Volume 196 **Summer 2008**

MILITARY LAW REVIEW

ARTICLES

Department of Army Pamphlet 27-100-196

MILITARY LAW REVIEW

Volume 196 **Summer 2008**

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BOOK REVIEWS

Headquarters, Department of the Army, Washington, D.C.

Pamphlet No. 27-100-196, Summer 2008

MILITARY LAW REVIEW—VOLUME 196

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The *Military Law Review* (ISSN 0026-4040) is published quarterly by The Judge Advocate General's Legal Center and School, 600 Massie Road, Charlottesville, Virginia, 22903-1781, for use by military attorneys in connection with their official duties.

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POSTMASTER: Send address changes to *Military Law Review*, The Judge Advocate General's Legal Center and School, U.S. Army, 600 Massie Road, ATTN: ALCS-ADA-P, Charlottesville, Virginia, 22903-1781.

CITATION: This issue of the *Military Law Review* may be cited as 196 MIL. L. REV. (page number) (Summer 2008). Each issue is a complete, separately-numbered volume.

INDEXING: *Military Law Review* articles are indexed in *A Bibliography of Contents: Political Science and Government; Legal Contents (C.C.L.P.)*; *Index to Legal Periodicals*; *Monthly Catalogue of United States Government Publications*; *Index to United States Government Periodicals*; *Legal Resources Index*; four computerized databases—the JAGCNET, the *Public Affairs Information Service*, *The Social Science Citation Index*, and *LEXIS*—and other indexing services. Issues of the *Military Law Review* are reproduced on microfiche in *Current United States Government Periodicals on Microfiche* by Infordata International Inc., Suite 4602, 175 East Delaware Place, Chicago, Illinois, 60611. The *Military Law Review* is available at http://www.jagcnet.army.mil/MLR.

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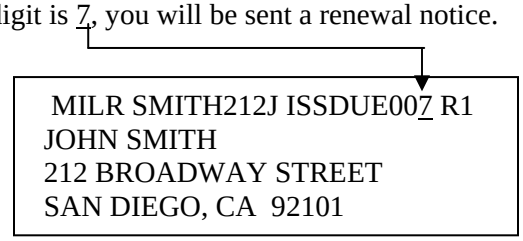

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MILITARY LAW REVIEW

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CHARTING A NEW ROLE FOR TITLE 10 RESERVE FORCES: A TOTAL FORCE RESPONSE TO NATURAL DISASTERS

COLONEL KEVIN CIEPLY[†]

The American people fully expect that all military forces that are available and can help respond to a disaster will do so without unnecessary delays. In time of need, the public, who pays for the military and whom our armed services are pledged to serve, does not care whether the military personnel who come to their aid are active duty or from the National Guard or Reserves.[1]

I. Introduction

Indeed, when Mother Nature unleashes her most potent forces causing catastrophic destruction and suffering, the public does not care whether needed military aid comes from the National Guard, the Active Component, or the Title 10 Reserve. To the public, receiving the right type of support, quickly and consistently, is what matters.

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[1] COMMISSION ON THE NATIONAL GUARD AND RESERVES, SECOND REPORT TO CONGRESS 60 (Mar. 1, 2007), http://www.cngr.gov/Worddocs/March%20ReportCNGR%20Second%20Report%20to%20Congress%20.pdf [hereinafter CNGR SECOND REPORT].

But the law differs. Under the law, *who* provides relief for natural disasters does matter, especially when it comes to the Title 10 Reserve (meaning, the Reserve Components minus the National Guard, hereinafter "the Reserve").[2] The law discriminates against the Reserve, making it difficult—although not impossible—for the Reserve to deploy for natural disaster response.

This is true even though much of the nation's military assets most relevant to natural disaster response reside throughout the country in the Reserve. For every natural disaster, therefore, it is likely that the Reserve, similar to the National Guard, will have critically relevant capabilities very close to the areas in need.

In its final report to Congress and the Secretary of Defense, the Commission on the National Guard and the Reserves (CNGR) recognized this potential and made it part of its focus, stating that "preparing for and responding to man-made or natural disasters at home is a total force responsibility."[3] In other words, no military force should be excluded—especially not one as relevant as the Reserve.

