silence of the drafters raises a question as to their intent on application of Article 73 before the convening authority's action. This issue will be addressed further in Part IV.B.1, *infra*.

31. The last sentence of UCMJ Article 73 (1950) states that "[o]therwise, the Judge Advocate General shall act upon the petition." However, the analysis section of RCM 1210 states that "[f]orwarding a new trial to the Judge Advocate General is not required just because the case was a new trial." MCM, *supra* note 11, R.C.M. 1210 analysis, app. 21, at A21-89.

32. Military Justice Act of 1968, Pub. L. No. 90-632, 1968 U.S.C.C.A.N. (82 Stat.) 1335.

33. Before the 1968 Military Justice Act, Article 73 limited petitions to cases involving sentences to death, dismissal, a punitive discharge, or a year or more confinement. UCMJ art. 73 (1950).

House floor debate included general comments on the need to reform the military system to be more in line with the federal system.[34]

The most recent amendment to the rule came in 1998 to "clarify its application consistent with interpretations of [Federal Rule of Criminal Procedure] 33 that newly discovered evidence is never a basis for a new trial of the facts when the accused has pled guilty."[35] The federal rules were changed, primarily, because it was recognized that a case involving a guilty plea was not the equivalent of a trial.[36]

III. Application of RCM 1210

A. New Trial Roadmap

Whether a petition for a new trial can be made before authentication of the record of trial (or action by the convening authority) is unclear from the language of the rule. It is clear in Article 73 and RCM 1210(a) that a petition can be filed up to two years from the date of the convening authority's action. However, the Court of Appeals for the Armed Forces (CAAF) expanded the period when it stated, "until the military judge authenticates the record of trial, he may conduct a post-trial session [under Article 39(a)] to consider newly discovered evidence."[37] Further, RCM 1102(b)(2) empowers the military judge to order a post-trial session "for the purpose of inquiring into, and, when appropriate, resolving any matter which arises after trial and which substantially affects the legal sufficiency of any findings of guilty or sentence."[38] The CAAF held that the above provisions

34. 114 CONG. REC. 30,564 (1968). Mr. Philbin commented that "[t]he enactment of this legislation will permit the procedure for trials . . . to conform more closely with the procedure used in the trial of criminal cases in the U.S. district courts and will enhance the prestige and effectiveness of the [military judge]." *Id.*

35. MCM, *supra* note 11, R.C.M. 1210 analysis, app. 21, at A21-89. *See* United States v. Difusco, No. 96-01550, 1999 CCA LEXIS 37, at *6 (N-M. Ct. Crim. App. Feb. 26, 1999) (unpublished op.) (finding waiver of the right to petition for a new trial when unconditional pleas of guilty are entered).

36. MCM, *supra* note 11, R.C.M. 1210 analysis, app. 21, at A21-89. The analysis goes on to state that "it is difficult, if not impossible, to determine whether newly discovered evidence would have an impact on the trier of fact when there has been no trier of fact and no previous trial of the facts at which other pertinent evidence has been adduced." *Id*. *See* United States v. Lambert, 603 F.2d 808, 809 (10th Cir. 1979) (stating that there was no trial because the defendant plead guilty).

37. United States v. Scaff, 29 M.J. 60, 65 (C.M.A. 1989).

38. MCM, *supra* note 11, R.C.M. 1102(b)(2).

allow application of RCM 1210(f) in post-trial sessions involving newly discovered evidence.[39]

In short, the military judge has broad discretion to consider matters that arise after completion of a trial and before authentication.[40] Returning to the hypothetical stabbing case, the military judge would have the authority to hold a post-trial hearing or to deny the petition without a hearing.[41] If the judge ordered a hearing, the burden would be on the defense. The defense would have to show that the eyewitness was discovered after trial, that he would not have been discovered at the time of trial in the exercise of due diligence, and that his testimony would probably produce a substantially more favorable result for the accused.[42] If the military judge finds that CPT Wood met this burden, the judge would have authority to set aside the findings of guilty.[43]

B. Confusion in Terms: New Trial, Rehearing, or Reopen?

Military appellate courts have been consistent in holding that a military judge has the power to hold a post-trial session to consider new evidence.[44] However, courts have been inconsistent in their terminology for the post-trial proceeding. Regardless of the type or quality of the new evidence, the terms "new trial," "reopen," and "rehearing" have all been used to describe post-trial proceedings.[45] Using these terms interchangeably

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39. *See Scaff*, 29 M.J. at 65-66 (stating that a trial court would be empowered to hold a post-trial session to consider evidence discovered after trial which might be grounds for a new trial under RCM 1210(f)). *See also* United States v. Williams, 37 M.J. 352, 356 (C.M.A. 1993) (stating that "[a]pplication of this three-prong test to post-trial motions for a rehearing or reopening of the trial . . . is not inappropriate").

40. *See* Major Randy L. Woolf, *The Post-Trial Authority of the Military Judge*, ARMY LAW., Jan. 1991, at 27-28 (discussing the expansive powers of the military judge following the decision in *Scaff*). This is consistent with practice in federal courts. *See, e.g.*, United States v. Yoakam, 168 F.R.D. 41, 44 (D. Kan. 1996) (stating that when "considering a motion for new trial, the court has broad discretion that will not be disturbed on appeal absent plain abuse of that discretion").

41. MCM, *supra* note 11, R.C.M. 1210(c) (providing requirements for the form of the petition).

42. *Id.* R.C.M. 1210(f)(2).

43. *Scaff*, 29 M.J. at 66.

44. *See id.* at 65 (interpreting Article 39(a) "to authorize the military judge to take such action after trial and before authenticating the record as may be required in the interest of justice"). *See also* United States v. Brickey, 16 M.J. 258, 263-64 (C.M.A. 1983) (discussing the greater post-trial powers of the military judge since enactment of the Military Justice Act of 1968).

creates confusion, because each term has a unique meaning. Each post-trial proceeding also has different procedures. Further, if the new evidence warrants some form of post-trial remedy, the scope and potential outcomes for each proceeding vary greatly.[46]

Because the CAAF and the service courts have not attached any significance to the terms they use,[47] military judges are left scratching their heads when trying to figure out what post-trial procedure is appropriate. Although most trial practitioners and judges should be able to sort through this confusing terminology, they should not have to do so.

IV. The Problem: A Verdict Worthy of Confidence?

Fairness to the accused and the integrity of the military justice system warrant a standard that measures "new" evidence appropriately. Otherwise, public confidence and trust in the military's system of justice will be lost. Even worse, without an appropriate standard the accused's right to due process will be denied and, potentially, innocent men and women may be convicted. Absent this standard, the result will be the same as in *United States v. Singleton*, where the Court of Military Appeals stated:

> On this record, despite the best of intentions and efforts of the military judge, we cannot conclude, in a due process sense, that appellant has yet enjoyed a full and complete trial. Far too much

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45. *See, e.g.*, United States v. Singleton, 41 M.J. 200, 204 (C.M.A. 1994) (finding that new evidence warranted a new trial); United States v. Van Tassel, 38 M.J. 91 (C.M.A. 1993) (holding that a new trial was warranted but ordering a rehearing); United States v. Williams, 37 M.J. 352, 356 (C.M.A. 1993) (stating that it is not inappropriate to apply the new evidence rule to order a rehearing or to reopen a trial); *Scaff*, 29 M.J. at 66 (ordering a rehearing); United States v. Dixon, No. 96-00466, 1997 CCA LEXIS 395, at *8 (N-M. Ct. Crim. App. July 21, 1997) (unpublished op.) (discussing error in denying defense motion to reopen but setting aside findings and sentence on other grounds).

46. *See, e.g.*, United States v. Parker, 36 M.J. 269 (C.M.A. 1993) (discussing the distinction between a rehearing and a new trial). The court stated that "[t]he two proceedings may be indistinguishable once you get there, but it's how you get there that matters" and "[t]he key element is the conclusion of error in the proceedings." *Id*. at 271.

47. A discussion of the different types of post-trial sessions is beyond the scope of this article. The point made here is that there is considerable confusion in just deciding what to call a post-trial session. This confusion is part of the bigger problem of improper application of RCM 1210(f) to new evidence which is addressed *infra.* For an excellent discussion of the problem with labeling post-trial sessions, see Woolf, *supra* note 40, at 27, and Major Jerry W. Peace, *Post-Trial Proceedings*, ARMY LAW., Oct. 1985, at 20.

> of the information that needed to be evaluated by a factfinder, in order to assess appellant's culpability, was not.[48]

A. Falling Short of Its Intended Mark: Improper Application of the Standard

Aside from trial and appellate courts attaching different labels to post-trial proceedings, the real problem is applying the wrong standard or the right standard improperly.[49] Article 73 and RCM 1210 were designed for the rare and unique problem of newly discovered evidence. The drafters of Article 73 were concerned that the military justice system needed a mechanism to handle newly discovered evidence.[50] They believed that the military appellate process did not provide for review of such evidence since it would be outside the record of trial.[51] Despite their good intentions, application of the new trial standard has fallen short of its intended mark. This has occurred at both the trial and appellate court levels. This reoccurring problem indicates that a new standard is required. At the very least, practitioners need clearer guidance on applying the rule.

1. Improper Standard Applied by the Trial Court

In *United States v. Fisiorek*,[52] the accused was found guilty of using cocaine.[53] After findings were announced, the trial court recessed. During the recess, a witness approached the defense and claimed he was responsible for blowing cocaine on cookies that the accused later ate, leading to the accused testing positive in a subsequent urinalysis. The defense moved for a mistrial, offering an affidavit from the witness. The military judge denied the motion and a subsequent defense request to reopen the case.

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48. *Singleton*, 41 M.J. at 207. *Singleton* is discussed further in Part IV.A.2, *infra*.

49. Attaching the wrong label does not mean that the court applied the wrong standard. The best example is *Scaff*, 29 M.J. at 66. The court stated that the trial judge could have set aside the findings "so that a *rehearing* could take place." *Id.* (emphasis added). What the court should have said is "so that a *new trial* could take place." The court's analysis and ultimate holding suggest that this is what they meant.

50. *Hearings on H.R. 2498*, *supra* note 26, at 1211 (Mr. Larkin's comments).

51. *Id.*

52. 43 M.J. 244 (1995).

53. *Id.* at 245.

The military judge applied the new trial rule under RCM 1210(f)(2) to both the motion to dismiss and the request to reopen.[54]

Holding that the military judge abused his discretion by denying the request to reopen, the CAAF stated that "the literal and strict application of the newly-discovered-evidence rule, which implements the statutory rule found in Article 73, UCMJ, 10 USC § 873, during trial, is inappropriately severe."[55] In other words, the military judge applied the wrong legal standard.[56]

The CAAF also indirectly acknowledged that the military judge probably applied the wrong standard based on dicta from one of their own cases.[57] In his concurring opinion in *United States v. Eshalomi*,[58] Judge Cox stated:

> If the discovery [of new evidence] occurs prior to announcement of the sentence and if the accused so moves, the military judge has the option of reopening the trial for the purpose of presenting the evidence to the court-martial. In considering the motion, I would adopt the same test that is used to determine if a new trial would be warranted by the discovery of new evidence [that it would probably produce a substantially more favorable result for the accused].[59]

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54. *Id.* at 246.

55. *Id.* at 247. The court also stated that the motion for mistrial is a drastic remedy that should only be applied after other lesser remedies are considered such as allowing a party to reopen its case. *Id*.

56. However, the court declined to establish a rule for military judges to follow as to the proper legal standard that should apply when new evidence is discovered during trial. Instead, the court provided the following general guidance:

> Suffice it to say, normal rules of relevance, cumulativeness, adequacy of substitutes in the record, completeness of the record, the interests of justice, the elimination of post-trial attacks on the verdict as well as mitigation of ineffective-assistance-of-counsel claims are all considerations. But the primary consideration should be whether discovery of the new evidence is *bona fide* and whether the new evidence, if true, casts substantial doubt upon the accuracy of the proceedings; that is, a rule which is not only fair to the defendant, but fair to the prosecution as well.

Id. at 248.

57. *Id.* at 246.

58. 23 M.J. 12 (C.M.A. 1986).

59. *Id.* at 28.

In *Fisiorek*, however, the CAAF never directly stated that this guidance from *Eshalomi* was wrong.

United States v. Scaff[60] also exemplifies the confusion at the trial court level. After the accused was found guilty of using cocaine, the defense learned of a witness who claimed that someone had placed cocaine in the accused's drink without his knowledge. The defense counsel promptly notified the military judge who scheduled a post-trial Article 39(a) session. However, upon advice of his staff judge advocate, the convening authority denied the defense request to pay the witness to attend the post-trial session. Despite believing this denial was incorrect, the military judge concluded that he did not have the authority to conduct a post-trial session to consider the newly discovered evidence.[61]

The Court of Military Appeals found that the military judge did have the authority under RCM 1102(b)(2) and UCMJ Article 39(a) to "conduct a post-trial session to consider newly discovered evidence."[62] The court also recognized that Article 73 did not apply until after the convening authority took action.[63] However, the court stated that this did not limit a military judge's authority under Article 39(a) to conduct a post-trial session to consider newly discovered evidence. Although the court cleared up the question as to whether RCM 1210(f) could apply before the convening authority's action, *Scaff* is a good example of how the language is misleading in both the rule and Article 73.[64]

2. Proper Standard Misapplied by the Trial Court

In *United States v. Williams*,[65] the Court of Military Appeals found that the military judge abused his discretion in denying a defense motion for a rehearing based on new evidence discovered after trial.[66] The accused was found guilty of rape and false swearing. After trial, the

60. 29 M.J. 60 (C.M.A. 1989).

61. *Id.* at 63-64.

62. *Id.* at 65. The case was returned for a hearing pursuant to *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967). *Id.*

63. *Id.* at 66.

64. Misleading in the sense that the wording of each does not give authority for the military judge (or anyone) to conduct a post-trial session before the convening authority takes action.

65. 37 M.J. 352 (C.M.A. 1993).

66. *Id.*

defense discovered that the victim was having an extramarital affair with another soldier and attempted to commit suicide when the affair ended. At a post-trial Article 39(a) session, the military judge denied the defense request for a rehearing or to reopen its case on findings.[67] However, the convening authority ordered a rehearing on sentencing based on the military judge's finding that this "new evidence would affect the sentence portion of the trial."[68] At the post-trial session, the military judge applied RCM 1210(f). The Court of Military Appeals held that the military judge abused his discretion when he found that this new evidence probably would not produce a substantially more favorable result for the accused.[69]

The court also concluded the Army Court of Military Review erred when it found that the military judge "did not consider whether the evidence was discoverable prior to trial by the exercise of due diligence."[70] The Court of Military Appeals found that the record clearly established the defense's diligent attempts to ferret out this evidence; therefore, the lower court's ruling was based on "an obvious misreading of the record of trial."[71] In *Williams*, the three levels of courts looking at the same evidence reached three completely different conclusions. Regardless of which court was correct, this demonstrates the problems with the new trial standard. It is too confusing and easily misapplied.

The Court of Military Appeals arrived at a similar result in *United States v. Singleton*.[72] The accused was found guilty of rape, communicating a threat, adultery and unauthorized absence. The defense made a pretrial motion alleging command influence. The military judge granted the relief requested by the defense relating to the presence and testimony of members within the chain of command. However, after trial and before authentication of the record, a post-trial Article 39(a) session was held at the defense's request to consider new evidence of command influence. Finding command influence but no prejudice to the accused, the military judge denied the defense's motion to dismiss and a request for

67. *Id.* at 355.

68. *Id.* at 354.

69. *Id.* at 356. In other words, the military judge misapplied the third prong under the rule. The military judge also found that the first two prongs were met by the defense. The Court of Military Appeals stated that the record "discloses noncumulative, uncontradicted impeachment evidence which was relevant not only to a material issue in this case but the dispositive issue in the case—the victim's credibility." *Id.* at 357.

70. *Id.* at 357 n.3.

71. *Id.*

72. 41 M.J. 200 (C.M.A. 1994).

a new trial. The command influence issue was intertwined with the request for a new trial because several witnesses were intimidated or withheld from the defense by the command.[73]

The Court of Military Appeals found that the "military judge abused his discretion in concluding that the evidence probably would not produce a substantially more favorable result for appellant."[74] Although the court applauded the "Herculean" efforts of the military judge throughout the trial, the evidence that was not put before the members because of the command's influence kept the appellant from receiving a "full and complete trial."[75]

3. Improper Standard Applied by the Appellate Court

In *United States v. Dixon*,[76] an unpublished opinion by the Navy-Marine Corps Court of Criminal Appeals (NMCCA), the accused was found guilty of wrongful possession with the intent to distribute marijuana and wrongful distribution of marijuana.[77] The government's only evidence implicating the accused was the testimony of a co-actor. After trial, the defense moved for a new trial or to reopen its case based on newly discovered evidence consisting of several witnesses who could impeach the co-actor's testimony.[78] The military judge denied both the request to reopen and the motion for a new trial. He found that the witnesses could have been discovered before trial with the exercise of due diligence and that, had they testified, his findings would not have changed.[79]

The NMCCA set aside the findings and sentence of the trial court based on the legal and factual sufficiency of the evidence.[80] Collateral to the main decision, the NMCAA also stated that the military judge committed error by denying the motion to reopen.[81] The law does not support this

73. *Id.* at 204.

74. *Id.* at 207 (citing MCM, *supra* note 11, R.C.M. 1210(f)(2)(C); UCMJ art. 73 (2000)).

75. *Id.* at 206-07.

76. No. 96-00466, 1997 CCA LEXIS 395, at *8 (N-M. Ct. Crim. App. July 21, 1997) (unpublished op.).

77. *Id.* at *2.

78. *Id.*

79. *Id.* at *5.

80. *Id.* at *7.

81. *Id.* at *8.

collateral finding, however. The NMCAA stated that the military judge might not have been aware of the CAAF's decision in *Fisiorek*,[82] and the court concluded that the military judge should have allowed the accused to reopen his case based on the "*Fisiorek* test."[83] In *Fisiorek*, however, the request to reopen was made just after findings and before the court reconvened for sentencing. Although the *Fisiorek* court established that the new trial standard for newly discovered evidence under RCM 1210 was "inappropriately severe," the CAAF specifically stated that it was the application of the new trial standard "*during trial*" that was "inappropriately severe."[84] Thus, in *Dixon*, the NMCCA erred because the defense requested to reopen the case a month after the trial concluded.

In addition, the NMCCA was wrong in holding that the military judge "incorrectly applied the '*Williams* test' in denying the appellant's motion to reopen."[85] First, the CAAF did not announce a new standard in *Williams*. The court merely reviewed the military judge's application of RCM 1210 to newly discovered evidence. There is no "*Williams* test." Second, unlike *Fisiorek*, the defense request to reopen its case in *Williams* came after trial.[86] Although *Dixon* has no precedential value, it offers a clear example of how the new trial standard has fallen short of its mark. This area of the law is riddled with errors committed by trial and appellate courts. These errors will continue unless the new trial standard under RCM 1210 is changed or clearer guidance is provided for applying the rule.