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[2] A couple of clarifying remarks are necessary up front. First, under 10 U.S.C. ch. 1003 there are subtle but very significant differences between the labels involving the following: National Guard, the Reserve, Reserve Components and Ready Reserve. This article follows the uses as found in 10 U.S.C. ch. 1003. Specifically, when this article refers to "the Reserve," it is referring to the Reserve Components minus the National Guard. This article mentions the National Guard separately when it intends to refer to the National Guard, or uses the phrase "Reserve Component personnel," which includes both the Reserve and the National Guard. Second, this article addresses the "Ready Reserve," as opposed to the "Standby Reserve" or "Retired Reserve." Title 10, § 10101 defines "Reserve Components" as a category comprising seven separate entities: (1) Army National Guard of the United States; (2) The Army Reserve; (3) The Naval Reserve; (4) The Marine Corps Reserve; (5) The Air National Guard of the United States; (6) The Air Force Reserve; and (7) The Coast Guard Reserve. Each is further defined at 10 U.S.C. § 10141, explaining that each armed force has a "Ready Reserve, a Standby Reserve, and a Retired Reserve." The Ready Reserve is defined by 10 U.S.C. §§ 10141–10150, and it includes both the National Guard and the Reserve. Specifically, the Ready Reserve is composed of three groups: the Selected Reserve, Individual Ready Reserve, and the Inactive National Guard. The Selected Reserve consists of "units, and, as designated by the Secretary concerned, of Reserves, trained as prescribed in § 10147(a)(1), of this title . . . ." 10 U.S.C. § 10143 (2000). This article focuses on the Ready Reserve, and specifically on the Selected Reserve. Primarily, this article focuses on the Selected Reserve of "the Reserve" (meaning, the Selected Reserve of the Reserve Components, minus the National Guard).

[3] COMMISSION ON THE NATIONAL GUARD AND RESERVES, TRANSFORMING THE NATIONAL GUARD AND RESERVES INTO A 21ST-CENTURY OPERATIONAL FORCE, FINAL REPORT TO

The purpose of this article is to highlight the specific law, 10 U.S.C. § 12304, that shackles the President, more than anything else, from effectively deploying the Reserve for natural disaster response. On 7 February 2008, the Department of Defense (DOD) submitted its proposed National Defense Authorization Act for Fiscal Year 2009 (FY09 NDAA) to Congress.[4] The proposal contained, at section 1031, a recommended change to 10 U.S.C. § 12304 that would enable the President to mobilize the Reserve for natural disaster response. On 22 May 2008, the House of Representatives passed its version of the FY09 NDAA,[5] substantively incorporating DOD's recommended change to § 12304. The governors and adjutants general, however, have now come forward and objected to the change. This article argues that for the best interest of this nation, as a whole, Congress should look past the misplaced resistance from the governors and adjutants general and enact the proposed amendment to 10 U.S.C. § 12304, with one revision.

A secondary, but equally important, purpose of this article is to outline ways to legally circumvent the needless roadblock of 10 U.S.C. § 12304, in case the amendment does not pass. The primary method is for the DOD and Service Secretaries to energize volunteerism of individual Reserve members, in the form of "hip-pocket" orders, much like the way the National Guard performs national security and national defense missions such as Operation Noble Eagle (ONE). In addition to hip-pocket orders, the Reserve may also provide natural disaster response under Immediate Response Authority (IRA), mutual aid agreements, Emergency Authority, and use of full-time personnel (i.e., Active Guard Reserve and Technicians). These alternative authorities are important, but they contain limitations that render them merely temporary solutions, necessitating Congress to provide a more permanent statutory fix.

Part II of this article will briefly describe the Title 10 Reserve's background and further expound on its potential use in disaster relief. Part III will then discuss the proposed amendment to 10 U.S.C. § 12304 that the House of Representatives recently passed in its FY09 NDAA, and the objection of the governors and adjutants general to that proposed

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CONGRESS AND THE SECRETARY OF DEFENSE 59 (Jan. 31, 2008) [hereinafter CNGR FINAL REPORT], *available at* http://www.cngr.gov/resource-center.CNGR-reports.asp.

[4] *See* DOD Proposed National Defense Authorization Act for Fiscal Year 2009, *available at* http://www.dod.mil/dodg/olc/docs/FY2009_BillText.pdf (last visited Apr. 11, 2008) [hereinafter DOD Proposed FY09 NDAA].

[5] H.R. 5658, 110th Cong. (2008).

change. This part will emphasize that changing the statute is the right thing to do. But given the fragmented nature of Congress, the fact that Congress rejected a similar change to 10 U.S.C. § 12304 in the Fiscal Year 2007 National Defense Authorization Act (FY07 NDAA),[6] and the current resistance by the states,[7] waiting for a legislative change may be imprudent.

Because of those political realities, Parts IV–VI will discuss the alternate executive options that, if exploited, could provide an effective Reserve response within the current legal framework. Part VII will summarize these recommendations and alternate strategies for employing the Reserve in disaster relief missions.

II. Background & Potential of the Reserve

A. Background

After Hurricane Katrina, which involved a National Guard and Active military response that peaked at 71,284 military personnel,[8] most state and federal disaster relief planners know how to bring the National Guard and Active military into the fray for support. They plan on the fact that the National Guard fills the role as the first military responder to natural disasters;[9] they are familiar with the procedure for the governor to call out the Guard under the governor's control;[10] and they know that if

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[6] H.R. REP. NO. 109-452, at 319 (2006), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_reports&docid=f:hr452.109.pdf.

[7] *See infra* notes 54–71 and accompanying text.