In *United States v. Brooks*,[87] the CAAF held "that the [NMCCA] erred by failing to apply the correct legal standard to the evidence."[88] The accused was found guilty of conspiracy to distribute methamphetamines and of several other drug-related offenses. After trial, the defense filed a petition for a new trial with The Judge Advocate General of the Navy as required under RCM 1210(a).[89] The petition was sent to the NMCCA

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82. *Id.* at *9 n.4. In the footnote, the court recognizes that the trial and subsequent post-trial session occurred months before the decision in *Fisiorek* but the record of trial was not authenticated until over a month later. In other words, the court is implying that the military judge could have changed his ruling had he read the decision in *Fisiorek* before authenticating the record of trial.

83. *Id.* at *10.

84. United States v. Fisiorek, 43 M.J. 244, 247 (emphasis added).

85. *Dixon*, 1997 CCA LEXIS 395, at *8.

86. United States v. Williams, 37 M.J. 352, 354 (C.M.A. 1993).

87. 49 M.J. 64 (1998).

88. *Id.* at 70.

89. *Id.* at 68 (citing MCM, *supra* note 11, R.C.M. 1210(a)).

since the case was pending before that court.[90] The basis for the petition centered on evidence from a co-actor to the conspiracy offense. The co-actor claimed he never saw the accused at a location where a controlled drug buy allegedly occurred between the accused and several undercover agents. This testimony contradicted the observations of the undercover agents. Neither side called the co-actor to testify during the trial, mainly because he was very uncooperative. The newly discovered evidence was the co-actor's affidavit, which showed the trial counsel improperly threatened the co-actor, according to the defense's petition. The NMCCA denied the petition because the court did not believe the co-actor was threatened.[91] Based on this belief, the court apparently did not analyze the newly discovered evidence under RCM 1210.

The CAAF remanded the case to the NMCCA, directing that court to reconsider the new trial petition under RCM 1210. The CAAF implied it was remanding the case because the lower court improperly determined that the co-actor's claim was not true. The CAAF firmly established that the authority first reviewing a new trial petition does not decide whether the underlying facts of the petition are true. Instead, "[i]t merely decides if the evidence is sufficiently believable to make a more favorable result probable."[92]

Although the CAAF held that the lower court applied the wrong legal standard in denying the new trial petition, the NMCCA never reached the question of whether the new evidence satisfied the requirements of RCM 1210(f). However, the opinion is important for two reasons. First, it is another example of the difficulty encountered when handling issues of newly discovered evidence. Second, the opinion established, or at least clarified, if the reviewing authority determines the credibility of newly discovered evidence. The reviewing court is not supposed to decide whether the new evidence is true or determine the historical facts.[93] The CAAF did not elaborate on the term "historical facts." Applying the facts of the *Brooks* case, the CAAF apparently meant that the reviewing court cannot deny a new trial petition based solely on its determination that the evidence is untrue. When there are opposite and supportable positions, the reviewing court does not determine what really happened in a case. Rather, the ultimate question is whether the new evidence is "sufficiently believable"

90. *Id.* (citing MCM, *supra* note 11, R.C.M. 1210(e)).
91. *Id.* at 67.
92. *Id.* at 69.
93. *Id.*

such that it is probable that a more favorable result would have occurred had the new evidence been before the factfinder.[94]

4. Proper Standard Misapplied by the Appellate Court

The accused in *United States v. Niles*[95] was found guilty of rape and several other lesser offenses.[96] The only direct evidence presented by the government regarding the rape was testimony from the victim. Apparently, the defense filed a new trial petition with the Army Court of Criminal Appeals (ACCA).[97] The newly discovered evidence was testimony from an officer who had interviewed the victim after the rape. The officer was reviewing an adverse officer efficiency report the accused had received, and the victim had some knowledge related to the adverse report. When the officer was interviewed by the defense before trial, he could not remember very much due to the passage of several years. However, his memory of the interview with the victim improved after trial. In that interview, the officer later recalled, the victim did not say she was raped, and she never claimed that she had told the accused to stop when they had sexual intercourse.[98]

The CAAF found that the ACCA erred "in concluding that [the officer's] testimony clearly would not produce a more favorable result for appellant at a new trial."[99] The court expressed disappointment with having to review this case by stating that "in such a case where the record discloses such a dichotomy of evidence, this Court is troubled by being in the position of attempting to assess the impact of important evidence on review rather than leaving such an evaluation to the factfinder."[100] The CAAF should not be expressing concern about having to review this case.

94. *Id.*

95. 45 M.J. 455 (1996).

96. *Id.*

97. From the CAAF decision, it is unclear when the new evidence was discovered or when (and to whom) the petition was initially made.

98. *Id.* at 458.

99. *Id.* at 459 (citing United States v. Sztuka, 43 M.J. 261, 268 (1995)).

100. *Id.*

Instead, the court should be concerned that the new trial standard under RCM 1210(f) is the real problem.

In *United States v. Sztuka*,[101] the accused was found guilty of wrongful use of marijuana. Innocent ingestion was the defense theory of the case. About a month after trial, the defense discovered evidence that supported this theory. The new evidence was a witness who claimed the accused's husband admitted to the witness that he had placed marijuana in food his wife later consumed. The witness also claimed the accused's husband wanted to get back at his wife for her wanting to leave him. The defense moved for a new trial at the Air Force Court of Military Review (AFCMR) where the case was pending review. The AFCMR denied the petition, but the CAAF held that the AFCMR abused its discretion and reversed the lower court's decision.[102]

Quoting the military judge when he noted on the record that this case had become a "judicial afternoon soap opera," the CAAF stated that "[l]ike all soap operas, this one has at least one more installment to play out."[103] The basis for the court's holding was that "the court below abused its discretion when it held that the new evidence would probably not produce a substantially more favorable result for appellant."[104]

B. Criticism: Trying to Fit a Square Peg into a Round Hole

1. The Drafters' Intent

There is no language in the text of Article 73 or RCM 1210 that states, or even implies, that a new trial petition can be made before action is taken by the convening authority. A plain reading of both Article 73 and RCM 1210 leads to one conclusion: A new trial petition can only be made after action is taken by the convening authority. The legislative history of Article 73 suggests the same conclusion. The closest the drafters came to discussing the period after trial and before authentication was during hearings when they said they combined the old English writ of *coram nobis*[105] with the motion for a new trial based on newly discovered

101. *Sztuka*, 43 M.J. at 261.

102. *Id*.

103. *Id*. at 271. The findings and sentence were set aside and the record of trial returned to The Judge Advocate General of the Air Force to decide whether to order a new trial. *Id.*

104. *Id*. (citing MCM, *supra* note 11, R.C.M. 1210(f)(2)).

evidence.[106] However, a strict reading of the text leads to an interpretation that limits the period to just two years from approval of the sentence by the convening authority.[107]

On the other hand, a liberal reading of the text leads to a broader interpretation that would allow submission of a petition at any time up to two years from action by the convening authority. This reading is consistent with the concerns of the drafters for "finality" of courts-martial.[108] They never discussed a limit on how early a petition could be made; their primary concern was the cutoff time for submitting a new trial petition.[109] Regardless, if the drafters intended Article 73 to apply before action by the convening authority, they would have said so in the text of the article or at least mentioned it during the hearings.

2. What is "Not Inappropriate?"

The CAAF's opinion in *United States v. Williams* sends mixed signals.[110] The court stated that "[a]pplication of this three-prong test [RCM 1210(f)(2)] to post-trial motions for a rehearing or reopening of the trial pursuant to RCM 1102 and Article 39(a) is *not inappropriate*."[111] First, the court never made a distinction between "rehearing," "reopen," and "new trial." The court used these labels loosely in referring generally

105. Meaning "our court," "[t]he essence of [*coram nobis*] is that it is addressed to the very court which renders the judgment in which injustice is alleged to have been done, in contrast to appeals or review directed to another court." BLACK'S LAW DICTIONARY 337 (6th ed. 1990).

106. *Hearings on H.R. 2498*, *supra* note 26, at 1211 (comment by Mr. Larkin).

107. There is also support for this interpretation from the Court of Military Appeals (now the Court of Appeals for the Armed Forces). In *Dunlap v. Convening Authority*, 48 C.M.R. 751, 753 (C.M.A. 1974), the court addressed the finality of courts-martial as compared to trials in the federal system regarding speedy disposition of charges. The court stated that "[i]n the federal civilian criminal justice system, finality of verdict and sentence is established in the trial court." *Id*. However, in the military justice system, "the functions of the court-martial and those of the convening authority in the determination of guilt and in the imposition of sentence are so connected that they can be regarded as representing . . . a single stage of the proceedings against the accused." *Id*. In other words, the "trial" is not over until the convening authority takes action. Since court-martial proceedings are not over until action is taken, there is strong support for the interpretation that the drafters' intended for Article 73 to apply only after action by the convening authority.

108. *Hearings on H.R. 2498*, *supra* note 26, at 1210-12.

109. *Id*.

110. United States v. Williams, 37 M.J. 352 (C.M.A. 1993).

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

to post-trial hearings.[112] Reopening a trial or conducting a rehearing is much different from setting aside findings and sentence in a case and then starting a new trial. Reopening a trial or conducting a rehearing may not nullify the entire trial. However, the court set aside the findings and sentence and returned the record so that a "rehearing may be ordered."[113] In short, the court ordered a new trial, not a rehearing. Although this is just a problem with semantics, it still clouds an already overcast area of the law.[114]

Second, the CAAF adds a thick fog when it says "not inappropriate." What does the court mean? Why not just say "appropriate?" The court may be telling military judges to go ahead and apply RCM 1210 but be careful because they are not sure it is the appropriate standard. At the very least, it shows that the court is not convinced that extending the rule to post-trial motions for a rehearing or reopening of the trial is a good idea.

3. Error by Trial and Appellate Courts: An Unnecessary Trend

In a span of less than ten years, application of RCM 1210(f) resulted in errors in eight cases at trial or on appeal.[115] Generally, the errors were committed by trial or appellate courts applying RCM 1210(f) when it should not have been or by applying the rule improperly. Although error in approximately one case per year may not seem alarming, the cumulative effect of the errors shows there is a problem with the rule. In short, trial and appellate courts have committed a significant number of errors in

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112. *See id*. (stating that "requests for a new trial, and thus rehearings and reopenings of trial proceedings, are generally disfavored").

113. *Id*. at 361.

114. Unfortunately, the MCM only adds to the confusion. Rule for Courts-Martial 810 discusses procedures for rehearings, new trials, and other trials without making a clear distinction between them. The rule merely lumps the different types of proceedings together. MCM, *supra* note 11, R.C.M. 810. The rule does define an "other trial" as "a case in which the original proceedings were declared invalid because of lack of jurisdiction or failure of a charge to state an offense." *Id.* R.C.M. 810(e). For a good discussion of the different types of rehearings, see Captain Susan S. Gibson, *Conducting Courts-Martial Rehearings*, ARMY LAW., Dec. 1991, at 9-10 (distinguishing "full rehearings, sentence rehearings, and limited evidentiary hearings").

115. The cases were discussed in Part IV.A, *supra*.

determining when to use the rule and how. This trend is unnecessary and, absent clear guidance, the trend will continue.

Instead of resolving problems with application of the rule case by case, a better standard needs to be established along with clear guidance as to how it should be applied.[116] This standard and guidance could be as simple as saying "do not use RCM 1210(f) for new evidence discovered after trial and before authentication." The CAAF could also provide guidance as they did in *United States v. Fisiorek*.[117] Instead of piecemeal resolution of problems with application of RCM 1210(f), it is time to provide practitioners with a better standard. An appropriate standard to measure newly discovered evidence will stop lower courts from trying to fit square pegs into round holes.[118]

V. The Solution: Do Not Apply RCM 1210(f) to New Evidence[119]

Newly discovered evidence is treated like a hot potato being tossed around in a smoke-filled room. The smoke represents the lack of a clear

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116. Aside from guidance from military appellate courts, one solution would be to give guidance to practitioners on RCM 1210(f). Adding a paragraph to the discussion section of the rule would provide practitioners with a better initial reference. The proposed language for the paragraph is discussed in Part VI, *infra*.

117. 43 M.J. 244, 248 (1995). The "guidance" provided by *Fisiorek* is discussed in Part V.A, *infra*.

118. Another problem noted by the majority in *Fisiorek* is that a ruling of lack of due diligence under RCM 1210(f)(2)(B) raises "the awesome specter of ineffective-assistance-of-counsel claims." *Id.* at 248 n.6. *See also* United States v. Childs, 17 C.M.R. 270, 275 (C.M.A. 1954) (finding a lack of due diligence clearly in the record of trial); Woolf, *supra* note 40, at 27 (stating that a failure to exercise due diligence . . . invites appellate action"). However, this concern does not mean the requirement for due diligence should be removed. The need for finality by limiting frivolous post-trial attacks from counsel who fail to do their jobs must remain part of the "new trial" equation. Otherwise, defense counsel may not diligently ferret out favorable or exculpatory evidence. Removing the requirement could potentially encourage the defense to be ineffective or at least to not zealously pursue discovery of the facts before trial. Due diligence needs to be considered in the new trial analysis but it must be balanced with the concerns of "the interests of justice . . . as well as mitigation of ineffective-assistance-of-counsel claims." *Fisiorek*, 43 M.J. at 248 n.6. This is in accord with practice in federal courts. *See, e.g.*, United States v. Gordon, 246 F. Supp. 522, 525 (D.D.C. 1965) (noting the requirement for due diligence but also stating that it means simple or ordinary diligence not "the highest degree of diligence").

119. Rule for Courts-Martial 1210(f) should still be applied to new evidence discovered after action by the convening authority. The proposed solution is to not use RCM 1210(f) for new evidence discovered before authentication or before the convening authority takes action.

standard on how to handle new evidence. The reluctance of military appellate courts to provide clear guidance makes the cloud of smoke even thicker. The hot potato (new evidence) gets tossed up the appellate chain because lower courts have no clear guidance. Currently, lower courts are being told that requests for a new trial are disfavored and relief should only be granted if a "manifest injustice would result absent a new trial . . . based on proffered newly discovered evidence."[120] Lower courts are reluctant to grant relief when new evidence is discovered because of this heavy burden and due to the concern over nullifying courts-martial proceedings. This burden and concern are appropriate when new evidence is discovered well after trial. The drafters intended application of the new trial standard after action by the convening authority, and this is evident by a plain reading of the text of Article 73 and RCM 1210.

A different standard for new evidence discovered before authentication is the solution.[121] Immediately after trial and until authentication, the inconvenience is less than it is well after trial. The evidence would still be close at hand, witnesses will still have a clear memory of the facts, and a majority of the parties to the court-martial will be nearby. The same is not true well after trial when action has been taken, evidence has been returned, the record of trial has been forwarded for appellate review, memories have started to fade, and the parties are no longer close at hand.

The main concern should not be inconvenience. What is most important is guaranteeing that an accused receives a full and complete trial. If newly discovered evidence strikes at the heart of the government's case and the defense has made a bona fide and good faith attempt to discover favorable evidence before trial, fairness dictates that a new trial must occur.

The solution is to not apply Article 73 and RCM 1210 before authentication (or action by the convening authority). Application of the current standard before authentication has led to a significant number of cases being reversed or remanded for further proceedings. There should be a distinction between petitions filed before and after authentication of the record because the concerns are different. The best solution available is to not use Article 73 and RCM 1210(f) for new evidence discovered after trial

120. United States v. Williams, 37 M.J. 352, 356 (C.M.A. 1993).

121. Although the focus of this article is on the period from the end of trial to authentication, extending the period to the date of the convening authority's action is also discussed.

and before authentication and to apply the guidance announced in *United States v. Fisiorek*.[122]

A. The *Fisiorek* Standard

Although the court in *Fisiorek* declined to provide a bright-line rule, they gave the following guidance to military judges:

> Suffice it to say, normal rules of relevance, cumulativeness, adequacy of substitutes in the record, completeness of the record, the interests of justice, the elimination of post-trial attacks on the verdict, as well as mitigation of ineffective-assistance-of-counsel claims are all considerations. But the primary consideration should be whether discovery of the new evidence is *bona fide* and whether the new evidence, if true, casts substantial doubt upon the accuracy of the proceedings; that is a rule which is not only fair to the defendant, but fair to the prosecution as well.[123]

1. Bona Fide Attempt at Discovery

The majority in *Fisiorek* did not elaborate on the meaning of "bona fide" as it applies to due diligence. In her dissenting opinion, Judge Crawford stated that "one must examine the parties' good faith, negligence in introducing or failing to introduce the evidence, and any deliberate withholding of evidence."[124] Although Judge Crawford argued that the defense did not meet the due diligence requirement, her discussion provides good guidance.

Most important is the good faith of the party proffering the evidence. A tactical decision to not present evidence only to spring it on opposing counsel after trial and asking for relief is unethical. The defense should not be rewarded for making a tactical error and then trying to cover up the mistake. The good faith requirement will prevent this from happening.[125] It will provide the military judge with a better tool to make a determination

122. 43 M.J. 244 (1995).
123. *Id*. at 248.
124. *Id*. at 249 (citing State v. Booze, 637 A.2d 1214, 1216-17, 1220 (1994)).

of due diligence. Case law and RCM 1210(f) currently do not provide the military judge with any guidance as to what constitutes due diligence.[126]

The diligence or negligence of a party is also important. A party with evidence sitting under their nose who fails to appreciate its significance should likewise not be rewarded. But being negligent is not the same as being deceitful. There may be times when a military judge may excuse the negligence of a party due to inexperience or just incompetence.

2. Substantially More Favorable Result

Most new trial petitions are denied because the newly discovered evidence does not meet the third prong of the rule, RCM 1210(f)(2)(C). What is a substantially more favorable result?[127] Both Article 73 and RCM 1210 are silent regarding what evidence will meet this burden. In reported cases where this standard was met, the new evidence was measured in terms of its type or form and the extent to which it contradicted the prosecution's case or corroborated the defense's case.

In terms of its type or form, newly discovered evidence meeting the burden under RCM 1210(f)(2)(C) is "relevant and admissible [as to] credibility [and consent],"[128] "material,"[129] "directly relevant to a material issue in the case,"[130] or "noncumulative, uncontradicted impeachment evi-

125. This is consistent with the practice in federal courts. *See, e.g.,* United States v. Gordon, 246 F. Supp. 522, 525 (D.D.C. 1965) (commenting that "the attorney for the defendant acted in good faith throughout" and "[t]here is no suggestion that there was any deliberate effort to make a scanty investigation with a view to using something that might be found later as a basis for a new trial if [sic] conviction resulted").

126. *Fisiorek*, 43 M.J. at 248-49, provides the one exception to this statement.