[8] Of those 71,284 troops, a large majority, 56,116, were National Guard and the rest—21,408—were primarily regular military forces. *See* S. REP. No. 109-322, at 476 (2006), *available at* http://www.gpoaccess.gov/serial/set/creports/katrinanation.html.

[9] This does not address the maritime domain, where the regular or reserve Coast Guard forces under the Secretary of Homeland Security would most likely serve as the first military-type force to a disaster.

[10] State active duty (SAD) is specifically defined by state law. In general, it refers to the National Guard under the control of the governor, performing a state mission, paid for by state funds. Operational duty under Title 32, typically is referring to duty under 32 U.S.C. § 502(f)(2)(A). Duty under 32 U.S.C. § 502(f)(2)(A) must be authorized by the President or Secretary of Defense (SecDef). Once authorized by the President or SecDef, this duty is under the control of the Governor, performing a federal mission, paid for with federal funds. One significant aspect of this status is that Posse Comitatus (18 U.S.C. § 1385) does not apply to these forces because the command and control remains under the Governor, thus maintaining the state nature of the forces. Both SAD and 32 U.S.C. § 502f(2)(A) forces are activated by an order from the governor (of course Title 32 would

needed, the Active military may supplement support to civil authorities under either the Stafford Act[11] or the Economy Act.[12] But that same familiarity and ease of implementation does not exist regarding how the "other" component—that is, the Reserve—deploys to a natural disaster. How do they deploy, if at all?[13]

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necessarily also require authorization for that status by the President or SecDef, as stated above).

[11] Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §§ 5121–5207 [hereinafter Stafford Act].

[12] If a response is needed to a natural disaster, typically the first and primary military responder will be the state National Guard. Positioned in approximately 3300 locations throughout the fifty-four states and territories, the National Guard provides a rapid, comprehensive, and trained force, uniquely familiar and connected with the local civil authorities. Moreover, the legal status of National Guard is *sui generis*. The Tenth Amendment of the Constitution secures the police power, including disaster response, with the states. The National Guard in its normal, default, everyday status is a state entity, directly under the control of the Governor. Each state possesses its own unique requirements under state law on exactly how, and under what circumstances, the governor may call out the National Guard. The purpose of this article is not to displace or inhibit the National Guard's primacy as a military provider to disaster response. Rather, it is only to add to that response by bringing to bear the assets of the Reserve, when a federal military response is appropriate.

[13] This lack of clarity is exemplified in Army Field Manual (FM) 3-07, as it attempts to describe just how the Army Reserve fits into disaster response with the following passage:

> The US Army Reserve is capable of extensive domestic support operations. This assistance and support may include the use of equipment and other resources, including units and individuals. US Army Reserve personnel may be activated in a volunteer status when ordered to active duty in lieu of annual training or after the president has declared a national emergency. Use of reserve component persons and units is restricted, under law, to immediate response under provisions DODD 3025.1 and to population and resource control for CBRNE incidents. US Army Reserve units may be used to respond to a CBRNE incident if they are in the area and in annual training status. They may not be used for other types of emergencies."

U.S. DEP'T OF ARMY, FIELD MANUAL 3-07, STABILITY OPERATIONS AND SUPPORT OPERATIONS para. 6-16 (20 Feb. 2003) (superseding FM 100-20). As is typical in this area, the paragraph displays incongruence. It starts off boldly describing the vast capability of the Army Reserve to contribute to disaster response only to spend the rest of its language on qualifying that capability with its limitations on activation, ultimately failing to explain all the options available.

Traditionally, the Reserve has been a force held as a strategic reserve for wartime support, focused almost exclusively on supplementing the active force in times of armed conflict against a foreign enemy. While the Reserve responded to Hurricane Katrina and the 2007 Southern California wildfires, they did so only on an exceptional basis, with few troops and sporadic forms of support.[14] The Reserve's relatively small contribution to natural disaster relief in the past, however, does not reflect its vast potential to serve the nation in the future during times of natural catastrophe. In today's natural threat environment where a deadly animal virus may only be a mutation away from efficient human-to-human infection,[15] where rising temperatures continue to alter weather patterns across the globe, and where an aging national infrastructure is becoming more and more precarious, it is imperative for the military to bring its plethora of military capabilities to bear on *all* contingencies in support of civil authorities.

As with the Active Component (AC), the Reserve may provide Civil Support[16] during natural disasters through either the Economy Act,[17]