127. Other commentators have recognized the ambiguity with this phrase. *See, e.g.*, Woolf, *supra* note 40, at 31 (stating that "[t]he court in *Scaff* created some ambiguity regarding what constitutes a substantially more favorable result" because the court says that "the new evidence must produce an acquittal"). However, the analysis in *Scaff* and subsequent cases indicates "the defense need only show that the case result would be changed substantially by the new evidence—not that an acquittal would occur." *Id.*

128. United States v. Chadd, 32 C.M.R. 438, 442 (C.M.A. 1963).

129. United States v. Brooks, 49 M.J. 64, 68 (1998).

130. Unites States v. Niles, 45 M.J. 455, 459 (1996). This is consistent with practice in federal courts. *See* United States v. Lau, 828 F.2d 871, 877 (1st Cir. 1987) (stating that "discovery of new evidence merits a new trial only if [it] is material and might have had some impact on the outcome of the trial"); United States v. Buzzi, 588 F. Supp. 1395, 1397 (S.D.N.Y. 1984) (finding that non-exculpatory, cumulative, and insufficiently material evidence does not warrant a new trial).

dence [relevant] to a material issue in the case."[131] On the other hand, it does not meet the standard if it "would have done nothing more than impugn the credibility of a witness who the members . . . had already found unbelievable."[132]

In terms of the effect on the trial proceedings, newly discovered evidence meets the standard under the third prong if it "casts substantial doubt upon the accuracy of the proceedings,"[133] "may cast a substantial doubt upon the foundation of appellant's conviction,"[134] or shows that "the landscape upon which a new trial would play would be vastly different."[135] It also meets the burden if it "gives [the court] pause as to the completeness of the factfinding process,"[136] or is "significant and substantial evidence,"[137] "relevant to the fact finder [on the issue of credibility of a material witness],"[138] or that raises "a significant chance . . . that [it] could have induced a substantially more favorable result for the appellant."[139] However, Article 73 is not designed to allow "an accused to relitigate general matters which were presented below" and "[p]ost-trial attempts to exonerate co-actors should be viewed with extreme caution," including evidence that appears "contrived to exculpate the petitioner."[140]

How do these cases compare with the guidance in *Fisiorek*? There is little or no difference. Looking at each descriptive word or phrase broadly, several objective conclusions can be made. First, there is no requirement that the evidence rise to the level that it would have resulted in an acquittal.[141] Second, it must be admissible and not cumulative. Third, the new evidence has to affect a matter that relates directly to the culpability of the accused. In other words, it must be material evidence. Finally, the new

131. United States v. Williams, 37 M.J. 352, 357 (C.M.A. 1993).

132. United States v. Jiles, 51 M.J. 583, 591 (N-M. Ct. Crim. App. 1999).

133. United States v. Fisiorek, 43 M.J. 244, 248 (1995).

134. United States v. Dixon, No. 96-00466, 1997 CCA LEXIS 395, at *10 (N-M. Ct. Crim. App. July 21, 1997) (unpublished op.).

135. United States v. Sztuka, 43 M.J. 261, 271 (1995).

136. United States v. Singleton, 41 M.J. 200, 206 (C.M.A. 1994).

137. United States v. Van Tassel, 38 M.J. 91, 96 (C.M.A. 1993).

138. United States v. Good, 39 M.J. 615, 617 (A.C.M.R. 1994).

139. United States v. Dyer, 16 M.J. 894 (A.C.M.R. 1983).

140. United States v. Bacon, 12 M.J. 489, 492 (C.M.A. 1982).

141. This is actually different than the standard in federal and state jurisdictions. The standard in most other criminal jurisdictions is that the new evidence would have changed the verdict (produced an acquittal). United States v. Sjeklocha, 843 F.2d 485, 487 (11th Cir. 1988); State v. Fisher, 859 P.2d 179, 185 (Ariz. 1993).

evidence needs to do more than just contradict a material issue. Its effect must be substantial or at least significant.[142]

B. Why the *Fisiorek* Standard is the Best Solution

The *Fisiorek* standard is the best solution for several reasons. First, military appellate courts have yet to provide any clear guidance for practitioners.[143] The significant number of errors caused by inconsistent application of RCM 1210(f) over just the last decade show that the rule is not being used properly. Any guidance would be beneficial. With *Fisiorek* as a roadmap, military judges would have a means of measuring new evidence with a set of objective criteria. Instead of flying by the seat of their pants, military judges would be empowered with a clear and objective standard using the *Fisiorek* guidance. The result would be more cases being completed without lengthy post-trial remands from the CAAF or the service appellate courts.

Second, the requirements under *Fisiorek* are no different from the current rule.[144] Case law shows that the objective test for newly discovered evidence provided by *Fisiorek* is the same as RCM 1210(f). The only difference is that *Fisiorek* provides a means for military judges to appropriately measure the new evidence. There is no such guidance in the current rule or case law dealing with its application. The *Fisiorek* standard would clear up the confusion with minimal effort. The CAAF would only have to say that RCM 1210(f) does not apply to new evidence discovered after trial and before authentication. In addition, the CAAF could provide similar guidance as they did in *Fisiorek* or simply direct application of *Fisiorek* during the period before authentication (or action by the convening authority).

Third, the *Fisiorek* standard will stop the current trend of courts committing error when applying RCM 1210(f). A plain reading of the rule and the current guidance from the CAAF is "do not grant new trial peti-

142. These four factors (or conclusions) were used to draft the proposed change to RCM 1210(f) that was forwarded to military judges in the field. *See* app. A, para. 6, *infra.*

143. The guidance in *United States v. Fisiorek*, 43 M.J. 244 (1995), was for new evidence discovered *before* the end of trial.

144. With one major exception, the *Fisiorek* requirements are no different than the current rule. Currently, *Fisiorek* applies only to evidence discovered before the end of trial. This article proposes extending *Fisiorek* to the period from the end of trial to authentication or action by the convening authority.

tions."[145] However, the piecemeal handling of "new trial" cases has led to a considerable number of these cases being returned for additional proceedings. These cases demonstrate that current application of RCM 1210(f) is missing its intended mark. The *Fisiorek* standard will put military judges back on target.

Fourth, using the *Fisiorek* standard is a relatively easy solution. There would be no need for a change to RCM 1210 or Article 73 because both already state that the current standard only applies after action by the convening authority. In addition, the *Fisiorek* standard is flexible and will not restrict the broad discretion of military judges. It merely provides guidance. [146] This guidance is broad enough so that military judges will not be restricted to a particular result. In other words, the *Fisiorek* standard would provide a tool for military judges that will prevent them from trying to fit a square peg into a round hole.

Finally, the *Fisiorek* standard satisfies the concern for "finality" of courts-martial. Instead of being routinely returned for additional proceedings, cases with newly discovered evidence will be completed before they are forwarded for appellate review. This will reduce the added time and expense caused by post-trial proceedings directed by military appellate courts. More importantly, the guidance will benefit the accused. The delay from the end of trial to review on appeal has been many years in cases that have been reversed or remanded because of error in application of the current "new trial" standard.[147] Using a standard that measures newly discovered evidence appropriately will significantly reduce this delay. The

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145. *See, e.g.*, United States v. Rios, 48 M.J. 261, 267 (1998) (stating that "petitions for new trial are generally disfavored"); United States v. Black, 42 M.J. 505, 518 (Army Ct. Crim. App. 1995) (recognizing that "[r]equests for a new trial on the ground of newly discovered evidence are not regarded with favor and should be granted only with great caution").

146. In *United States v. Jiles*, 51 M.J. 583 (N-M. Ct. Crim. App. 1999), the court applied the *Fisiorek* guidance to evidence that was discovered after trial. The court recognized that this guidance from the CAAF was for new evidence discovered during trial but stated that "[n]onetheless, we apply the guidance provided in that case to these facts." *Id.* at 591. The court applied the *Fisiorek* guidance because of the CAAF's reluctance to establish a particular rule for newly discovered evidence. *Id.*

147. *See, e.g.*, *Fisiorek*, 43 M.J. at 245 (five years); United States v. Williams, 37 M.J. 352 (C.M.A. 1993) (three years); United States v. Niles, 52 M.J. 716 (Army Ct. Crim. App. 2000) (8 years).

Fisiorek guidance is this standard. It is the best solution for both the accused and the government.

C. Comments from the Field: What do the Military Judges Think?

1. Background

To get a "second opinion" regarding RCM 1210 from the legal field, the new trial questionnaire in Appendix A was sent to military judges in all of the services.[148] Seventy-five contacts were made and there were forty-two responses.[149] Only seven of those who responded had any experience with new trial petitions dealing with newly discovered evidence. There were two military judges who did not have "new trial" experience but made comments regarding the proposed discussion paragraph. Appendix B provides a summary of the comments that were received.

2. Results

Three conclusions can be made from the responses. First, new trial petitions are very rare. Of the seven military judges who had experience, the number of total petitions between them was ten. Out of the ten petitions, only two were granted and returned for a new trial or another disposition. This suggests that, not only are new trial petitions rare, but they are almost never granted. What does this mean? Either the standard is too strict or it is appropriate and the petitions that were made just did not meet the standard. Looking at all cases reported over the last ten years that considered new trial petitions, a majority of the decisions contained some form of error. A large number of these errors resulted in a finding that the cases

148. Four of the questionnaires were sent to field grade judge advocates without experience on the bench. A questionnaire was also sent to the Chief Judge of the Coast Guard Trial Judiciary.

149. The contacts were made either directly to each military judge or indirectly through the chief (senior) judge for the trial judiciary of each respective service.

needed to be returned for a new trial. Therefore, this review of reported decisions suggests that the standard is too strict.[150]

The second conclusion is that the guidance from military appellate courts is more than adequate. Six of the seven respondents with new trial experience said they felt comfortable with the case law on the subject. The one negative response related to case law that covered the third prong under the rule, whether the new evidence "would probably produce a substantially more favorable result for the accused."[151] The respondent found that case law was confusing and the analysis section of the *MCM* for RCM 1210 was no help. This opinion aside, the consensus among the respondents was that case law pointed them in the right direction.

The final conclusion is that the RCM 1210(f) discussion paragraph—proposed to the military judges in the new trial questionnaire—would be helpful. Seven of the nine respondents had a favorable opinion of the paragraph. Of those, two suggested changing some of the language or at least making the paragraph shorter. The remaining two respondents said that the paragraph was too lengthy and confusing, although only one had experience with new trial petitions. Several respondents recommended placing the paragraph in other sources like the Military Judges' Benchbook[152] or the analysis section of the *MCM*.[153] However, the consensus was that a version of the proposed paragraph should be included in the *MCM* or another source to clarify application of RCM 1210(f).

D. Getting a Second Bite at the Apple: Problems with Changing the Rule

The "court-martial process is designed to be fair and, at the same time, give finality to the case."[154] One of the major concerns of the drafters of Article 73 was finality.[155] The concern for finality must be balanced

150. The cases discussed in Part IV.A, *supra*, were decided over the last decade. Although there are other cases where error occurred, these eight cases illustrate that the rule is being applied improperly (or that the wrong standard is being used).

151. MCM, *supra* note 11, R.C.M. 1210(f)(2)(C).

152. U.S. DEP'T OF ARMY, PAM. 27-9, LEGAL SERVICES: MILITARY JUDGES' BENCHBOOK (1 Apr. 2001).

153. MCM, *supra* note 11, R.C.M. 1210 analysis, app. 21, at A21-89.

154. United States v. Fisiorek, 43 M.J. 244, 247 (1995).

155. *Hearings on H.R. 2498*, *supra* note 26, at 1215 (comment by Mr. Smart stressing the problems of obtaining witnesses and evidence which will unduly weaken the prosecution).

against the need for a fair system of justice that provides an accused with a full and complete trial. Getting a second bite at the apple may be necessary in some cases. Newly discovered evidence that is material, not cumulative, and otherwise admissible must be tested in the crucible of a court-martial. Otherwise, the courts-martial system will not produce verdicts worthy of confidence.

Since the burden is already heavy, any change to the new trial standard will be viewed as a lower burden for the accused. Many would argue that this would open the floodgates for more "new trial" requests or petitions. It may also result in an unwarranted safety net for defense counsels who do not do their jobs to ferret out favorable evidence before trial. A counsel who procrastinates and never sets foot out of his office to discover favorable evidence should not benefit later when new evidence falls in his lap after trial. The same is true for a counsel who decides not to present favorable evidence only to surprise opposing counsel with a new trial petition. However, the due diligence requirement would adequately protect against such defense counsels who fail to diligently perform their jobs.

V. Conclusion

Application of RCM 1210(f) to new evidence discovered after trial and before authentication of the record is a problem. Despite the large number of errors caused by inconsistent application of the rule over the last decade, military appellate courts have not recognized there is a problem. Without a change to the rule or clear guidance for application of the rule, these errors will continue.

The best solution is not to apply RCM 1210(f) to new evidence discovered after trial and before authentication (or action by the convening authority). In the place of RCM 1210(f), military judges should use the standard established by the guidance in *United States v. Fisiorek*.[156] New

156. 43 M.J. at 248. One court has taken the first step in this direction. In *United States v. Jiles*, 51 M.J. 583 (N-M. Ct. Crim. App. 1999), the court applied the *Fisiorek* guidance despite recognizing that the defense request for a new trial was made after trial. *Id*. at 591. *Jiles* is important because the court applied *Fisiorek* knowing that the CAAF's holding in *Fisiorek* applied to new evidence discovered during trial. *Id*. The court applied *Fisiorek* because there has been no clear guidance from any source. *Id*. Hopefully, other military appellate courts will follow *Jiles*, or at least recognize the need for a different standard for new evidence discovered after trial and before authentication (or action by the convening authority).

evidence that is discovered between the end of a trial and before authentication (or action by the convening authority) needs to be treated differently than new evidence discovered after authentication (or action by the convening authority). The concerns are different. Before authentication or action, evidence will be close, witnesses will still have clear memories, the parties to the court-martial will be nearby, and the record of trial will be available. These concerns are not the same well after trial when authentication has occurred and the convening authority has acted.

Application of *Fisiorek* is the best solution for many reasons. It will provide guidance that currently does not exist, the trend of "new trial" errors will be stopped, there will be no need to change RCM 1210(f) or UCMJ Article 73,[157] and it will satisfy the concern for finality of courts-martial. More importantly, it will result in a better military justice system.

Another potential solution would be to provide guidance in RCM 1210(f) consistent with RCM 1102(d).[158] Nearly all the military judges responding to the survey in Appendix A believed that the proposed discussion paragraph for RCM 1210(f) would be helpful.[159] If RCM 1210(f) continues to be applied to new evidence discovered before authentication, adding the proposed paragraph is an easy way to provide the guidance that currently does not exist. Without this guidance, application of RCM 1210(f) will continue to result in repeated errors.

Rather than causing the new trial "floodgates" to open or encouraging defense counsel to "sandbag," the *Fisiorek* standard would result in a more efficient system of justice. In short, it would help clear up a confusing area of the law and ensure that the court-martial process produced verdicts worthy of confidence.

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157. Neither RCM 1210(f) nor UCMJ Article 73 state that defense counsel can make a new trial petition before the convening authority takes action. In *United States v. Scaff*, the CAAF expanded the period for submission of a new trial petition to include the period before action is taken. 29 M.J. 60, 64-65 (C.M.A. 1989).

158. One military judge suggested adding language to the proposed paragraph. The language would clarify that a post-trial session may be held at the direction of the convening authority pursuant to RCM 1102(d) before action is taken. *See* app. B, para. 9, *infra*.

Appendix A

New Trial Questionnaire

Instructions: This is an anonymous questionnaire (Please do not give me your name). I am a student in the 48th Graduate Class at The Judge Advocate General's School, U.S. Army. I am writing my research paper/ thesis on "New Trials" under RCM 1210, MCM (2000 ed.). If you provide any comments, please do not use names of cases or persons related to cases that are pending review.

1. Have you ever been involved in a post-trial session as the Military Judge or counsel regarding a petition for a new trial under RCM 1210, MCM (2000 ed.)? ___yes ____no. If your answer is "no" please do not continue.

2. How many? ____

3. How did each case end up at a post-trial session? (for example, petition for new trial to the military judge before authentication of the record of trial, to the convening authority after authentication, to the Service Secre-

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159. The proposed paragraph to the discussion following RCM 1210(f) would state:

> The military judge may hold a post-trial session to consider a petition for a new trial that is filed before authentication of the record of trial or before action is taken by the convening authority under RCM 1107, MCM (2000 ed.). If such a post-trial session is held, the military judge will apply the requirements of this paragraph. The "due diligence" requirement is satisfied by a showing that the petitioner made a bona fide and good faith attempt at discovery. In finding whether or not the new evidence would probably produce a substantially more favorable result, the military judge is guided by the normal rules of relevance, cumulativeness, credibility of witnesses and evidence, the interests of justice, and elimination of frivolous post-trial attacks on the verdict. New evidence that would produce a substantially more favorable result is evidence that casts substantial doubt as to the accuracy of the trial proceedings. It does not mean that the new evidence would have resulted in a finding of not guilty for the offense related to the new evidence.

Most of the substantive language in the paragraph above is taken directly from *Fisiorek*, 43 M.J. at 248.

tary, or to the Service Court of Criminal Appeals/Court of Appeals for the Armed Forces)

4. What was the result of each petition (denied or granted)?

5. Did you feel that you had enough guidance from military appellate courts regarding how you should apply RCM 1210(f)? (please provide comments)

6. Would the paragraph below be helpful if it was added to the discussion following RCM 1210(f)? (please provide comments and use additional pages if necessary)

> The military judge may hold a post-trial session to consider a petition for a new trial that is filed before authentication of the record of trial or before action is taken by the convening authority under RCM 1107, MCM (2000 ed.). If such a post-trial session is held, the military judge will apply the requirements of this paragraph. The "due diligence" requirement is satisfied by a showing that the petitioner made a bona fide and good faith attempt at discovery. In finding whether or not the new evidence would probably produce a substantially more favorable result, the military judge is guided by the normal rules of relevance, cumulativeness, credibility of witnesses and evidence, the interests of justice, and elimination of frivolous post-trial attacks on the verdict. New evidence that would produce a substantially more favorable result is evidence that casts substantial doubt as to the accuracy of the trial proceedings. It does not mean that the new evidence would have resulted in a finding of not guilty for the offense related to the new evidence.

Appendix B

Summary of Responses

1. I have been involved with two cases where Article 39(a) sessions have been held to determine if a new trial should be granted. One was a petition to the military judge and the other was a petition to the convening authority. The convening authority did order a post-trial 39(a) session for the military judge to determine if a new trial was warranted. Each petition was denied.

There is plenty of guidance from the appellate courts on applying the standard under RCM 1210(f). That is not the problem. The problem is that the standard is so extremely high that it is virtually impossible for the standard to be overcome. In both cases the military judge was able to state that the evidence could have been discovered if due diligence was exercised. The problem I see with this rationale is that by denying the motion for a new trial, the issue of ineffective assistance of counsel is raised. What the court says is that, if counsel had interviewed this particular witness, the evidence would have been discovered. Then the converse is true that by not interviewing this witness who arguably has exculpatory or evidence likely to change the outcome, then counsel is ineffective.

The modification is very helpful. It lessens the burden on the accused to a more reasonable standard without allowing litigation of a trial just because counsel was lazy. The change also clarifies the effect that the new evidence has on findings.

2. No experience. I personally believe the language would be very helpful to practitioners.

3. I have had one case dealing with a new trial petition made to the military judge before authentication. It was denied. I had enough guidance from the appellate courts regarding application of RCM 1210(f). The discussion paragraph is too lengthy and potentially misleading/confusing. This lan-

guage is better served in the analysis section of the manual with citations to applicable case law.

4. No experience. The discussion paragraph is too lengthy and confusing.

5. I have experience with two new trial petitions. One was made to the [convening authority] and denied.

The second request was also made to the [convening authority] and a hearing was granted and held. I felt that I had enough guidance from the appellate courts. In both cases, I was aware of what I needed to do to request the hearing—by reading the rules and by a thorough review of the case law. In the case that was denied, the request was "weak." In the second case, this issue was substantial—and was well argued applying the standard. The first issue was whether the defense counsel had exercised bad faith in delaying until authentication to make the request [the judge did not consider this a real issue]. Next litigated was "due diligence"—in this situation, the new evidence came from a witness who claimed he had committed the offense. The last two prongs failed because, based on the testimony of the witness at trial, it was so readily apparent to all in the courtroom that the guy was lying and making up things as he went along. The judge could not make the leap and ruled against the defense.

The proposed discussion makes sense, appears to be supported by case law, and would make this area a bit less of a mystery—it involved some extensive research on my part to make sure I did things right in the first place.

6. I had two cases at the appellate level. Both requests for a new trial were granted. In one case, no new trial occurred because the victim disappeared. In the other, a new trial was held and the accused was acquitted.

The proposed discussion paragraph looks like a good gap-filler for that post-trial period.

7. I was involved with one new trial petition on appeal. There were actually two petitions made, one to the convening authority just after authentication and one to the [Judge Advocate General], which was forwarded to the service court of criminal appeals. Both were denied.

The issue in this case was more of a factual question than one of complicated review of the RCM. However, I felt and continue to feel that the

case law was somewhat confusing as to what constituted "probably produce a substantially more favorable result for the accused." RCM 1210(f)(2)(C). The analysis in the MCM was of little assistance in clarifying this ambiguity.

I believe the additional information would be helpful discussion, but I recommend redacting the highlighted language [deleting the portion from "cumulativeness" to "verdict"].

8. I have had one new trial petition as a military judge. It was made in the form of a motion for appropriate relief. I denied the petition without a hearing. The case was affirmed on appeal.

I had enough guidance from military appellate courts. I found no real need to go to the appellate courts—the RCM seemed to me to be quite clear on its face.

The language would be helpful. It would be especially useful for new judges who do not feel as comfortable as they might with esoteric rulings. Alternatively, it might be placed in the Benchbook.

9. I had one case with a new trial petition. I made the request after trial and before authentication of the record of trial. It was denied. The case did not involve dismissal or confinement—no relief from [the Office of The Judge Advocate General].

I had enough guidance from appellate courts (*Scaff* and RCM 1102).

Your first sentence [in the proposed discussion paragraph] appears ambiguous, unless you are recommending that RCM 1102(d) also be amended. Perhaps, you might change the latter part of the sentence to read: "…authentication of the record of trial or when directed by the convening authority before action is taken by the convening authority under RCM 1107, MCM." I have not researched all the case law recently on this but your third sentence adds additional concepts, "bona fide" and "good faith," that just seem to create additional tests that probably could be obviated by just leaving the sentence out. In your fourth sentence, I would add that "the military judge is guided by, *among other factors*, the normal rules of relevance, *admissibility*, …." The reason for adding those is so as not to limit the matters the military judge should be able to consider from the trial and also not to leave out admissibility. Some evidence may be relevant but not admissible (e.g. MRE 412 evidence that is excluded, evidence that is not

admitted under MRE 403). If you have found case law that substantially supports the last two sentences, you could probably leave them in; if not, the rule as written seems clear enough in RCM 1210(f)(2)(C). In short, if you are going to add to the current discussion section, I would recommend you pare down your suggested additional paragraph.

THE SIXTEENTH GILBERT A. CUNEO LECTURE IN GOVERNMENT CONTRACT LAW[1]

LIEUTENANT GENERAL PAUL J. KERN[2]

I have most often been a consumer of law rather than one who gives advice on its use, although I did start my career with some legal training. There probably aren't too many people left in the Army who will remember that, years ago, second lieutenants used to have "other duties assigned" as either a prosecutor or defense counsel. So it was with me. I did receive a little bit of education in law and found it very interesting to understand whether command influence had a bearing in life or not. I can tell you there were a few lieutenants I knew who prevented some colonels from being promoted. That was an interesting aspect of life back then.

But that is not the type of law I'm here to discuss today. I am here to discuss the wonderful world of procurement law, contract law, and fiscal law. I will begin by discussing the rapid evolution of procurement law. This discussion will be a backdrop for what the Army is doing today—transforming to meet the twenty-first century's National Military Strategy.

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1. The Gilbert A. Cuneo Chair of Government Contract Law was dedicated on January 9, 1984. Gilbert A. Cuneo attended St. Vincent College, Latrobe, Pennsylvania, and Harvard Law School. He received an honorary LL.D. from St. Vincent College in 1973.

After graduating from Harvard Law School in 1937, he was engaged in the private practice of law in New York City until entering military service in October 1942. From August 1944 to March 1946, he was a member of the faculty of The Judge Advocate General's School, where he taught the legal and accounting phase of government contract negotiation, termination, and renegotiation, and wrote a substantial part of the test entitled *Government Contracts and Readjustment*, published by The Judge Advocate General's School.

Mr. Cuneo served as an administrative judge with the War Department of Contract Appeals and its successor, the Armed Services Board of Contract Appeals, from 1946 to 1958, at which time he entered private practice in Washington. He served as Chairman of the Section of Public Contract Law of the American Bar Association in 1968-1969. Mr. Cuneo was an Honorary Life Member of the National Contract Management Association, a member of its National Board of Advisors and a recipient of numerous awards and citations from the Association.

A pioneer in his field, Mr. Cuneo wrote and lectured extensively on all aspects of government contract law for thirty years. As a commentator on developments in the field of government contract law and as a premier litigator, he shaped much of the present law of government contracts and was considered the "dean: of the Government Contract Bar until his death in April 1978.

I will then discuss the Army Chief of Staff and the Secretary of the Army's transformation strategy and the legal implications of that transformation. I am sure the Army will need the Judge Advocate General (JAG) community's help to solve some of those legal issues we are confronting today. Some of these issues Congress has laid out in front of us and others are the result of our own contracting efforts, which don't always come out the way we expect.

My first acquisition assignment was to the Bradley Program Office, and it was an interesting step for me. As a student at the Command & General Staff College at Fort Leavenworth, Kansas, I received orders assigning me to DRCPM-FVS. I asked, "what is that?" I didn't have a clue. I learned this was the Bradley Program Office and then spent three years in the program office just as it was going through an Army Systems Acquisi-

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2. As Military Deputy to the Assistant Secretary of the Army for Acquisition, Logistics and Technology, Lieutenant General Paul J. Kern is the senior military advisor to the Army Acquisition Executive and the Army Chief of Staff on all research, development and acquisition programs and related issues. He supervises the Program Executive Officer system, and serves as the Director, Army Acquisition Corps.

General Kern, a New Jersey native, was commissioned in 1967 following graduation from the United States Military Academy. In 1973 he earned Master's Degrees in Mechanical and Civil Engineering from the University of Michigan. His military education includes the Armor Officer Basic Course, Infantry Officer Advanced Course, United States Army Command and General Staff College, Defense Systems Management College, and a Harvard University Senior Service College Fellowship.

Prior to assuming duties as the Military Deputy, Lieutenant General Kern served as the Commander, 4th Infantry Division (Mechanized), the Army's Experimental Force. General Kern's career includes service as the Senior Military Assistant to the Secretary of Defense and Senior Military Assistant to the Deputy Secretary of Defense; Military Staff Assistant, Defense Research and Engineering for Test and Evaluation, Office of the Secretary of Defense; Director of Requirements (Support Systems), Office of the Deputy Chief of Staff for Operations and Plans; Team Chief, Light Combat Vehicle Team, Office of the Deputy Chief of Staff for Research, Development and Acquisition; Program Branch Chief, Bradley Fighting Vehicle Systems; Commander, 5th Battalion, 32d Armor, 24th Infantry Division, Fort Stewart, Georgia; Commander, 2d Brigade, 24th Infantry Division at Fort Stewart and Southwest Asia during Desert Storm; and Assistant Division Commander of the 24th Infantry Division at Fort Stewart. General Kern taught weapon systems and automotive engineering at the United States Military Academy and was the department's research officer. He also served two tours in Vietnam with the 11th Armored Cavalry Regiment as a platoon leader and troop commander, and as a battalion operations officer with the 3d Armored Division in Germany.

tion Review Council (ASARC). That was my first encounter with acquisition law.

I arrived at the program office in 1979. At that time there was a law on the books stating that if the Bradley program didn't begin production of the Bradley Infantry Fighting Vehicle by 1980, then it could not be produced. The Bradley program conducted a series of reviews designed to put the Bradley into production as Congress directed (because the Army couldn't make up its mind).

The Bradley program actually began in 1963. I joined it in 1979. The program started out in 1963 as the Mechanized Infantry Combat Vehicle—the MICV '63. During the same period, the Army started another program called the Army Reconnaissance Scout Vehicle (ARSV), which had two competing variants—wheeled and tracked. The Army made several attempts to consolidate the MICV '63 and ARSV programs only to split them apart each time. By 1979, Congress had grown weary of the Army's indecision. Congress then said to either get on with it or forget it. That is when they set the 1980 production deadline. This was my first encounter with the legal and acquisition processes intersecting.

The second encounter was a more interesting one for me. I was directed to report to Aberdeen Proving Ground with an Air Force colonel named Burton in order to observe the Bradley live-fire testing. I wondered why an Air Force colonel was testing an Army vehicle. At the conclusion of the live fire testing, I reported to General Merryman, who was the Deputy Chief of Staff for Research, Development, and Acquisition at the time, to back brief him on the test. Coincidentally, Colonel Burton was working in the same office in which I would work years later—the Defense Research and Engineering for Test and Evaluation, Office of the Secretary of Defense. That was the second set of legal issues that I got involved in which defined acquisition. The event led to the laws under which we must conduct live-fire testing today.

I could relate many stories that demonstrate the link between the law and acquisition. Mr. Norsworthy[3] could probably tell you a few dozen that

3. Levator Norsworthy, Deputy General Counsel (Acquisition), Office of the Army General Counsel, serves as a legal advisor to the Army Acquisition Executive.

I've asked him to solve over the last couple of years. I'll mention some of those stories in context during today's lecture.

Acquisition has always been exciting and interesting for me. I really think that the acquisition community has a great deal to contribute to the future of the Army. My experience has been that most of the Army is focused on what is happening today: the readiness of the Army to meet its mission requirements, to fulfill the Regional Commanders-in-Chiefs' (CINC) requirements around the world, and to carry out what we are directed to do under U.S. Code Title 10—to raise, train, and equip the Army.

What does that leave for us? Our responsibility is not only to the Army of today, but the Army of the future. We have been blessed with a pretty good Army in the last half of the twentieth century. Our challenge is to make sure our future soldiers inherit an Army that is equipped to do the job that they are asked to do. That means we are asked to put on our thinking caps, to look into that crystal ball and try to figure out what the Army of tomorrow should be like. What I want to show you is the path I believe we are on today. A lot of it isn't crystal clear, but we have to crystallize it soon with some good ideas.

You will be challenged in areas of intellectual property rights for which there is no case law. Information technologies are abounding now, but when current case law was written, there were not a lot of microprocessors in use around the world the way we are going to use them in the future military. We will have to figure that out.

One of the major issues on the table today concerns information security. What are the security requirements for a tactical Internet? Who is going to be allowed to use it? What information will travel across the tactical Internet? We are going to have all sorts of interesting discussions about that. It seems very easy to secure information when it is written on paper in black and white. It is an altogether different matter when that same information is located on a disc drive. Imagine the legal records you are going to have to reference in the twenty-first century. How much of the information on that tactical Internet disc drive needs to be saved? Where do you save it? Who is responsible for it? How do you refer to it? Who has access to it? What happens when the information is never delivered to its intended recipient, but just gets stored in the ether somewhere, never quite making it because the electrons get lost? I know it is hard to believe, but sometimes out there in that great ether, electrons never make

it from the sender to the receiver. I am sure the electrons are out there somewhere and I am equally sure that some electrical engineer can prove that they really aren't lost, but we argue an awful lot about what happens in those lines of code and where the information goes when the electrons are misdirected.

Another set of issues that we deal with is the business of testing. Airplanes fly today based on a model. When the Wright brothers attached a cable with some levers back to a control surface, it was pretty easy to figure out that when they pulled on a specific lever, a control surface moved, and the aircraft moved up or down, left or right. Today, that lever isn't attached to any cable; it is attached to electrons. A model designates what a specific surface will do. In some cases, one only need enter flight instructions into a computer and the plane responds to the inputs. Who really is flying that machine? You can take that on to the next step as we move to unmanned vehicles and try and determine the legal responsibilities [for] these systems, particularly if we use them in lethal roles. There is going to be a whole new set of issues that emerges as we develop these weapon platforms of the twenty-first century.

With that introduction, I'll begin the main theme of my presentation. The presentation will cover some history and it will explain where the Army is headed. It will also show that, even though times have changed, many of the issues we are dealing with today are not new. Whether it was General Washington equipping and supplying the Revolutionary Army or General Shinseki developing equipment for the Objective Force in the Information Age, many of the same issues still apply.

Today, we move into the twenty-first century, but we are still trying to solve the same problems of equipping our armed forces and doing it legally. It is interesting to go back and look at the history of materiel acquisition. When Washington crossed the Delaware in 1792, the Treasury Department purchased War Department supplies. You can imagine the difficulty that caused. In 1798 the War Department and the Navy Department were given authority to procure their own supplies. That was probably the first set of legal issues that were raised as our forefathers identified the Executive Branch roles.

In 1809 the first federal statutes requiring advertising were written. You can all imagine the discussion that took place when people realized they could no longer buy from familiar contacts or friends, regardless of who had the "best" deal. The War Department began trying to figure out

how to get the best supplies for the armed forces and how to do it in a fair and equitable manner. The next step in the procurement evolution was the introduction of sealed bids. The government was required to advertise once a week for four weeks and award the contract to the lowest bidder. There were also some constraints inherent in the sealed bid process. Sealed bids had to be opened in the presence of two witnesses and even more constraints were put on top of that. Over time, one can see that new laws were written, usually in response to abuses of the system. The Army then went to abstract bids in 1843, and advertising sixty days before presenting a bid opening became a requirement in 1852. During the Civil War, purchases and contracts for supplies and services in any department of the government required advertising. Another interesting aspect that came into play during that period of time was the fact that most Civil War logisticians were contractors. All those muleskinners that brought supplies forward were under contract to the Army Quartermaster. Much of the Army's medical support during the Civil War was contracted as well. So our current efforts to deal with contractors on the battlefield are not new. They have been around for a while.

The year 1876 saw the first codification of the United States Statutes and the use of sole source exceptions in procurement. Occasionally today we see sole source exception requests.

World War II brought some significant changes. Less than two weeks after Pearl Harbor was attacked, the Congress enacted Title II of the First War Powers Act of 1941. This Act authorized the President to empower agencies connected with the war effort to enter into contracts without regard to existing provisions of law, wherever such action was deemed to facilitate the prosecution of war. Clearly a different set of criteria applied during this period because the entire country was brought to a war-time footing. Following World War II, procurement law as we know it today began taking shape as outlined in the Armed Services Procurement Act in 1947.[4] This Act removed almost all of the exceptions that had been granted during World War II and required advertising of all procurements unless authorized otherwise by seventeen specific exceptions. In 1984, procurement law continued to evolve with adoption of competition in con-

4. Armed Services Procurement Act, 10 U.S.C. §§ 2202, 2301-2314, 2381, 2383 (1948).

tracting as outlined in the Defense Acquisition Regulation (DAR). The DAR has since been replaced by the Federal Acquisition Regulation.

Now, it is always interesting when I talk with young contracting officers about the benefits codification provides them when they are deployed to places like Bosnia, Albania, or Central Africa. Just trying to get these guys to read the Federal Acquisition [Regulation] is a challenge in and of itself. Contingency contracting is further complicated by the fact that we often send our troops to countries where there is no history or knowledge of private contracts. In such cases our contingency contractors must teach those rules and regulations to those with whom they award contracts. In the Balkans the locals have quite a bit of contracting experience. In Hungary, there is a good understanding of how competition and capitalism work and they work within the system pretty well—they are very competitive. In Serbia however, where the people have been raised under communist rule, the local people, with whom contracting officers must negotiate, don't even understand the concept of a two-party contract. Their experience tells them their government must be a third party in the contract. They clearly don't understand why the U.S. Army has contracted with the low bidder, the United Kingdom, to rent trucks when there are local trucks available for the Army's use. That is the position we put contracting officers in today as we send them off to do contingency contracting.

We are doing certain things to make it easier for our contracting personnel. One of our initiatives is to make the contracting process paperless. For example, when a contracting officer hands over a computer disc to a contractor in Rwanda, I want to make sure that he accepts it and provides gasoline in return. Those are the kind of issues with which we currently deal on a daily basis. The better we try to define the roles, the more exceptions we find. We put people in impossible situations and expect them to succeed. That is the situation we live in today.

We have been through a lot of different changes for a lot of different reasons, most of the changes resulting from abuses of the procurement process. For that reason the government has tended to legislate or regulate almost the entire process. Having gone too far, the government recently began acquisition reform. That brief history brings us to where we are today.

As we look around the world we believe that in the near-term there is no major military competitor. The United States truly has the most profi-

cient armed service anywhere in the world today—Army, Navy, Marine, Coast Guard—you name it and we are the best. There aren't too many people who would argue against that point.

There is a very interesting book called *The Innovator's Dilemma*.[5] This book has nothing to do with war; it has to do with business. The book is based on two case studies in particular: one that deals with the steel industry and another that deals with memory storage for computers—specifically, hard disc drives. In both cases, when a successful company followed the advice of this country's business schools and the best practices for making a profit, it lost. In the steel industry, a small businessman started a junk business. Soon the man started looking at scrap steel and developed the micro-steel mills, which put the big steel industry in the United States pretty much out of business. The big businesses failed to heed the growing niche market that eventually overcame them.