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[14] The total contribution from the Reserve was low enough that it was not mentioned in Congress's final report on the preparation for and response to Hurricane Katrina. *See* U.S. HOUSE OF REPRESENTATIVES BIPARTISAN FINAL REPORT ON THE PREPARATION FOR AND RESPONSE TO HURRICANE KATRINA, A FAILURE OF INITIATIVE (Feb. 15, 2006) [hereinafter FINAL REPORT ON THE PREPARATION FOR AND RESPONSE TO HURRICANE KATRINA], *available at* http://www.gpoaccess.gov/katrinareport/fullreport.pdf. But the Reserves did in fact contribute. For instance, B Company, 5th Battalion, 159th Aviation Regiment, Fort Eustis, flew 138 hours in the first seven days, carried 1400 Soldiers and rescue workers, 115,000 pounds of food and water, and 1.7 million pounds of sandbags. The 206th Transportation Company, Opelika, Alabama provided 124 Soldiers, water and ice delivery; the 647th Transportation Company, Laurel, Mississippi sent 120 Soldiers and did debris removal in drainage lanes; and the Army Reserve Contact Teams dispatched to evacuee shelters. E-mail from Office of the Chief, Army Reserve, to author (30 Aug. 2007) (on file with author); Lieutenant General Jack Stultz, Call to Duty: Army Reserve Soldiers Serving with Pride (9 July 2007) (unpublished PowerPoint presentation, on file with author). In addition, the Reserve responded with Emergency Preparedness Liaison Officers (EPLOs). *See infra* note 29.

[15] For example, the avian influenza, associated with the H5N1 virus, currently only contracted from birds, poses a grave potential human-to-human threat if the proper mutation occurs. *See* Key Facts About Avian Influenza (Bird Flu) and Avian Influenza A (H5N1) Virus, http://www.cdc.gov/flu/avian/gen-info/facts.htm (last visited June 26, 2008).

[16] Civil Support is defined as "Department of Defense support to US civil authorities for domestic emergencies, and for designated law enforcement and other activities." JOINT CHIEFS OF STAFF, JOINT PUB. 3-28, CIVIL SUPPORT glossary, at 6 (14 Sept. 2007) [hereinafter JOINT PUB. 3-28].

[17] 31 U.S.C. § 1535 (2000).

when another federal agency possesses authority to provide civil support and when that federal agency requests DOD support, or through the Stafford Act, when the President declares a major disaster or emergency. But there is a difference between the AC and the Reserve under these laws: the Reserve members, by default, reside in a non-active duty status, and neither the Economy Act nor the Stafford Act provides inherent authority to activate the Reserve.[18]

To activate the Reserve, statutory authorities provide few practical options. Historically, the available authorities have been used only for warfighting or for training to conduct warfighting missions; they have not been used for natural disasters. When the Reserve has managed to respond, it has done so by groping for whatever authority lies within its reach, with members of the same unit often deploying under disparate personnel statuses.[19] The result has been an inchoate system of

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[18] When referring specifically to *involuntarily* bringing the Reserve into an active duty status, this article will use the terms "mobilize" or "mobilization." But when referring to the concept of bringing the Reserve into an active duty status either as a general matter (involuntarily and voluntarily) or specifically referring to voluntarily coming onto active duty, this article intentionally uses the narrower term "activate" or activation. One may quibble over the terms in any given case, but for the purposes of this paper, the intent, regardless of the term being used, is to convey the process of placing portions of the Reserve into an active duty status. Department of Defense Instruction (DODI) 1235.12 defines both terms: "Activation: The ordering of units and individual members of the Reserve components to active duty, with or without their consent, under legislative authority granted to the President, Congress or the Secretaries of the Military Departments." U.S. DEP'T OF DEFENSE, INSTR. 1235.12, ACCESSING THE READY RESERVES para. E2.1.1 (19 Jan. 1996) [hereinafter DODI 1235.12]. "Mobilization. The process by which all or a portion of the Armed Forces are brought to a state of readiness for war or a national emergency. It includes the order to active duty [i.e., activation] of units and members of the Reserve components under a declaration of national emergency by either the President or the Congress or when the Congress declares war. It includes the order to active duty of all or part of the Reserve components, as well as assembling and organizing personnel, supplies, and material." *Id.* para. E2.1.8. As explained in the *Domestic Operational Law Handbook*, activation is a more proper term when referring to the act of ordering individuals or units to active duty under presidential or congressional authority. CTR. FOR LAW & MILITARY OPERATIONS, TJAGLCS, U.S. ARMY, DOMESTIC OPERATIONAL LAW HANDBOOK vol. I, ch. 10, at 208–09 (2006) [hereinafter DOPLAW HANDBOOK]. Mobilization, on the other hand, as found in DODI 1235.12, is a broader term encompassing the entire scope of assembling and organizing personnel, supplies and material." *See also* JOINT CHIEFS OF STAFF, JOINT PUB. 1-02, DEP'T OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS 4, 344 (12 Apr. 2001).

[19] For example, during the 2007 Southern California Wildfires, some members of the 302d Airlift Wing, Peterson A.F.B. deployed in their everyday Title 5 technician status, while others in the same unit deployed under Active Duty Operational Support under 10 U.S.C. 12301d and DODI 1215.06. *See* U.S. DEP'T OF DEFENSE, INSTR. 1215.06,

integrating the Reserve assets into the federal disaster response. Thus, the bottom line continues to be that while a vast potential for the Reserve exists, that potential currently remains embryonic.