The same thing happened with disc drives. The big drives were produced for the big main frames and with time they were developed to be more and more efficient. Then somebody came along with another storage device that was much smaller, but it wasn't very efficient. When all of the cost analysts looked at it, they said, "No, this doesn't enter into our profit picture, we aren't going to invest in that business." Low and behold those are the drives that made their way into the lap top computers and PCs and put all the mainframes out of business. The message for the biggest guy on the block is to be careful of the small guy.

There is evidence [that] suggests that the time to be most cautious is when someone, no matter how small, is going to find a way to defeat you. In the military we call it asymmetric warfare. From a legal perspective, if you happen to be the general counsel to the president of Sudan, what is the difference between a cruise missile destroying your neighborhood and a truck bomb destroying somebody else's neighborhood in another country? The results are the same. We really have to find out what that niche warfare is all about and try to understand the issues from the world's perspective, not just our own. What I am saying is that in the mid-term some of our competitors may emerge as asymmetric threats that expand their limited information warfare capability and open up a whole new set of legal issues with which we must deal. Information warfare is probably going to be the most legalistic warfare with which we have ever had to deal. We

5. CLAYTON M. CHRISTENSEN, THE INNOVATOR'S DILEMMA: WHEN NEW TECHNOLOGIES CAUSE GREAT FIRMS TO FAIL (1997).

must decide who will be allowed access to our information networks and how we will protect those networks. Information warfare will raise a whole new set of issues for us to solve.

In the far-term, a strong military competitor will emerge—history has taught us. Nobody stays on the top forever. We should expect that to happen. The question is how do we prepare for that?

In 1989, the Army was just looking to downsize its eighteen active duty divisions and ten reserve component divisions when Desert Storm put it all on hold. After the Gulf War we really did start coming down, and things started to change. Some would say that the Army didn't change quickly enough. Some would say that it still hasn't changed quickly enough, but it has changed. We now have fewer divisions. The Division XXI effort, which I had a hand in a few years ago, has resulted in the new heavy division design, which has taken those divisions from more than 17,000 people to 15,000 people. The new design takes twenty-five percent of the combat vehicles out of those formations, but the division will be more capable with far fewer people and equipment.

Light force modernization started last year [1998] with an effort called the Rapid Force Projection Initiative. We will look at it again during the Joint Contingency Force Advanced Warfighting Experiment (JCF AWE) in September 2000. The JCF AWE will bring a whole other set of Title 10 issues for the JAG community to consider. Another result of our light force experiments this summer is going to be the identification of the Joint Forces Command's role in designing the forces of the future (versus the Army, Navy and Air Force roles).

The bottom line is we have several issues to solve: our equipment must be more deployable, our modernization programs are stretched out (not very effective for what we really want to do), and we have a lot of equipment out there which is not being recapitalized. We have grounded every aircraft in the United States Army this past year at one time or another. For example, just this week the CH-47s were taken off the grounding for the first time in more than six months. The Apache fleet is grounded today because of parts that are wearing out (a clutch and a bearing). We have grounded the UH-1s twice this year. In fact, we should have retired the UH-1 fleet a long time ago. So now you realize that a great deal of recapitalization continues to be unfinanced. We must do more! It is not enough to say we have changed. We really are not ready to move into the twenty-first century because the U.S. Army is equipped and organized to

fight the Cold War. We still have Abrams tanks, Apache helicopters, Bradley Fighting Vehicles—all systems designed to fight the Soviet Union in central Europe.

Now, we have modified how we fight with this equipment to deal with the world as we find it today, but that is not the purpose for which today's equipment was designed. We have a seventy-ton Abrams tank that consumes five hundred gallons of fuel a day. That is reality. We have to change that. When General Shinseki assumed duties as the Army Chief of Staff, he told us the heavy forces must be more strategically deployable and more agile with a smaller logistical footprint. He said light forces must be more lethal, survivable, and tactically mobile. Achieving this paradigm will require innovative thinking about structure, modernization efforts, and spending, and I will tell you he sure was right. The transformation is going to take a lot of innovative work. We have a lot of people who are working literally day and night, seven days a week right now trying to figure that out. All the services are pretty much in the same boat. I have never seen a year like this one. It is the 9th of December [1999] and we don't have a budget. We are not even close to finalizing our budget.

The difference between the Army's Budget Estimate Submission (BES) that we delivered to the Office of the Secretary of Defense (OSD) in September and the Program Budget Decision[6] that we are working right now, is $700 million. Moreover, to meet the objectives of the transformation strategy, the Army will need an additional $3 billion. So you figure it out. The President's budget, on which I will provide testimony in a few short months, has yet to be created. That is the situation in which we find ourselves. I had lunch today with my counterparts in the Air Force and the Navy, and they are in the same boat as the Army. I have never seen it quite like this. So we are all going to have an interesting time of transforming our services and maneuvering our way through the intricacies of the law, and how we will legally reach our objectives. We do have guidance, however. The Joint Staff has published Joint Vision 2010. This Joint Vision

6. The Program Budget Decision (PBD) 745, entitled Major Budget Issue—Army Vision, implemented the Deputy Secretary of Defense's decision on the major budget issues regarding the new Army Vision. The PBD adjusted the Army's Budget Estimate Submission (BES) for fiscal year (FY) 2000 so that it fell in line with the new Army Vision funding requirements. The Army had submitted the BES to OSD in September 1999, one month prior to the formal announcement of the new Army Vision. The PBD also aligned Army investment funding from FY 2004 and 2005 into FY 2002 and 2003. The final version, PBD 745R, is dated 11 January 2000.

has painted a picture for us all to follow and it is holding up pretty well as a way of building the armed forces structure.

For us to develop a full spectrum force, we have to make the light forces in the United States more lethal. We are not going to the send the 82d Airborne Division into the Saudi Arabian Desert anymore as a bump in the road as we did during Desert Shield. We are going to send them in to be lethal and survivable. Early entry forces, whether they are the Army Rangers, an air mobile force, or an airborne insertion, must be decisive. They have to be able to survive, be lethal, and be decisive and today they are not. We have got to change that.

The heavy forces must be more deployable. There is much debate about the need for the Crusader, a self-propelled artillery piece. You will continue to hear debate on whether or not the Crusader is too heavy and about what the Army is going to do to fix it. The self-propelled howitzer that we have in the inventory today is the Paladin A6. The A6 is the sixth version of a system that was designed in the fifties. Clearly we need to modernize our critical indirect fire system.

Let me now explain how the Army is changing its investment strategy to meet its modernization requirements. Currently we are investing a lot in information dominance, moving ourselves into the Digital Age while moving out of the Industrial Age. A lot of money is being put in information dominance, fitting ourselves into the Digital Age, moving out of the Industrial Age. This includes how we use the microprocessor to help the soldier on the battlefield. A lot of money is going toward that effort. We have also invested quite a bit into overmatch capabilities. Recapitalization has been getting fewer, rather than more dollars. The Army's investment strategy changes as we move into the 2000 budget—a significant transformation from where we were just a few months ago. That is why today we don't have a budget that has been formalized with OSD. We have changed the funding focus to meet our requirements to develop the Interim Brigade Combat Teams, to recapitalize the legacy systems, and to pay for the science and technology efforts required to develop the Objective Force.

The Chief has directed us to consider wheeled vehicles for use in the Objective Force. Historically, the U.S. Army has not used wheels, we have used tracked vehicles. No matter how many times we have studied the issue, we always came up with the same answer—tracks. We are trying to put a competition together now that doesn't bias the answer. Some have a predisposed opinion that we need to develop a wheeled force. We are

going to need your help working our way through that. We also say we are going to buy vehicles that fit together as a set of vehicles. In the past we have always bought one system at a time. This time we must develop a request for proposal which focuses on our ability to get off-the-shelf equipment that meets our lethality and survivability requirements without bias. That is the challenge I have given the contracting officer. Is there anyone here from the Tank and Automotive Command that is going to solve that one? That is what we must do in the next month or so.

The Army has set a path for itself to meet its modernization goals. The first effort is to digitize III Corps. The 4th Infantry Division will be the first digitized division. The 1st Cavalry Division will be next and the rest of the III Corps elements will follow it. Digitization is the process that has been ongoing with our heavy forces to make them fit into the Information Age. Next we must continue the light force experimentation such as the JCF AWE that will be conducted by the Joint Forces Command. We must develop the Interim Brigade Combat Teams as our contingency brigades. This is the effort that will take place at Fort Lewis and also includes our effort to accelerate procurement of the Interim Armored Vehicle.

Just one year ago we were working on an Army-After-Next concept, which was focused on the year 2025. The Training and Doctrine Command was working on a mission needs statement which was focused on the year 2018. General Shinseki took over and said, "No, 2012 is where I want you to focus." More recently the Chief has said that 2012 is not fast enough so our top priority is to accelerate the development of the future combat systems.

A joint transport rotorcraft is another item on our modernization path. Currently there are no new helicopters in development in this country, with the exception of the Comanche. We are still trying to determine whether future air transports will be a rotorcraft, as we know them today, or a tilt rotor like the V-22 [Osprey]. Once that is decided, we still must integrate air transport with the other future combat systems of the Objective Force so that the force is both strategically and tactically mobile.

The Defense and Army Science Boards have conducted numerous studies showing that the Air Force's heavy lift capability pales in comparison to what is available in the commercial sector. If you have dealt with any of the aircraft agreements, you know that we have already had some issues there. Suppose we decide that it is necessary to rely more heavily on commercial lift. How will we do this? There are some real challenges

for us to make the law and the requirements come together in this area, but it is clear that if want to deploy our forces quickly in the world today, we must use commercial lift. So we had better figure out how to do it.

We are also looking at heavy lift systems. Lockheed-Martin has come in and shown us a proposal they are working with Federal Express, on a non-rigid body lifter that will carry a million pounds at a speed of one hundred and fifty knots. The new lifter will be faster than a ship, but slower than a C-17. A million pounds in one lift changes the dynamics a bit. This aircraft is to be developed as a commercial lifter, built for the Federal Express [corporation], not for the U.S. Air Force. We are going to have to work through that.

The last item on the modernization path is recapitalization of the legacy force. Recapitalization may be the biggest challenge that we face today because we have a fleet that is aging to the point where tank engines are about one third as efficient as when they were first put into the systems and aircraft are being grounded everyday.

The digitization effort raises some real challenges—from a materiel development side, not from a legal side—about integrating all these digital systems. Our modernization plan specifies that we build systems as part of a larger system. The test community has directed that new systems be tested all together. Instead of testing a platoon of Abrams tanks, or a battalion of Apaches, we will be required to field and test in brigade sets. This raises another set of challenges which we are going to have to learn our way through, but pay attention because that is how we will field the Initial Brigade Combat Teams at Fort Lewis and the Objective Force. A medium conversion will begin with two brigades at Fort Lewis: the 3d Brigade (a heavy brigade) of the 2d Infantry Division, and the 1st Brigade (a light brigade) of the 25th Infantry Division (Light). In the near future we will outfit both of these brigades with a new set of equipment which we have yet to define.

Let me explain how challenging the medium conversion time-line has been. The *Commerce Business Daily* announcement was published the first week in November [1999]. We had an Industry Day the first week in December, just last week, which about four hundred people attended. The competition is international. We are going to have a lot of foreign competitors. We are going to have a vehicle demonstration at Fort Knox, Kentucky, in January 2000. We will put a request for proposal on the street on the 15th of February, or thereabouts, and we don't even have an Opera-

tional Requirements Document (ORD) yet. We are going to have a competition in June for award most likely at the beginning of the next fiscal year. We will talk a little bit more whether I have authorization to do that yet or not, but that is the plan.

We have taken an oath to defend the Constitution. This means obeying the laws of the United States, which include annual appropriations and authorization laws. Some of these laws are not quite as clear as we might like. We have found cases this year where the congressional appropriators have disagreed on how the Army should bring all the modernization pieces together. We found language within the appropriations law this year where the Conference Committee did not rescind language that was put out by an earlier committee. As a result we unintentionally violated the law. There were also other organizations that broke the law, all as a result of the complexity of the issues we are dealing with as we try to both modernize and uphold the Constitution at the same time. Quite often we need your help, and a lot of help from others, looking at what is legislated, and perhaps more importantly, how we can change legislation so that we can do some of the things for those soldiers of tomorrow who are in second grade today. The challenge then is to come out with a positive legal standard, not a prohibitive standard. I usually go to my legal counsel—Levator Norsworthy—and say, "Vate, I didn't ask you why I can't do something, tell me why I can do it." Vate will usually respond that he will have to go find someplace in the law that says that I can do it. We have to be pretty smart right now in understanding what the law is telling us we can or can't do, not just what we would like to do. We are going to rely on you to come back and help us with those answers.

We are finding all the time that we have some real challenges here. We are going to come back to you more frequently to find out where we need rescissions and where we need referrals. We just have to wind our way through those paths, which is getting, in my view, more complex all the time.

This is what Congress added to our appropriations bill last year:

> In addition to amounts appropriated or otherwise made available in Public Law 106-79, $1,000,000,000 is hereby appropriated to the Department of the Army and shall be made available only for transfer to titles II, III, IV and V of Public Law 106-79 to meet readiness needs, provided:

- Funds may be used to initiate fielding and equipping.
- Funds transferred shall be merged with and available for the same purposes and time period as the appropriation.
- The Transfer is in addition to any transfer authority available to the Department of Defense.
- That none of the funds made available may be obligated or expended until 30 days after the Chief of Staff of the Army submits a detailed expenditure plan to the Congress.[7]

I'll ask you the question, "Do I have authorization now to put the Interim Armored Vehicle proposal out on the street on February 15th?" I only provided you a summary of the language in the appropriations bill, so you would obviously want to read every word of it before you responded to my question. We would probably debate whether we can or cannot issue the proposal. It is relatively easy in the end because the bill's language directs the Army to provide Congress a detailed plan before spending any money. But we have some cases where Congress is trying to help us change and is giving us some latitude to do things. There are many ways to move money around, but in order to do so we must consider fiscal law. Normally we work under budget caps, but now we have provisions within the Kosovo Supplemental that allow us to use monies for readiness issues. This could free up other money, originally budgeted for readiness, to pay other bills. We must all work together to try to figure our way through this.

How can we generate the resources to accomplish those modernization initiatives I have discussed within the time-lines that we said we want to do them in? Take, for example, the light force effort. The Joint Lightweight 155 [mm Howitzer], is a joint U.S. Army-Marine Corps program. The Marine Corps has the lead. The Navy Acquisition Executive has oversight responsibility. The first issue is deciding where the gun tube should be made. Each service has a different opinion. Does the Arsenal Act apply to the United States Navy? The Navy doesn't think so. What is the intent of Congress? What are they going to make us do? This has yet to be resolved.

I previously mentioned an instance where an appropriations conference report did not rescind the language of one of the committees. This report dealt with the Line of Sight Anti-Tank (LOSAT) system. Based on the appropriations conference report, we re-programmed money, OSD's money, back to a line which the original committee had prohibited us from

7. H.R. CONF. REP. NO. 106-479 (1999) (Appropriations Conference Report).

doing. They just took some more money away. They got even. So we still have to fund the LOSAT because it is one of our top priority programs needed to make our light forces more lethal. We have to find our way through that process.

The High Mobility Artillery Rocket System is a system that sits atop a common Army truck chassis. That truck is from the Family of Tactical Vehicles (FMTV), a program with which the Army has never had a legal problem! We have gone back and forth about whether we are going to complete the FMTV or not, and the program delays have been endless. In acquisition, too often one system that we need to field quickly is linked directly to a system that is delayed.

As we move forward with the JCF AWE, we may determine that the Army should accelerate one or more existing programs in order to increase the lethality of our light forces. The challenge is to accelerate a program in the short-term when our planning, programming and budgeting process and the appropriations process do not lend themselves to rapid change. How do we accelerate without violating the Anti-Deficiency Act? We cannot use future funds to pay for a current need. A decade ago, the Senate appropriated funds for the Army to keep a mortar round line open at the Louisiana Army Ammunition Plant. The Army had no valid requirement for additional mortars—adequate stocks were already on hand. Despite the adequate supply, a Louisiana senator asked the Army to keep the line open. The promise could not be kept because to do so would be in violation of the Anti-Deficiency Act by contracting in advance of an appropriation.

We ran into a similar situation last year with the LOSAT. The contractor was very willing to put his own money on work that we knew would have to get done but which we did not have the money to do in the near-term. The contractor knew it was our top priority program within the military and that we were going to pay for it eventually. We couldn't do it. It was a future appropriation that we could not use to fix a current need. We had to go through a re-programming action. These are the kinds of issues for which we need your help.

I talked to you about fielding of the Initial Brigade Combat Teams. There are several challenges that we must solve before fielding the IBCTs. I also spoke to you about the *Commerce Business Daily* announcement. One of the vehicles we are looking at for the IBCT is the LAV, not the Marine Corps LAV2, but the LAV 3 built by [General Motors] of Canada.

The Canadian Army has agreed to loan us those vehicles so that we can start our operational testing and understand the new organization for wheeled-vehicle organizations.

I have received a lot of information lately on the difference between leasing and loaning equipment from foreign countries. When making such agreements we really need to pay attention to what the agreement says about the condition the vehicles must be in upon their return to the loaner. I just returned from France where I discussed the possibility of the French loaning us vehicles. The particular vehicle we are interested in is one the French Army does not want to provide us from their inventory. GIAT [Industries], the French company that produces the vehicle, is willing to lease additional vehicles to the French Army, who in turn, could loan it to the U.S. Army. The loan of the Italian and German vehicles we want had to be arranged under a NATO agreement. The Armored Gun System was easy. We already own six of them. One of them we loaned back to the contractor to do some future development work and one was used for testing. The remaining four will go to Fort Lewis. Those are the kind of issues we are involved in right now with fielding loaned equipment to ensure we have enough vehicles to conduct tactics, techniques and procedures at Fort Lewis.

How do we conduct a competition between wheeled and tracked vehicles without prejudice? How do we convince people that we really haven't already decided whether our future force will use wheels or tracks?

Perhaps the biggest challenge of all is to completely redesign the United States Army in the next ten years and put it into production by 2010. We have a decision point in 2003. We will do that by looking at efforts underway at the Defense Advanced Research Projects Agency, the Army laboratories, and industry. How many of you think we can field a system in ten years that has yet to be defined? That is what we must do. That is the challenge that the Chief has given us. If we don't accomplish that goal, what are tomorrow's soldiers going to go to war with—the seventy-ton Abrams tank fielded in 1980, a Bradley, an Apache that we just grounded? The challenge is real and, while it is significant, we are going to have to figure out how to do it.