B. Potential of the Reserve

As the saying goes in real estate, the key to success is "location, location, location." The same holds true for natural disaster response. The local response, or at least the most local entity able to respond, likely will provide the most effective and urgently needed assistance. That is what makes the National Guard so effective—they are, by nature, in every state and territory, ready to respond.[20] But so too is the Reserve. The Reserve members and their units are dispersed throughout the United States in large and small communities.

Specifically, the Army Reserve alone sits in over 1100 communities across the United States, with over 6400 buildings, of which 975 are Army Reserve Centers.[21] Similarly, the Air Force, Marine, Coast Guard and Navy Reserve units have a pervasive presence throughout the nation. And like the National Guard, their ranks are filled by community members and leaders with deep roots in the areas they serve. The Reserve could be, if allowed, a federal forward-deployed force fortuitously positioned to respond to the indiscriminate wrath of nature.

Unlike the National Guard, the Reserve brings a unified, cohesive chain of command to its entire spectrum. That is, the Reserve, in its entirety, ultimately falls under the same Title 10 chain of command: under the Secretary of Defense and the President. This unified national chain of command can be essential to an effective disaster response,

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UNIFORM RESERVE, TRAINING, AND RETIREMENT CATEGORIES para. 6.1.4.2.1 (Feb. 7, 2007) [hereinafter DODI 1215.06]. Who went under what status really depended on the individual's preference. Technician pilots often choose to fly in their technician status during the week to preserve their leave days. The unit wisely permits this flexibility to encourage technician pilots to volunteer for the duty. Another example is the emergency preparedness liaison officers (EPLOs) who are forced to perform their mission in a training status. *See* DODI 1215.06, *supra*, para. E7.2.1; *see also infra* note 29 and accompanying text.

[20] The National Guard's ability to quickly deploy is another reason they are typically the first military responder to any calamity. The lack of authority is what hinders the Reserve.

[21] E-mail from Eric Loughner, Army Reserve Division, Office of the Assistant Chief of Staff for Installation Management (17 Sept. 2007) (on file with author).

enabling the Reserve to respond not only from a local or state venue, but also from a regional basis, ensuring availability of assets outside the disaster area that are still close enough to respond quickly. Moreover, because the Reserve falls under a federal chain of command, its assets are easily transferred to out-of-state areas during times of widespread natural disaster. National Guard assets, on the other hand, are perpetually tethered to local concerns.

The local concern of the Guard is best demonstrated by envisioning an unpredictable, sweeping situation such as a pandemic influenza. If a pandemic influenza developed, states could reasonably hesitate or refuse to send assets out-of-state today in fear of what tomorrow may bring, i.e., a situation requiring those same assets in-state.[22] This ever-present primacy of local concern that the National Guard faces as the elected governor's military force creates the potential for inefficient distribution of National Guard assets on a national scale during a widespread disaster.[23] The Reserve's geographical dispersion, ease of conducting operations across state borders, and federal chain of command enables it to contribute as part of an integrated federal response that has the command and control structure to objectively make tough decisions on how to balance federal assets against competing state needs, bringing regional and national complementary forces to state National Guard efforts.

While these aspects may make one wonder why this nation continues to fail in training, exercising, and employing the Reserve for natural disaster response, the situation becomes even more confounding when

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[22] All fifty states, the District of Columbia, Puerto Rico, U.S. Virgin Islands, and Guam are members of the Emergency Management Assistance Compact (EMAC). Emergency Management Assistance Compact, *available at* http://www.emacweb.org (last visited Apr. 8, 2008). The EMAC requires member states to provide mutual assistance and cooperation, which may include the National Guard. The EMAC has proven to be a very effective method of support among the states over the years. The EMAC does, however, contain an escape clause for a state to withhold assistance/cooperation if the state deems it necessary for its own welfare. Specifically, Article IV states: "Any party state requested to render mutual aid or conduct exercises and training for mutual aid shall take such action as is necessary to provide and make available the resources covered by this compact in accordance with the terms hereof; provided that it is understood that the state rendering aid may withhold resources to the extent necessary to provide reasonable protection for such state." *Id.*

[23] For instance, if a pandemic influenza breaks out in a particular region of the country, governors may in fact be very resistant to sending National Guard forces such as medical personnel, civil support teams, etc., to other states.

considering the *composition* of the Reserve. The Army Reserve consists primarily of combat support and combat service support units.[24] This composition means it possesses a majority of the Army's critical specialties relevant to disaster response. The Army Reserve assets include over half of the Army's medical assets, over half of the Army's chemical units, and half of the Army's transportation assets and mortuary affairs.[25] Likewise, the Navy Reserve has aviation units and Seabee units—units specifically outfitted with equipment and personnel designed to conduct missions such as debris removal and building infrastructure.[26] The Air Force Reserve has medical units, air transportation units, firefighting equipped aircraft, and civil engineering units.[27] The Marine Reserve has medical units (including surgical units), bulk fuel, transportation, maritime transportation, supply, engineering, aviation, communication and motor maintenance units.[28] The Coast Guard has aviation and maritime assets uniquely positioned to respond to areas in close proximity to the water. The Reserve also maintains emergency preparedness liaison officers (EPLOs).[29] The EPLOs are primarily military officers, in the grade of O-5 and O-6, who specialize in consequence management. There are currently approximately 422 EPLOs nationwide, with teams in every state and each of the ten Federal Emergency Management Agency (FEMA) regions,[30] ready to contribute to any federal response under the Defense Coordinating officer (DCO) in

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[24] The National Guard, on the other hand, primarily consists of Combat and Combat Support Units. From a disaster-response perspective, this is nothing short of nonsensical. The Army is organized in a manner that places its most relevant disaster response units into a component that is rarely used in natural disasters, and places its combat units in a component that is under the control of a state governor for most of its existence.