We are going to have to look at engine propulsion system technologies that are being developed in the commercial sector. The commercial automotive industry today, both [domestic] and foreign, is spending billions of dollars, literally billions of dollars on hybrid electric and fuel cell

technologies. The Army's largest engine program spent $250 million. What we spend pales in comparison to what the commercial sector spends. This is just the reverse of what happened in the 1960s and 1970s. We are going to have to learn how to leverage these commercial efforts to develop military equipment.

Cooperative Research and Development Agreements (CRDA)[8] have been very effective for the Army since the mid-Eighties. [These] CRDAs are not competitive. One of your compatriots, who deals with vaccines at the Medical Research and Development Command, has become a real expert at figuring out how to change the Federal Acquisition Regulation to allow us to initiate a non-competitive CRDA and end up with a contract awarded on a competitive basis. The issue becomes, "who owns what rights?" That is only the tip of the iceberg when one starts investigating intellectual property rights that are going to come out of the many information technologies being developed today. I helped initiate a CRDA with the University of Southern California (USC). [The university] conducts research affiliated with the entertainment industry. We initiated a CRDA because USC won't contract with the Army and we wanted to use some of their innovative technologies for use in training simulations. These types of efforts can be done using CRDAs.

One of the things we also want to continue to do is buy equipment using performance specifications. We do not want to return to the use of old military specifications. Let me give you one example. I do not know if it is good or bad example, nevertheless it is an example. We procured the Hunter Unmanned Aerial Vehicle (UAV) using performance specification. Because the initial air vehicles had some problems, we decided not to buy anymore. Over time, the initial systems we procured have functioned remarkably well. In fact, the Hunter has flown more hours over Kosovo than the Air Force's Predator UAV, and most people never even realized the Hunter was even in town. We know we can do it. We are learning how to block requirements. We are learning how to write contracts against those blocked requirements. Then we have to build testing

8. In 1986, Congress provided incentive to government research laboratories by creating the CRDAs. These CRDAs allow labs to cooperate with academia and private business on anything that is research-related. The agreements provide easy access to intellectual property, patents, and exclusive commercialization rights.

against those requirements and do it against performance specifications rather than a military specification.

If we can't figure it out, [today's] second graders are going to war in Abrams tanks, Apache helicopters, Multiple Launch Rocket Systems rockets, and probably Paladins because the Crusader will be too heavy.

The challenge the Chief has given us is this: one brigade must deploy in ninety-six hours. We will have to rely on military airlift to meet this requirement. We better design equipment for that. A division must deploy in one hundred and twenty hours. Again we are restricted to the use of airlift to meet that requirement. We had better make that light force really lethal and survivable real fast and we had better figure out how to put a tank on a diet, real fast. Five divisions must deploy in thirty days. Meeting that requirement will require a combination of pre-positioning, and both air and sea lift. Our pre-positioned stocks had better be in the right place because the requirement is not that we have to be able to deploy to Southwest Asia, or Southeast Asia, or Northeast Asia, but any part of the world in those time frames.

There are many legal issues that have arisen in reference to recapitalization. Whenever recapitalization is mentioned, the depot caucus will definitely get involved. How do we use Operations, Military Army appropriations to get a better product to the field? In some cases, we do things so cleverly that we constrain ourselves to buying processors that are out of production because we haven't figured out how to use the right laws to get the right wording and the right efforts. I would also suggest to you that some of that fiscal law has nothing to do with law. You are going to be in the middle of those arguments because the legal issue, the fiscal issue, will become the one that is used as the argument. We've got to figure our way through that or we are not going to be able to modernize the force.

I came into this job two-and-a-half years ago. I didn't expect to be in it two-and-a-half years. I didn't expect to be in it at all, quite frankly. When I arrived, Apache Prime Vendor was an issue and it is still an issue. In fact, there is a group of Army contract officers, lawyers, program managers, and staff who are at Carlisle Barracks right now to figure it out. They have been directed to stay until they figure it out! Have a nice Christmas! They need help. The real answer is we have to do it together. We must do it for our current soldiers and for our future soldiers—those kids who are in second grade today. I'm not going to solve it by myself and you are not going to solve it strictly from a legal standpoint. We have to bring

all those pieces together. Clearly, the challenges are there. They are not new necessarily, but they are framed in today's context as we move into the twenty-first century. It is going to take civilian counsels, contractors, the government, the JAGs, and all of us working together to figure out what the right answers are so that we will have armed forces in the twenty-first century as good as the ones we are blessed with today at the end of the twentieth century. That is the challenge for all of us to figure out and we will do it together.

CHOOSING WAR: THE LOST CHANCE FOR PEACE AND THE ESCALATION OF WAR IN VIETNAM[1]

REVIEWED BY MAJOR FRANCIS DYMOND[2]

> *To argue that American leaders* could *have withdrawn or had the opportunity to begin disengagement from Vietnam at various stages is not sufficient. Of course, they could choose, but that does not mean they possessed* real *choice.*[3]

Frederick Logevall introduces previously unreviewed evidence and offers an historical interpretation of it in the latest round of arguments against America's 1965 escalation to war in Vietnam.[4] Logevall, who was born in the early 1960's, rebuts the common current view that the United States lacked the "real choice" necessary to disengage from military intervention. Logevall uncovered a plethora of primary sources—including international diplomatic documents and recently declassified U.S. records—to paint a clear and damning picture of both ambivalent and "pig-headed" U.S. decision-making concerning Vietnam. His conversational style, combined with his original assessment of the international diplomatic and domestic political climate of the era, add significant weight to his argument that America *could* have negotiated disengagement during what Logevall calls "the Long 1964."[5] But in rebutting the inevitability doctrine, he distorts his work by alleging that America's leaders committed immoral or criminal acts when they squandered such opportunities.

The portrait of "the Long 1964" is skillfully drawn through logical chronological segments of the period beginning 29 August 1963 and end-

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1. FREDERICK LOGEVALL, CHOOSING WAR: THE LOST CHANCE FOR PEACE AND THE ESCALATION OF WAR IN VIETNAM (1999).

2. United States Army. Written while assigned as a student, 49th Judge Advocate Officer Graduate Course, The Judge Advocate General's School, United States Army, Charlottesville, Virginia.

3. LOGEVALL, *supra* note 1, at xvi-xvii (quoting LESLIE GELB & RICHARD K. BETTS, THE IRONY OF VIETNAM: THE SYSTEM WORKED 244 (1978)).

4. *See, e.g.*, DAVID KAISER, AMERICAN TRAGEDY: KENNEDY, JOHNSON, AND THE ORIGINS OF THE VIETNAM WAR (2000); MICHAEL LIND, VIETNAM THE NECESSARY WAR: A REINTERPRETATION OF AMERICA'S MOST DISASTROUS MILITARY CONFLICT (2000); ROBERT MCNAMARA, ARGUMENT WITHOUT END (1999).

5. LOGEVALL, *supra* note 1, at xiii. For a brief review commenting on Logevall's "brilliant" use of these sources to frame the international stage during this period, see Kai Bird, *The Weapons in the Wings*, WASH. POST, Apr. 30, 2000, at X04.

ing in July 1965. Starting briefly from 1954, Logevall sets out a measured tale of interaction among the key international participants (South and North Vietnam, France, Britain, Canada, Russia, and China), the domestic political participants (primarily key policy- and law-makers), and the media. 29 August 1963 was a critical turning point, he argues, as it represents the point when French President General Charles de Gaulle elevated Vietnam to the political front burner for President John F. Kennedy, Jr. For a variety of reasons, de Gaulle "believed that a major crisis threatened in Vietnam."[6] He became one of a growing number of protagonists questioning the use of military force to resolve the Vietnam problem.

The level of difficulty for achieving political and military success in South Vietnam then rose quickly. Consequently, both Presidents Kennedy and Lyndon Johnson confronted waning support for and general challenges to the U.S. military policy. Against this backdrop, Logevall exemplifies the historian by elucidating three key themes connecting these challenges.[7] First, Logevall demonstrates how fluid the global and domestic political positions were regarding any particular means or method of stopping communist aggression in Southeast Asia. Second, he paints a sympathetic but shameful picture of the ambivalent and rigid thinking of America's leaders that drove their political maneuvering on Vietnam. In particular, Logevall patiently displays subtle shifts in these leaders' standards for success as they became more desperate to shore up successively weaker South Vietnamese governments.[8] Third, Logevall faults his protagonists and—minimally—the Ho Chi Minh government for failing to successfully urge Kennedy and Johnson to consider some kind of negotiated settlement by presenting viable peaceful solutions.

In under 400 pages, Logevall artfully weaves these themes into a summary of eighteen months worth of international and domestic diplomatic, political, media, research, personal, and deliberative documents. For example, he intimates a level of certainty in the meaning of events through frequent inferences and conversational phrases. Likewise, his use of a droll sense of humor, a pleasant side effect of his personal motivation behind the work, highlights the absurdity we can now see in the politicking behind U.S. policy-making. The reader can even detect an effective level of sarcasm to this end. Logevall effectively applies all three techniques when describing Washington's efforts to decry the lack of west-

6. LOGEVALL, *supra* note 1, at 1.
7. *Id*. at xvi.
8. *Id*. at 99, 205, 318.

ern support for its Vietnam policies in mid-1964 and its reaction to British hints of fostering negotiations.[9] He observes that Washington did not view these matters as reasons to examine the fundamentals of America's objectives, but, rather, as representative of "merely another problem to be addressed" in carrying out the "single-minded"[10] military policy. When Washington accused de Gaulle and the American media "Cassandras" of conspiring to cause these problems, Logevall retorts that such a "belief was erroneous, of course—the British and Canadians, for example, were coming to their interpretations on their own, thank you—but it was wrong."[11]

Presidents Kennedy and Johnson played successive leading roles in deciding to stick with the military solution, roles commonly ascribed to the other key participants: Secretary of State Dean Rusk, Secretary of Defense Robert McNamara, and National Security Advisor McGeorge Bundy. Logevall portrays the two leading actors as men who avoided fundamental analysis of the situation in favor of short-term political preservation.[12] Kennedy "like many politicians . . . liked to put off difficult decisions for as long as possible,"[13] and wanted to avoid stirring the issue either internationally or domestically before his reelection. This played out in three ways during his tenure. First, Kennedy failed to take sides with the ruling Ngo brothers, for fear of signaling endorsement of their appeasement with the communists; conversely, he failed to openly support a military coup against them, for fear that he appear too hawkish in advancing a more vigorous prosecution of the war.[14] Second, Logevall describes Kennedy's "complete rejection of exploring the possibilities for a political solution to the conflict" and his consequent work to quell de Gaulle's and the United Nations Secretary General's efforts to initiate peace talks.[15] Last, Kennedy refused to change the military advisor strategy in South Vietnam, except to apply inconspicuous "selective pressures" on South Vietnamese leaders to win and then steadily increase America's commitment of advisors from about 3,000 in 1961 to over 16,000 at the time of his assassination.[16]

When Johnson succeeded Kennedy a year before the 1964 election, he too faced the dilemma of defeating (or, at least not losing to) the com-

9. *Id*. at 172-73.
10. *Id*. at 105.
11. *Id*. at 173.
12. *Id*. at 108, 389.
13. *Id*. at 73.
14. *Id*. at 72.
15. *Id*.
16. *Id*. at 69.

munists in South Vietnam without changing the policy he aided in creating.[17] But with an impending socio-political collapse in South Vietnam, he would desperately escalate to war fifteen months later. Logevall portrays Johnson as a man with a simplistic and limited foreign policy mindset who attempted to forestall criticism and military defeat with traditional political intimidation tactics and increasingly more aggressive military tactics.

Specifically, Logevall argues that Johnson's use of these tactics in 1963 and 1964 helped him to win election. Johnson used old-fashioned dirty American politics to defeat his hawkish opponent, Barry Goldwater. He combined campaign statements against expansions of American involvement in the conflict with flag-waving retaliations against North Vietnam for its provoked attacks on U.S. destroyers in the Gulf of Tonkin.[18] Then, for the three months after his election, Johnson fell into the best settlement position of all U.S. presidents. Unfortunately, Johnson refused to reexamine Vietnam. He grew incensed at growing criticism of his anti-communist convictions and the growing disinterest and political discord among South Vietnamese. He covered up his worries about Vietnam and secretly predicted war despite assurances that he would adhere to his pre-election statements against war. After letting the biggest pool of political capital in American history slip through his fingers, internal South Vietnamese dysfunction in late spring of 1965 forced Johnson to put into action his aids' secret plans[19] for escalation.

Logevall portrays Kennedy's and Johnson's intellectual rigidity and defensiveness with a level of detail that makes this aspect of his historical rendering compelling. Also complete are his accounts of Rusk, McNamara, Bundy, and their other deputies, who he portrays as cow-towing, political hacks overseeing institutions that were equally rigid in upholding the "simple-minded" ideology. But Logevall's effort to paint a picture of immoral or criminal deceit that drove a nation into an unnecessary war[20] for personal gain is undermined by the primacy he gives to dirty politics as a motive for action. Logevall gives no or only cursory consideration to other possible motives. He makes light use of other evidence

17. *Id.* at 78.

18. *Id.* at 200. Logevall makes a persuasive argument for this version of the Gulf of Tonkin incident.

19. *Id.* at 273.

20. A recent work furthers the argument that the United States needed to remain in Vietnam. LIND, *supra* note 4.

bearing on assessments of geo-strategic, legal, ideological, or military factors.

Logevall immediately stumbles in his account by unnecessarily offering—and confusing—his anti-war protagonists' mantra as the ultimate interpretation of the period: "That the American decision for war was the wrong decision is today taken as axiomatic by a large majority of both lay observers and scholars, [Logevall] included, who see the U.S. intervention as, at best, a failure and a mistake, at worst a crime."[21] For, in the end, "there was no good reason why" soldiers continued to be asked to kill and be killed there.[22] Logevall taints his interpretation of the period with this premise.

His most important personal reason for publishing this work was to discover "why [the two leaders chose] war?"[23] Of course, because Logevall begins with the conclusion that the war was wrong, he is compelled to find immoral or criminal motives. His ultimate answer is that Kennedy, Johnson and their key deputies each sought to uphold their personal credibility and that each reluctant step toward escalation was measured by the effect the step would have on their respective egos and legacies. To this end, he erroneously quotes recent Vietnam apologies provided in the memoirs of key principals—for example, McNamara's 1995 acknowledgement that "we were wrong, terribly wrong"[24]—to bolster his claim of immoral or criminal motive instead of errors in geo-strategic, legal, ideological, or military judgment. He does not examine relevant theories in these disciplines that support the merit of U.S. actions. For example, he acknowledges only in passing that the military believed victory was possible if certain political limitations were removed.[25] His primary evidence against the merit of U.S. policy is the sheer volume and rate of growth of contrary sentiment and opinion.

Logevall condemns the principals by implication for their lack of vision—their inability to objectively set aside their convictions to more "fundamentally analyze" the protagonists' understanding of the projected outcome and their inability to see European inclination to accept murkier solutions. He does so by discounting the merit of America's broader anti-communist role in the world and the ideological fervor with which its lead-

21. LOGEVALL, *supra* note 1, at xiii.
22. *Id.* at 413.
23. *Id.* at 387. *See also id.* at xiv.
24. *Id.* at xiii.
25. *Id.* at 404.

ers' supported that role. Logevall dispenses with Michael Hunt's application of America's post-World War II anti-communist ideology as an overly simplistic slippery slope.[26] Without any detailed analysis or reference to other such work,[27] Logevall concludes, in condescending tones, that America's acceptance of the Soviet Union as legitimate by the early 1960's should have forced a public acknowledgement of the end to that ideology. Accordingly, the U.S. should have sought rapprochement with Russia and China. Former U.S. Ambassador to the Soviet Union, Jack F. Matclock, Jr., notes in his review of *Choosing War* that this is "an exercise in fantasy."[28] Indeed, how can an historian condemn actors as criminals because they failed to acknowledge the erosion of an underlying assumption of their widely shared belief system?

Logevall also dismisses economic theories as explanations for America's actions. "In high-level policy deliberations of 1964-1965 concerns for the fate of world capitalism appear to have been entirely absent . . . ."[29] Yet, he quits this potential explanation because arguments for the significance of America's "capitalist world framework" are "not very helpful."[30] He goes further to create his own new theory, based on the inertia of state action, entitled the "phenomenon of escalation."[31] This theory posits that decisions of predecessors will widen in effect unless successors recognize the fundamental errors and change course. This vague descriptive theory provides no useful analytical insights, especially compared to Secretary McNamara's most recent work that sets out specific criteria to assess interventions.[32] It also fails to take into account other actors to whom he otherwise devotes considerable time and criticism in his work and other external contingencies.

Logevall comes only slightly closer to providing adequate contextual explanations for Kennedy's and Johnson's generally accepted intimidation tactics and political maneuvering as pure personal motives. Here, he fails to consider that such tactics were an accepted method in American politics to implement ideological conviction.[33] Incidents are replete throughout

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26. *Id.* at 385.

27. *See, e.g.*, KAISER, *supra* note 4.

28. Jack F. Matlock, Jr., *Why Were We in Vietnam?*, N.Y. TIMES, Aug. 8, 1999, § 7, at 11.

29. LOGEVALL, *supra* note 1, at 386.

30. *Id.* at 386.

31. *Id.* at 387.

32. For a good contrast between the lessons drawn from these two works, see Matlock, *supra* note 28.

the record of Johnson hearing, considering, rebutting, and rejecting various protagonists' views. As Undersecretary of State George Ball acknowledged after this period, these leaders "still tenaciously believed that we did not dare negotiate . . . ."[34] That no one was successful in changing Johnson's convictions to join in what was then the American minority view only means that he found no compelling reason to change his beliefs, regardless of how he acted on them politically. Finally, Logevall's conversational style and glossing reference to volumes of research in this area amplify the weaknesses in this section of his book and reveal his lack of experience[35] and depth of thought in the relevant disciplines. For example, he gives more historical relevance to Oliver Stone's movie *JFK* and the "incipient-withdrawal" theory as a basis for Kennedy's assassination[36] than he does the effect of American casualties and prisoners of war on Johnson's convictions.[37] His somewhat clinical analyses of individuals and key events contrasts with his conversational tone, serving to undermine the inferences he draws. For example, Logevall comments on the initial effect of the American retaliatory bombings of Hanoi after the Gulf of Tonkin incident, but fails to demonstrate how such effective military tactics could lead to victory if properly executed. To an extent, he assumes the reader has a certain level of knowledge and interest in these disciplines vis-à-vis Vietnam and that they agree with his premise that U.S. policy lacked any merit.

Logevall fails to prove that Kennedy and Johnson committed immoral or criminal acts by drawing America into a war primarily for personal gain. He also fails to convincingly disprove reasons put forth from other disciplines to justify America's involvement in Vietnam. In total, however, Logevall is artful in his broader contextual rendering of "real choice" throughout "the Long 1964." *Choosing War* will be helpful to those who try to objectively assess the overall importance of Southeast Asia to freedom's cause and to those who are interested in the messy realities of politics and war.

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33. He attributes this to a "permissive context" within domestic politics. LOGEVALL, *supra* note 1, at 400.

34. *Id.* at 245.

35. Ambassador Matlock found that the work is "thorough and nuanced, and expressed with admirable clarity. . . . One who lived through the period as an attentive adult will, however, detect at times a failure to understand fully the spirit of the age." Matlock, *supra* note 28, at 11.

36. Logevall, *supra* note 1, at 69-71.

37. *Id.* at 398.

FLAGS OF OUR FATHERS[1]

REVIEWED BY MAJOR W.G. PEREZ[2]

> *For me, a middle child among eight, the mystery was tantalizing. I knew from an early age that my father had been some sort of hero. My third grade school teacher said so; everybody said so. I hungered to know the heroic part of my dad. But try as I might I could never get him to tell me about it . . . . "The real heroes of Iwo Jima," he said once, coming as close as he ever would, "are the guys who didn't come back."*[3]

James Bradley's *Flags of Our Fathers* chronicles the lives of the six service members who raised the U.S. flag on Mount Suribachi on the island of Iwo Jima during World War II. Bradley's book explores the impact of the famous photograph of that event, and it delves into how the image affected the lives of the surviving flag raisers and the nation. The book is well researched. Bradley spent several years on the project, to include interviewing surviving family members of the six flag raisers: Mike Strank, Harlon Block, Franklin Sousley, John Bradley (the author's father who was a Navy Corpsman assigned to the Marines at Iwo Jima), and Ira Hayes. Additionally, Bradley used personal letters written by the flag raisers, military records, police records, and other primary sources of information.[4]

Bradley begins his book with a visit to Iwo Jima where he and his family honored the flag raisers by placing a plaque on Mount Suribachi. His book then provides a brief biography for each of the flag raisers, covering their lives from the days before they entered military service until their deaths. The book next discusses the training that prepared the participants for the invasion, and it describes the actual battle of Iwo Jima, to

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1. JAMES BRADLEY, FLAGS OF OUR FATHERS (1999).

2. United States Marine Corps. Written while assigned as a student, 49th Judge Advocate Officer Graduate Course, The Judge Advocate General's School, United States Army, Charlottesville, Virginia.

3. BRADLEY, *supra* note 1, at 4.

4. *Id.* note section (providing a listing of some of the documents Bradley reviewed).

include the flag raising. Bradley concludes the book by addressing how the flag raising affected the lives of the surviving flag raisers.

Every judge advocate should read *Flags of Our Fathers*. This book review addresses the two primary strengths of the book: its detailed information about the preparation for the invasion and the invasion itself, and the discussion on the relationship between the media and the military regarding the famous photograph. This review also addresses the main weakness of the book: Bradley's attempt to rationalize the brutality committed by Japanese soldiers on prisoners of war during the Iwo Jima campaign.

Bradley offers an exceptional glimpse into the training that led up to the invasion. In Chapter Five of his book, Bradley covers the agonizing and sometimes tedious challenge of taking thousands of men and forging them into one cohesive unit prepared to accomplish a mission. The six flag raisers arrived to Camp Pendleton along with 21,000 other Marines. They were to be transformed from "standard issue fighting men to an elite, interdependent martial society."[5] The six flag raisers became members of "E" Company, 2d Battalion, 28th Regiment, part of the newly created 5th Marine Division. The 28th Regiment was named as the "spearhead" charged with leading the assault on Iwo Jima. Their primary mission was to take the high ground (Mount Suribachi).

The 28th Regiment prepared for their mission in stages. The first stage was learning fire and maneuver, which developed teamwork. Bradley provides insightful narration on the level of effort and choreography required in maneuvering men while fellow Marines provide covering fire. The fire and maneuver training was described as "tedious, long and repetitive."[6] This training was done under the most difficult conditions to simulate actual combat. The goal of the first stage of the exhaustive training was repetition until these combat skills were so ingrained that they would be performed automatically on the battlefield.[7] The second stage of training combined small unit fires and maneuvers with supporting arms. The third stage of training involved coordinated mock amphibious assaults on

5. *Id.* at 102.
6. *Id.* at 106.
7. *Id.*

San Clemente Island (off the coast of California) and on the beaches of Camp Pendleton.

The six flag raisers spent six months on Camp Pendleton training for the assault. They departed on 19 September 1944 and set sail for Hawaii. Upon arrival to Hawaii, the 28th Regiment stayed at Camp Tarawa, described as: "a miserable place, with those lava rocks and constant dust. The Red Cross judged it unfit to hold prisoners, so it was perfect for the Marines." [8] The Marines honed their skills for four months while at Camp Tarawa. In all, the Marines prepared and trained as a unit for ten months. They constantly rehearsed for the invasion and used so much live ordnance at Camp Pendleton that they set off countless prairie fires.

It is difficult for judge advocates, especially those not assigned to operational units, to appreciate the amount to time, effort, and sweat invested to prepare for real-life operations. Because Bradley goes to great lengths to explain this extensive training, he places the conduct of the battle in perspective for the reader. In Chapters Six through Thirteen, Bradley then covers the battle in a quick-paced, clear, and graphic narrative. Bradley makes it obvious to the reader that, but for the frequent and grueling rehearsals, the battle for Iwo Jima would have been lost. The combat statistics are staggering. In the 2nd Battalion alone, "1,688 Marines and sailors . . . landed on Iwo Jima [and] 1,511 had been either killed or wounded. Only 177 walked off the island and of those . . . 91 had been wounded at least once and returned to battle."[9] Bradley does an exceptional job, not just in presenting the raw numbers, but in humanizing the loss. He writes:

> Nineteen year old Corpsman Danny Thomas hit the beach at 10:15 a.m. several paces behind his best buddy, Chick Harris. In training camp Thomas and Harris were called the Buttermilk Boys, because they were too young to drink on liberty. "I was charging ahead and saw Chick on the beach facing out to sea, his back to the battle," Thomas recalled. His buddy was in a strange posture; his head and torso were erect as though he let himself be buried in the sand from the waist down in some bizarre prank. As Thomas rushed by him, he yelled a greeting and Chick's hand and eyes moved acknowledging him. Then Thomas glimpsed something else that made him fall to his knees in the sand, vom-

8. *Id.* at 116.
9. *Id*. at 246.

> iting. The something else was blood and entrails . . . . [He] realized that Chick had been cut in two. [10]

Bradley provides further illustrative passages of the horrors of combat. As judge advocates we should be prepared to face such horrors and appreciate the importance that effective peacetime training has in disciplining the mind so that it is not overwhelmed by these horrifying scenes.

Three weeks before the Marines secured Iwo Jima, the famous photograph was taken. Of the six flag raisers—Strank, Sousley, Block, Bradley, Gagnon, and Hayes—only Bradley, Gagnon, and Hayes would survive. The other three men died in the final three weeks of fighting on the island. There were actually two flag raisings. In the first, the commanding officer of 2d Battalion sent a platoon up Mount Suribachi with a small American flag. Their ascent up the mountain went unopposed, although the men felt they were on a suicide mission due to the lack of cover or concealment during the climb. After a quiet, forty-minute ascent, the platoon from 2d Battalion raised the flag. Photographers were present, but none of their photographs become famous.

The second flag raising occurred after the 2d Battalion commander learned that the Secretary of the Navy wanted the first flag raised over Mount Suribachi. Because the battalion commander felt the first flag belonged to the unit, he ordered a platoon to conduct a second flag raising using a larger flag. That flag would later be sent to the Secretary of the Navy. This time, Joe Rosenthal, a photographer for the Associated Press, accompanied the platoon performing the flag raising honors. When the platoon reached the top of the mountain, two ceremonies occurred: the taking down of the first flag and the raising of the second. These ceremonies occurred simultaneously. The Marines involved thought the second flag raising ceremony was "no big deal." In fact, Rene Gagnon would remark later in life to his son that, " the [second] flag raising was as significant as going to the mail box."[11] Bradley effectively documents the Marines' belief that the real heroism occurred on the battlefield, and that there was nothing heroic in their second flag raising. Bradley also clearly demonstrates that the media did not share this belief.

The final chapter of Bradley's book explores the relationship of the media, the military, and the surviving service members—Bradley, Gagnon,

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10. *Id.* at 158.
11. *Id.* at 334.

and Hayes. In this relationship, the media distorted the facts, manipulated the public, and capitalized on the newly created heroic myth. Bradley blames the media for this "travesty of the accuracy."[12] He opines that the media created the story of a fierce firefight during the ascent to create heroes who would help sell newspapers. He excuses the military and the surviving Marines as having nothing to do with this distortion of the truth. However, this absolution is not supported by Bradley's own research. Bradley's reliance on the former Commandant of the Marine Corps (General Krulak) offers one possible explanation for this. The former Commandant arranged, among other things, for Bradley and his family to travel to Iwo Jima. Clearly, without the Commandant's assistance Bradley would have had difficulty completing his book. It is apparent that Bradley's deference to the Marine Corps and the military was influenced by his friendship with the former Commandant. Regardless of this deference to the Marines, however, Bradley's book makes a strong case that the military was also guilty of a "travesty of accuracy."

Specifically, the department of defense ordered the return of the surviving service members so they could tour with the final war bond campaign, "the Mighty 7th War Bond Campaign." The military realized it was going to be difficult to get the American populace energized for another war bond campaign. The military needed a hook and they found it with the media-created "heroes of Iwo Jima." This war bond campaign had to raise fourteen billion dollars. Not only did it raise that amount, but also doubled it to twenty-eight billion dollars. The campaign was a nation-wide tour bordering on a Broadway show, complete with reenactments, musical groups, singers, and actors. The surviving flag raisers were thrown into this media-exploitation frenzy after leaving the scenes of horrifying combat just weeks earlier. The military was bent on using the famous photograph and media-created heroes to push the sale of war bonds, and nothing was going to interfere with this effort. In fact, when surviving Marine Ira Hayes noticed that the image of Harlon Block in the photograph was originally identified as Hank Hansen, he tried to correct it. A Marine public affairs officer told him that it was too late, because the inaccurate report had already been released.[13] This error was eventually corrected but only after the intervention of the Commandant of the Marine Corps. Therefore, although Bradley grants great deference to the military and the Marine

12. *Id.* at 224.
13. *Id*. at 275.

Corps, his own research supports the conclusion that the military and the media both benefited from the creation of the heroic myth.

Bradley fails to condemn the military and the media for their treatment of the surviving flag raisers during the war bond campaign. However, he alludes to the fact that the three survivors were likely suffering from post-traumatic stress disorder (PTSD).[14] The survivors' unique heroic welcome home and participation in the war bond campaign may have worsened the effects of their PTSD, concludes Bradley. However, he acknowledges that, in reaching this conclusion, he has the luxury of hindsight and fifty years of psychological innovation and research.

Bradley does provide significant evidence that Ira Hayes dealt with extreme PTSD and survivor's guilt. Bradley points out the correlation between Ira Hayes' increase in destructive alcoholism and his participation in the war bond campaign. Although Bradley finds that Hayes' alcoholism cannot be attributed to a single event or cause, the war bond campaign made it easier for Hayes to indulge in his addiction. Eventually, this addiction contributed to Hayes' death. Rene Gagnon and John Bradley handled their PTSD and fame in different ways.

Rene Gagnon began to accept the hero moniker and to believe that his life was set owing to his newfound status. He eventually learned that promises made during wartime are quickly forgotten once the shooting stops. His dreams of joining the state police force or of being hired for jobs just because of his hero status, even though he was not otherwise qualified, quickly faded. Gagnon ended up working as a janitor and, at the age of 53, died of a heart attack while at work.

John Bradley handled his PTSD through denial. He attended mortuary school, became a mortician, and finally a funeral director that opened up his own funeral home. He was successful, raising a large family and becoming a prominent member of the local community. He rarely gave interviews to the media about his involvement in the flag raising and sparingly spoke to his children about the war. It is ironic that John Bradley, who was a corpsman during the war, chose to be a funeral director in civilian life. His occupation choice gives the reader some insight into his personality. He was a man who chose to be surrounded by death even after he left the war. The younger Bradley never tells us why his father chose to be a mortician. All the author provides by way of explanation is that his father

14. *Id.* at 289.

wanted to be a mortician even before the war started. But the author should have explored his father's true motivation further. Nevertheless, Bradley does a good job of recounting the events of his father's life after the war.

The main weakness in Bradley's book is his rationalizing of the war atrocities committed by the individual Japanese soldiers during the war. Bradley provides the reader with some information dealing with Japanese war crimes that occurred during the occupation on Nanking.[15] He also describes the torture and eventual death inflicted on American prisoners of war (POWs), but his explanation for such acts rings hollow.

For example, one graphic description of POW executions involved Ralph "Iggy"Ignatowski, a good friend of John Bradley. When his body was discovered by Bradley, the Japanese had "gouged out his eyes, cut off his ears and nose, stabbed him multiple times and cut off his penis and stuffed it in his mouth."[16] Despite these unjustifiable acts, Bradley rationalizes the behavior of the individual Japanese soldier by concluding that his actions were due to the Japanese government's perversion of the tradition of the ancient samurai and the Bushido code. Bradley then explains his rationale in detail.

Bradley provides a two-part rationalization for the horrors committed by the ordinary Japanese soldier. First, he suggests that they were uneducated simpletons, not comprehending the illegality of their acts. This logic fails since it suggests that a high level of reasoning and education are required to realize that torturing and killing noncombatants is unlawful. Second, he offers that the Japanese government, through the perversion of the Bushido code, brutalized its own soldiers. This perversion of the code, Bradley opines, broke down the Japanese soldier's concern, not only for the lives of noncombatants, but also for his own life. To the Japanese soldier, surrender meant dishonor and death was preferable. By Bradley's logic, POWs were dishonorable and, therefore, the killings of POWs were justified. This second part of his rationalization may explain the motive for the criminal acts, but it does not in anyway excuse those acts.

Bradley's rationalization for the Japanese conduct during the war may be his attempt to reconcile his personal experiences in Japan with the historical record. As we learn later on in his book, Bradley lived and studied in Japan for several years. He found the Japanese people shared the same

15. *Id*. at 65.
16. *Id*. at 334-35.

attributes that his father demonstrated: quiet, polite, honest, honorable, simple, and devoted to family. Undoubtedly, Bradley's explanation of the war atrocities committed by Japanese soldiers during the war is his way of reconciling these two disparate facts in his mind. What is clear from the historical record, however, is that Japanese soldiers consistently committed war crimes during the war.

In spite of these weaknesses, *Flags of our Fathers* is a book well worth reading. It provides the judge advocate great insight to the conduct of major campaigns. It also captures the unique relationship that the military and the media have, and how that relationship can have unintended consequences for the lives of ordinary Americans. The research is extensive, and the pace and detail of the book make for an exciting and informative read. In the end, the reader is left with two distinct feelings: one of gratitude for the heroic sacrifices made by these service members, and one of sadness because the surviving flag raisers never had a chance to live a normal life after the war.

GUARDIANS OF EMPIRE[1]

REVIEWED BY MAJOR JAMES W. HERRING, JR.[2]

Today's Army is unquestionably in a period of transition. One cannot escape the parade of newspaper headlines announcing the exodus of junior officers, the debate over what the Army's mission should be, and the movement to a lighter, more mobile force to name just a few current issues. Commanders are often heard voicing their concern that resources do not mesh with the assigned mission. All this could easily lead today's officers to question their career choice or yearn for less turbulent times.

It is somewhat comforting to learn that we have been here before. To gain some perspective in these times of change, all one has to do is read Brian Linn's *Guardians of Empire.*

Guardians of Empire examines the United States Army in the Pacific from the conclusion of the Spanish-American War until the outbreak of World War II. The Army at the turn of the twentieth century was also a force in transition. Having spent many years as the protector of America's continually advancing western border, by 1902 the Army found itself with responsibility for guarding a Pacific empire, a mission for which it was neither trained nor equipped. Adding to the turmoil was the pressure to become a modern force able to hold its own against Europe's large and increasingly mechanized armies. These demands pulled the Army in opposite directions. The Army that was needed to hunt down insurgents in the mountains and jungles of the Philippines and to secure Hawaii from attack bore little resemblance to the Army needed to counter modern European forces.

In addition to these conflicting goals facing the Army as a whole, the Army in the Pacific faced its own peculiar challenges. Commanders could not decide if their focus should be on the external threat (Japan) or the internal threat (uprisings by Filipinos or ethnic Japanese). It was difficult to defend against the external threat if commanders did not have confidence in their ability to devote local manpower and resources to the

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1. BRIAN M. LINN, GUARDIANS OF EMPIRE: THE U.S. ARMY AND THE PACIFIC, 1902-1940 (1997).

2. Judge Advocate General's Corps, United States Army. Currently assigned as an Assistant Professor at the United States Military Academy, West Point, New York.

defense of the Philippines and Hawaii. On the other hand, the large coastal defense batteries and aircraft needed to defend against invasion were of little use in maintaining internal control of these possessions.

Linn finds that in the aftermath of both the Spanish-American War and World War I, the Army "endured major structural changes without the necessary manpower, finances, or political support."[3] At the end of the Spanish-American War, Secretary of War Elihu Root wanted to modernize the Army. He emphasized the need for officer education in such areas as tactics, military history, and international law.[4] However, Secretary Root's attempts to implement these and other changes met resistance from senior officers who believed it was "wrong to overturn a system tested and proven in the Civil War."[5] The conclusion of World War I spawned additional issues. Commanders in the Pacific Army found that they could not get the equipment they requested. Instead, surplus World War I equipment was supplied despite its incompatibility with the needs of the Pacific forces. As a result these supplies sat in dockside warehouses in Manila and Honolulu rotting in the tropical climate.[6]

Like the Army of today, the Pacific Army was plagued with a high turnover of officers and enlisted soldiers. Between 1900 and 1907, for example, officer resignations increased five-fold.[7] Discipline problems within the ranks rose as fast as officer resignations. Linn notes that some commands averaged one court-martial per soldier. Enlisted soldiers left the Army at the earliest opportunity, leaving many units dangerously under strength. Unskilled laborers in the civilian market earned as much as five times what a private was paid in 1907.[8] The demands of providing manpower to guard America's new possessions, Linn concludes, "stretched the nation's military to the breaking point."[9]

Of particular interest to judge advocates are the court-martial statistics Linn compiles from Army records. Many crimes of violence in the Pacific forces had their roots in what Linn terms "the competition for eligible females."[10] By the 1930s the Army in Hawaii inspected and

3. LINN, *supra* note 1, at 55.
4. *Id.* at 54.
5. *Id.* at 55.
6. *Id.* at 76.
7. *Id.* at 57.
8. *Id.*
9. *Id.* at 59.
10. *Id.* at 125.

approved brothels that competed with lower-priced but more troublesome off-limits establishments.[11] Commanders also struggled with the age-old discipline problems related to alcohol. Prohibition only aggravated alcohol's disruptive influence as soldiers were forced off post to find libations of questionable origin. Linn notes the popularity in Hawaii of a particular local drink called "okolehao" because of its reputed ability to supply two drunks for the price of one. Soldiers found they could drink until intoxicated, sleep it off, and then get intoxicated again by quickly drinking water.[12] With the end of prohibition and the return of on-post drinking establishments, alcohol-related prosecutions decreased. Linn's examination of courts-martial shows that illegal drugs, although readily available in both Manila and Honolulu, did not pose the same problems for the command as alcohol.