[25] *See* Army Reserve homepage, http://www.armyreserve.army.mil/ARWEB/MISSION/Role.htm (last visited Oct. 24, 2007).

[26] *See* Navy Reserve homepage, www.navyreserve.com (last visited Nov. 1, 2007); *see also* the Navy Reserve Seabees website, http://www.navyreserve.com/opportunities/enlisted/construction.jsp (last visited Oct. 30, 2007).

[27] *See* Air Force Reserve homepage, http://afreserve.com (last visited Aug. 6, 2008); *see also* Air Force Reserve Civil Engineer website, http://afreserve.com/mission.aspx?id=13 (last visited Aug. 6, 2008).

[28] *See* Marine Reserve homepage, http://www.marines.mil/units/Pages/categoryresults.aspx?Column=DivisionMulti&ColumnDisplayName=Unit%20Type&Value=Reserves (last visited Aug. 6, 2008).

[29] *See* JOINT PUB. 3-28, *supra* note 16, at II-19; *see also* U.S. DEP'T OF DEFENSE, DIR. 3025.16, MILITARY EMERGENCY PREPAREDNESS LIAISON OFFICER (EPLO) PROGRAM (18 Dec. 2000) [hereinafter DOD DIR. 3025.16].

[30] Information compiled by U.S. Northern Command (USNORTHCOM) (charts on file with author). Don Reed, U.S. Northern Command, J35, Working Seminar Addressing the Structure of EPLOs (17 Jan. 2008) (unpublished PowerPoint presentation, on file with author).

aid of local and state authorities.[31] The assets in the Reserve are, therefore, uniquely designed to provide precisely the type of services needed in times of disaster—whether natural or man-made.

IV. Legislative Change

A. 10 U.S.C. § 12304—Not Available for Natural Disasters

The statutory authority for a presidential Reserve call-up is found at 10 U.S.C. § 12304. It allows the President "to augment the active forces for any operational mission . . . ."[32] For instance, the President invoked 10 U.S.C. § 12304 to mobilize Reserve Component personnel for the following operational missions: Persian Gulf War (1990–1991), intervention in Haiti (1994–1996), Bosnian peacekeeping mission (1995–2004), Iraq (1998–2003), and Kosovo (1999–present).[33]

Title 10, § 12304 is also a handy, responsive tool for the President to use when troops are needed for terrorist-related incidents as well as disasters related to weapons of mass destruction (WMD). Under this authority, the President can immediately, involuntarily call up to 200,000 Reserve Component (RC) personnel for up to 365 days. No declaration of a national emergency or major disaster is needed,[34] and the language of the statute explicitly allows the President to order an involuntary mobilization when there is a "threatened" terrorist attack or when there is a "threatened" use of weapons of mass destruction. It is precisely the

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[31] The EPLOs fall under the Service Secretaries, not assigned to any particular combat command, including USNORTHCOM and Pacific Command (PACOM). This arrangement began prior to USNORTHCOM's establishment, when the Services were responsible for the federal military civil support missions with Army as the primary executive agent. The Office of the Assistant Secretary of Defense (OASD (HD & ASA)), the Services, USNORTHCOM, and PACOM are currently clarifying the precise roles of EPLOs and how they fit into the National Response Framework. The most effective structure appears to be one that keeps the EPLOs assigned to the Services, enabling them to receive administrative support that has evolved and proven effective over time. Upon the occurrence of a disaster, the EPLOs should then fall under the Tactical Control (TACON) of the DCO. Because of the current restrictions of 10 U.S.C. § 12304, EPLOs primarily deploy to disasters using Annual Training (AT) and Individual Duty Training (IDT). *See infra* note 145.

[32] 10 U.S.C. § 12304(a) (2000).

[33] Lawrence Kapp, *Reserve Component Personnel Issues: Questions and Answers*, CONG. RESEARCH SERV. REP. RL30802 (Jan. 18, 2006).

[34] 10 U.S.C. § 12304. Part of its title establishes Congress's intent that this statute does not require a declaration from the President. *See infra* note 75 and accompanying text.

type of forward-leaning authority that is needed in modern society—it mitigates suffering through proactive measures.

Title 10, § 12304 is also a quick, effective and practical method for mobilization because it does not create a personnel quandary for the total force. The Reserve members ordered to active duty under this authority are not accounted for in the active duty end strength.[35] Moreover, this authority provides a mechanism for congressional oversight by requiring the President to notify Congress within twenty-four hours, specifically setting forth in writing, "the circumstances necessitating the action taken . . . and describing the anticipated use of these units or members."[36]

But as good as 10 U.S.C. § 12304 is as a mechanism to mobilize the Reserve for operational missions and to respond to WMD and terrorist attacks, it may not be used as an authority to mobilize the Reserve for natural disasters such as hurricane relief, wildfires, flooding, or pandemic influenza. The explicit language of 10 U.S.C. § 12304(c)(1) prohibits its use for natural disasters. It states: "[N]o unit or member of a reserve component may be ordered to active duty under this section . . . to provide assistance to either the federal government or a state in time of a serious natural or manmade disaster, accident, or catastrophe."[37]

This is true even when the natural disaster is grave, pervasive, and extraordinary in scope; it is true even if the Reserve forces that would be allowed to respond under a WMD or terrorist event are also the exact type of resources needed for the natural disaster response, as undoubtedly would be the case. Because of this disparity between potential and authority, one may expect that Congress would move quickly to amend this law to provide involuntary call-up authority based

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[35] *See id.* § 12304(d); *see also id.* § 115(i)(4).

[36] *Id.* § 12304(f).

[37] *Id.* § 12304(c)(1). This paragraph was changed as part of the FY08 NDAA repeal of Public Law Number 109-364 (Enforcement of the Laws to Restore Public Order). With the FY08 NDAA, 10 U.S.C. § 12304(c) now reads, in full:

> No unit or member of a reserve component may be ordered to active duty under this section to perform any of the functions authorized by chapter 15 or section 12406 of this title or, except as provided in subsection (b), to provide assistance to either the Federal Government or a State in time of a serious natural or manmade disaster, accident, or catastrophe.

Pub. L. No. 110-181, § 1068 (Jan. 28, 2008).

on the gravity of the national threat. This expectation, unfortunately, has not fully come to fruition.

B. FY07 Changes

Congress's best opportunity to effectively address the lack of authority to mobilize the Reserve for natural disasters came while considering the FY07 NDAA.[38] One particular version of the FY07 NDAA from the House of Representatives included language that would have permitted the President to mobilize Reserve Components under 10 U.S.C. § 12304 for *any* natural disaster response. Specifically, the language would have added a new paragraph, 10 U.S.C. § 12304(b)(3), authorizing mobilization of Reserve Components for *any* situation involving "serious natural or manmade disasters, accidents, or catastrophes that occur in the United States, its territories and possessions, the District of Columbia and the Commonwealth of Puerto Rico."[39] This language was actually in the bill that passed the House, but was eventually dropped in the Senate, never making its way into the final version that became law.[40]

When Congress rejected the proposed change to 10 U.S.C. § 12304(b) in FY07, it was allegedly not the aspect of making the Reserve available for natural and manmade disasters that sealed its fate, but rather the scope of its applicability. Specifically, the proposed FY07 NDAA change to 10 U.S.C. § 12304(b) unwisely included the National Guard, exposing the National Guard to federalization during periods

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[38] During the FY07 NDAA legislative process, Congress considered and made numerous changes concerning 10 U.S.C. § 12304. For instance, Congress changed the duration limit of mobilization from 270 days to 365 days. In addition, Congress altered the statute to allow the President to mobilize the Reserve Components under 10 U.S.C. § 12304 for the Enforcement of the Laws to Restore Public Order (ELRPO). Under the FY07 NDAA, Congress replaced the Insurrection Act with the ELRPO. This was a short-lived change, as one year later Congress repealed the ELRPO and reverted the statute back to the former Insurrection Act. In FY08, Congress also repealed the corresponding change to 10 U.S.C. § 12304 that addressed mobilization for the ELRPO. *See* Pub. L. No. 110-181, § 1068 (Jan. 28, 2008).

[39] H.R. REP. NO. 109-452, at 319 (2006), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_reports&docid=f:hr452.109.pdf.

[40] There were six versions of the NDAA for 2007; the final version that became law was the John Warner National Defense Authorization Act for Fiscal Year 2007. *See* National Defense Act for Fiscal Year 2007, Pub. L. No. 109-364, 120 Stat. 2083 (2006).

when it inevitably would be needed by the states. It was that aspect of the FY07 NDAA that caused its failure in the Senate.

After the House passed its version of FY07 NDAA, including the provision that would have revised 10 U.S.C. § 12304 to be used for natural and manmade disasters, Governors Mike Huckabee (Arkansas) and Janet Napolitano (Arizona) wrote a letter to the Chairman and Ranking Member of the Committee on Armed Services, U.S. House of Representatives.[41] The letter objected to "the House-passed DoD Act [that] would allow the President to federalize the National Guard of the states without the consent of the governor."[42] The letter went on to assert that the "possibility of the federal government pre-empting the authority of the state or governor in natural and manmade disasters is opposed by the nation's governors."[43] The letter was endorsed by all fifty governors.[44] The message from the governors was clear: any attempt to expand the President's authority to federalize the National Guard will meet heavy resistance from the states.