One Pacific Army court-martial found its way to the United States Supreme Court. While on guard duty in 1904, Private Homer Grafton shot and killed two Filipinos. Grafton claimed he was being attacked by these two individuals and fired in self-defense. He was tried by court-martial and found not guilty. The local Philippine prosecutor, not pleased with the outcome of the court-martial, filed his own charges against Grafton. Private Grafton was convicted by the Philippine court and sentenced to twelve years confinement. In 1907, the United States Supreme Court heard Grafton's appeal and ruled that his Filipino conviction was unconstitutional.[13]

Surprisingly, a legal opinion of The Judge Advocate General played a significant role in the Pacific Army's lack of preparedness. The 1920 Defense Act created an Enlisted Reserve Corps in response to the Army's manpower shortages. In 1921, The Judge Advocate General opined that this Act applied only to American citizens, thereby excluding Filipinos from enlistment in the reserves.[14] Although there was no legal issue as to Hawaii's participation in the enlisted reserve, a lack of financial support

11. *Id.* at 128.

12. *Id.* at 134.

13. *Id.* at 27. Grafton's case was appealed to the United States Supreme Court from the Supreme Court of the Philippine Islands. The Court set aside his Filipino conviction on double jeopardy grounds. The Court's reasoning was that the same sovereign, the United States, created the court-martial and the Filipino court. Therefore, Grafton's subsequent conviction was barred by his earlier acquittal. *Id.* (citing U.S. v. Grafton, 206 U.S. 333 (1907)).

14. *Id.* at 150. The Philippine Department repeatedly asked the War Department to challenge this opinion.

combined with the racial prejudice against Hawaii's many ethnic groups kept an effective reserve from being established in the islands. [15]

Linn's exhaustive research of the Pacific Army is impressive. He leaves no aspect of this force untouched. Athletic activities, social life, family life, career concerns, interaction with the local populations, and the often strained relations with higher headquarters in Washington are all discussed in entertaining detail. Polo, teas, and dances were major distractions. Families struggled with the decision to store their household goods or have them shipped in the care of the Quartermaster Corps, a sure promise of significant damage. Officers in the Pacific Army were expected to spend lavishly on uniforms, in some cases requiring as many as three different uniforms in one day.[16] Boxing, as made famous in the novel *From Here to Eternity* and its classic movie adaptation, attracted great interest and command support. Overall, the Pacific Army took on its own persona and exhibited, in Linn's view, "an almost insubordinate independence."[17]

One of the more interesting aspects of Linn's book is his examination of the relationship between the Army and the local populations in Hawaii and the Philippines. There was a greater degree of tension in the Philippines, as would be expected in the aftermath of the Filipinos fight for independence. Charges of war crimes violations, many of which proved true, plagued the Army during the Philippine campaign.[18] Tensions with the Army remained even after some Filipinos were organized into the Philippine Scouts. For example, in 1924 over 600 Philippine Scouts refused to drill in protest over their pay and treatment. After being warned by their officers of the seriousness of their actions, almost 400 Scouts returned to duty. The remaining Scouts were tried by court-martial, convicted, and received sentences ranging from five to twenty years.[19]

In Hawaii, the multicultural, multiethnic population of the islands proved problematic for military commanders. The ethnic Japanese were

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15. *Id.* at 152.

16. *Id.* at 73.

17. *Id.* at 108.

18. One of the most famous of these, not mentioned by Linn, was the court-martial of General Jacob Smith. On taking command on the island of Samar, General Smith instructed his subordinates to turn the island into a "howling wilderness." They apparently did their best to comply with this order, much to the detriment of Filipinos in the region. *See* Captain Paul Melshen, *Hero or Butcher of Samar?*, U.S. NAVAL INSTITUTE PROCEEDINGS, Nov. 1979, at 42-48.

19. LINN, *supra* note 1, at 148.

of special concern. Commanders debated whether troops should be stationed near Honolulu to guard against any mischief by the Japanese population or in a more central location from which they could move to counter any attempted landings.

Much of Linn's research focuses on the central question of why the Pacific Army was so unprepared for an attack that it had been anticipating for almost forty years. Japan was the at the center of U.S. military planners' attention in the Pacific throughout this period. In 1923 Brigadier General Billy Mitchell prepared a report predicting a Japanese aerial attack on Pearl Harbor. However, his prediction was a little off on the details. Mitchell concluded the threat was not aircraft carriers, because they could not possibly launch a sufficient number of aircraft. He envisioned the Japanese building a secret air base on the secluded Hawaiian island of Niihau. They would use this base to launch the attack using aircraft ferried to the island by Japanese submarines. Japanese bombers from Midway Island, once that American outpost was captured, would also join in the attack.[20]

There was certainly no lack of plans and theories on how to defend these possessions. In the Philippines, the debate ranged from those who believed that the archipelago could be successfully defended from invasion to those who believed the islands should be abandoned in the event of war. Some officers believed that the Philippine garrison served a purpose because its mere presence would require an enemy of the United States to expend significant resources to secure the islands.

Among the many plans considered for the defense of the main Hawaiian island of Oahu was a plan calling for the use of poison gas against attackers. This resulted in Oahu becoming, by the 1930s, the home of one of the largest supplies of chemical warfare agents in the world.[21] The impact these agents could have had on the civilian population and on the environment received little attention from planners. The use of gas also figured prominently in defense plans for the Philippines. Unlike Hawaii, however, the War Department refused to supply sufficient chemical agents

20. *Id.* at 214.
21. *Id.* at 198.

and protective equipment to the Philippines to make gas a viable defensive option.[22]

After reviewing numerous war plans and their changes throughout the period, Linn concludes that several causes contributed to the American Army's inability to defend America's empire in the Pacific. One major cause was the failure of commanders to decide exactly what enemy they were defending against. Another key factor was the lack of resources to support any of the plans for defense of the Philippines or Hawaii. A final contributor was the lack of coordination between the Army and the Navy, particularly in the case of Hawaii. The fact that it was never decided which service bore responsibility for long-range reconnaissance had disastrous consequences at Pearl Harbor.[23]

Linn's *Guardians of Empire* provides an informative and engaging look at the military force that bore the brunt of the American's entry into World War II. It also shows the potential consequences of allowing a force to be under-manned, under-equipped, and unfocused for years. This is the real lesson of the Pacific Army that those in positions of authority today should take to heart.

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22. *Id.* at 197.
23. *Id.* at 213.

ALL THE LAWS BUT ONE[1]

REVIEWED BY MAJOR JAMES M. LANGHAM[2]

> *The Constitution has not greatly bothered any wartime President. That was a question of law, which ultimately the Supreme Court must decide. And meanwhile—probably a long meanwhile—we must get on with the war.*[3]

This insightful comment by Francis Biddle, Attorney General under Franklin D. Roosevelt, captures the underlying thesis of Chief Justice William Rehnquist's book about civil liberties in wartime: of necessity, those rights may be secondary to the national interest.

Chief Justice Rehnquist has created an engrossing treatment of civil liberties in wartime that reads more like a novel than a historical treatise. His simple organization and easy style make this work not only good constitutional history, but good storytelling. Even though his thesis is not explicitly stated at the outset, it is developed throughout the story and surfaces in the final chapter, where he poses some thought-provoking questions that all students of constitutional law and history should consider.

The Chief Justice's underlying thesis is that civil liberties will, and perhaps should, take a back seat to national security during wartime. This thesis will no doubt be unpopular with civil libertarians, but it shows the reasonable and pragmatic approach the Chief Justice takes based on his study of constitutional history and his nearly thirty years on the United States Supreme Court.

Chief Justice Rehnquist takes us through a snapshot history of three major wars, the Civil War, World War I, and World War II. But this book is not a history of war; it is a history of the law. *All the Wars but One* focuses on the legal issues that arose during these wars. Although Chief

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1. WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME (1998).

2. United States Army. Written while assigned as a student, 49th Judge Advocate Officer Graduate Course, The Judge Advocate General's School, United States Army, Charlottesville, Virginia.

3. REHNQUIST, *supra* note 1, at 191-92.

Justice Rehnquist provides sufficient facts to set the stage for each legal battle, he does not overburden the reader with superfluous facts about each war. His use of detail is artful, giving the reader not only a sense of history, but also a sense of character. His brilliant portrayal of historical events and characters brings them to life for the reader.[4]

Chief Justice Rehnquist devotes nearly four-fifths of the book to cases arising during the Civil War era. The twentieth century cases are covered in just a few chapters at the end of the book. As a result, the book seems a bit lopsided, with the modern cases appearing somehow less significant. In his book the Chief Justice never explains this disparity. However, in a later interview, he said he intended to write a book about the Civil War, but then briefly included the twentieth century cases when he did not have enough Civil War material to complete the book.[5]

In that first four-fifths of the book, Chief Justice Rehnquist recounts the legal battles surrounding President Lincoln's suspension of the Writ of Habeas Corpus and other infringements on civil liberties. The Chief Justice describes the tension this raised between national security and civil liberties. This marked the first time in U.S. history that these two fundamental concepts were at odds. He uses major Civil War cases[6] to skillfully illustrate this tension, and he points out that the disaccord continued, in one form or another, throughout World War I and World War II.

During World War I, the government had to contend with adverse public sentiment because it was not a popular war. With this backdrop, Congress passed the Espionage Act, which prohibited certain activities

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4. For instance, he describes Justice Felix Frankfurter as "a brightly plumaged bird who never gave up his professorial mien in his battles for judicial restraint." REHNQUIST, *supra* note 1, at 194.

5. Justice Rehnquist said,

> At first I though it would be just a book about civil liberties in the Civil War, but then it turned out that didn't have quite enough material—(laughs)—for an entire book, and I got interested in carrying it forth—you know, carrying it forward into World War I and World War II.

Thomas E. Baker, *At War with the Constitution: A History Lesson from the Chief Justice*, 14 BYU J. PUB. L. 69, 71 n.9 (1999) (book review) (citing Interview by Brian Lamb with Chief Justice William H. Rehnquist, United States Supreme Court, Book TV on C-SPAN 2 (Oct. 25, 1998) [hereinafter Lamb Interview]).

6. *Ex parte* Merryman, 17 Fed. Cases 144 (Cir. Ct. Md. 1861); *Ex parte* Vallandigham, 1 Wallace 243 (1864); *Ex parte* Milligan, 4 Wallace 2 (1866).

that would normally be protected as civil liberties. In 1917, Eugene V. Debs was convicted for violating the Espionage Act by presenting a speech opposing the war at a political rally. The Supreme Court upheld the jury finding that the speech was designed to obstruct recruitment. In 1919, the Supreme Court also upheld Charles Schenck's conviction for violating the Espionage Act. Mr. Schenck printed and distributed to draftees leaflets that encouraged draft resistance.[7] He unsuccessfully claimed that the Act violated the First Amendment right to a free press.

Chief Justice Rehnquist effectively uses these cases to underscore the tension between national security and civil liberties that continued to exist throughout World War I and World War II, with civil liberties taking second chair. Unlike the Civil War period, however, the government during World War I relied more on legislation to curtail civil liberties, rather than bare presidential authority. He uses this point to expound on a nuance of governmental power that many citizens probably do not realize: the executive's power is at its zenith when coupled with a legislative mandate. The author gives the reader several such "mini-government lessons" in *All the Laws but One*. Undoubtedly most readers will come away from this book knowing more about governmental workings.

During World War II, the evacuation and detention of thousands of "persons of Japanese origin"[8] from strategic areas of the West Coast and the imposition of martial law in Hawaii also tested the limits of First Amendment jurisprudence, all in the name of military necessity. Four notable cases came out of these evacuations and detentions.[9] The court upheld the convictions in these cases without any attempt at a separate inquiry into the bases for the claims of military necessity. The Court simply bowed to the military's judgment in determining military necessity.

With these cases as a backdrop, Chief Justice Rehnquist poses two thought-provoking questions. First, in discussing the reluctance of courts to decide a case against the government on an issue of national security during a war, he asks, "Is this reluctance a necessary evil—necessary

7. REHNQUIST, *supra* note 1, at 174.

8. *Id.* at 190.

9. *Id*. at 193 (citing *Ex parte* Endo, 323 U.S. 283 (1944) (challenging the propriety of continued detention); Korematsu v. United States, 323 U.S. 214 (1944) (violating a military exclusion order and remaining at home); Yasui v. United States, 320 U.S. 390 (1943) (curfew violations); and Hirabayashi v. United States, 320 U.S. 81 (1943) (failure to report for evacuation)).

because judges, like other citizens, do not wish to hinder a nation's "war effort"—or is it actually a desirable phenomenon?"[10]

This question has far reaching implications for governmental control and oversight. The U.S. Constitution establishes separate branches of government to provide checks and balances that protect the citizenry from governmental abuse. Regardless of how the question is answered, the judiciary is placed in an awkward position. An affirmative answer to the question would remove the courts as a check on the exercise of executive power. The courts, by their own inaction, would subjugate themselves to the executive. A negative response could have grave implications for overall national security during wartime. This places the judiciary in a precarious position. As the Chief Justice said, perhaps judges, "like other citizens, do not wish to hinder a nation's 'war effort.'"[11] As admirable as this sentiment is, judges are not like "other citizens." They are entrusted with the daunting task of balancing the exercise of executive power with judicial restraint. Judges should not have the luxury of non-action enjoyed by other citizens.

Chief Justice Rehnquist eventually answers his own question and gives another "mini-government lesson" by explaining how such judicial reluctance is manifested. A court may simply avoid deciding a constitutional question during a war. A court may also decide in favor of the government during a war and yet decide the same issue against the government in time of peace.[12] Either way, the Supreme Court has shown its reluctance to decide against the government under these circumstances. Chief Justice Rehnquist seems to believe that this judicial reluctance is inevitable, even desirable. He criticizes some of the earlier Court decisions as flawed, yet does not harshly criticize the presidential actions infringing civil liberties.[13] "In defense of the military, it should be pointed out that these officials were not entrusted with the protection of anyone's civil liberties; their task instead was to make sure that vital areas were as secure as possible from espionage or sabotage."[14] This statement underscores the basic premise of the *All the Laws but One*: sometimes civil liberties may have to take a back seat to national security.

Recognizing that judicial reluctance is inevitable during wartime, Chief Justice Rehnquist poses his second question. "If, in fact, courts are

10. *Id.* at 221.
11. *Id.*
12. *Id.* at 221-22.

more prone to uphold wartime claims of civil liberties after the war is over, may it not actually be desirable to avoid decision on such claims during the war?"[15] This question strikes to the very heart of judicial lawmaking. If the premise of *stare decisis* is to create a body of law from which to draw precedent, then deciding important civil liberty cases in favor of the government at one time yet against the government at another creates a disparate body of law. As a matter of constitutional principle, the law governing a particular set of facts should be the same whether in war or peace. Such uniform treatment would create a coherent body of law. If the courts are prone to judicial reluctance during wartime, then perhaps it would be better to withhold a decision until after the war when the court would be more inclined to follow judicial norms.

Chief Justice Rehnquist answers these questions with ease. He takes the reader through his reasoning and helps the reader see his viewpoint without any heavy handedness. He is clear in his message that civil liberties will be treated differently during time of war. He makes no apologies for his message.

> In any civilized society the most important task is achieving a proper balance between freedom and order. In wartime, reason and history both suggest that this balance shifts to some degree in favor of order—in favor of the government's ability to deal with conditions that threaten the national well being. It simply cannot be said, therefore, that in every conflict between individ-

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13. Baker, *supra* note 5, at 74 n.27 (citing Lamb Interview, *supra* note 5).

> C-SPAN: What do you think you would have done back then, if you had been in a leadership position? Justice Rehnquist: Oh, I think one of the most difficult things in the world to do, is to second-guess people who were in leadership positions at that time. You know, it's very easy, in the atmosphere of the late 1990s, to say something was a very bad thing to have done. That doesn't mean that it was not a very bad thing to have done. But so far as criticizing people who were in leadership positions at that time, you've got to realize they operated under the ethos and the standards of the times in which they lived."

Id. In response to the question, "What do you think of what Abraham Lincoln did with the writ of habeas corpus during the war?," Chief Justice Rehnquist confessed, "I think, if I'd been president, I would have done exactly the same thing." *Id.* at 81 n.83 (citing Lamb Interview, *supra* note 5).

14. REHNQUIST, *supra* note 1, at 204.

15. *Id.* at 222.

> ual liberty and governmental authority the former should prevail.[16]

This is a bold statement from the Chief Justice of the Supreme Court.

Some may contend that *All the Laws but One* lacks substantive legal analysis.[17] Perhaps this is the case; however, this is not a legal textbook.[18] It is a historical work from a gifted amateur historian. Chief Justice Rehnquist's audience is the general public. In this work, he has admirably contributed to the national debate in the area of civil liberties. His finely honed analytical skills allow him to take complex issues and distill them to their bare essence. In exemplary fashion, he walks the reader through the intricacies of legal decision making in a manner that anyone can follow.

Legal issues involving civil liberties are not decided lightly. Chief Justice Rehnquist gives his reader the feel and flavor of these decisions and their interplay with national security. With his unique insight, he provides a solid lesson in constitutional history. His pragmatic approach is one that many readers will appreciate. Along with showing his pragmatism, his final words in the book give us all a profound point to consider. In summarizing his view of the past and the future state of civil liberties in wartime, Chief Justice Rehnquist concludes:

> [I]t is neither desirable nor is it remotely likely that civil liberty will occupy as favored a position in wartime as it does in peacetime. But it is both desirable and likely that more careful attention will be paid by the courts to the basis for the government's claims of necessity as a basis for curtailing civil liberty. *The laws will thus not be silent in time of war, but they will speak with a somewhat different voice*.[19]

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16. *Id.*

17. Margaret A. Garvin, *Civil Liberties During War: History's Institutional Lessons, All the Laws but One: Civil Liberties in Wartime*, 16 CONST. COMMENTARY 691 (1999) (book review).

18. In the acknowledgement section of the book, Chief Justice Rehnquist credits both his daughter and his editor for making him sound less like a lawyer. They have done an admirable job.

19. REHNQUIST, *supra* note 1, at 225 (emphasis added).

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