C. Another Attempt at Change Needed

The rejection by Congress in FY07 to amend § 12304(b), coupled with the statute's explicit language currently found at 10 U.S.C. § 12304(c), leaves no doubt as to Congress' intent concerning the breadth of 10 U.S.C. § 12304—it is not to be used for natural disasters.[45]

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[41] *See* William Banks, *Who's in Charge: The Role of the Military in Disaster Response*, 26 MISS. C. L. REV. 75 n.189 (2006/2007).

[42] Letter from Governors Mike Huckabee & Janet Napolitano to Duncan Hunter, Chairman, Committee on Armed Services, and Ike Skelton, Ranking Member, Committee on Armed Services, U.S. House of Representatives (Aug. 1, 2006), *available at* http://www.nga.org/portal/site/nga/menuitem.cb6e7818b34088d18a278110501010a0/?vgnextoid=7a62d3164d5cc010VgnVCM1000001a01010aRCRD.

[43] *Id.*

[44] *See* Banks, *supra* note 41, at 75 n.189.

[45] *See* 10 U.S.C. § 12304(c)(1) (2000). Congress's decision to reject the involuntary activation of the Reserve for natural disasters in 10 U.S.C. § 12304 does not translate into an implied will of Congress to prohibit, writ large, involuntary activation of the Reserve for natural disaster response, not even as a prohibition limited to times when national emergency/disaster has not been declared. *Id.* Section 12304(c)(1) explicitly limits the scope of the prohibition to activation under 10 U.S.C. § 12304. Specifically, it states: "no unit or member of a reserve component may be ordered to active duty *under this section* . . . ." *Id.* § 12304(c)(1) (emphasis added). Implicitly, 10 U.S.C. § 12304(c)(1) does not intend to limit other sections. And indeed, other sections such as 10 U.S.C. § 12301(a), 10 U.S.C. § 12301(b) and 10 U.S.C. § 12302 contain unqualified language, in

But while it is understandable for the states to resist changes in the law that expand the President's authority to federalize the National Guard, it does not make sense to hobble the President's ability to effectively and efficiently use the Reserve. This is especially true when the statutory framework intentionally padlocks the same assets that are available during incidents involving terrorism or weapons of mass destruction. The quantity and quality of the Reserve assets that are potentially available, coupled with their dispersion across the country, makes it imperative for Congress to reconsider this statute.[46]

In its final report to Congress, the Commission on the National Guard and the Reserves reiterated the need for change with the following words: "The Commission believes that current mobilization authorities for federal reserve forces to respond to emergencies are insufficient and should be expanded."[47] The single best point to begin this expansion is to address the limiting language of 10 U.S.C. § 12304.

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relation to natural disasters, that authorizes activation. *See infra* pt. IV. When possible, statutes are to be read in concert with each other. John Doe v. Rumsfeld, 435 F.3d 980, 987 (9th Cir. 2006) (citing La. Pub. Serv. Comm'n v. F.C.C., 476 U.S. 355, 370 (1986)). Congressional rejection of natural disasters in 10 U.S.C. § 12304, therefore, should not be seen as the expression of congressional will that goes beyond the four corners of 10 U.S.C. § 12304.

[46] The fact that the Reserve members may volunteer for natural disasters, as will be discussed later in Section V, pardons Congress only to the extent that Congress can guarantee that no natural disaster will occur where volunteerism becomes a questionable concept, e.g., a pandemic influenza.

[47] CNGR FINAL REPORT, *supra* note 3, at 112. In this report, the Commission on the National Guard and Reserves recommends using the Coast Guard model as a potential solution. Specifically, the Commission states the following in its final report:

> We further believe that the mobilization authorities for the Coast Guard Reserve present a good model. Rear Admiral Kenneth T. Venuto of the Coast Guard testified that this authority increases the availability and accessibility of reservists to respond to domestic crises, especially when disaster is imminent. Similar authorities should be adopted to provide service Secretaries the authority to involuntarily mobilize federal reserve components for up to 60 days in a four-month period and up to 120 days in a two-year period during or in response to imminent natural or man-made disasters.

Id. An alternative to this approach, of course, is a change to 10 U.S.C. § 12304.

D. FY09 NDAA: A New Attempt to Access the Reserve

On 22 May 2008, the House of Representatives passed its proposed version of FY09 National Defense Appropriations Act—House Bill 5658.[48] Section 594 of House Bill 5658 would amend 10 U.S.C. § 12304 by adding a paragraph that gives the President the authority to access the Reserve for natural disaster relief. Specifically, it would give the President the authority to order

> any unit of the Selected Reserve of the Army Reserve, Navy Reserve, Air Force Reserve, Marine Corps Reserve, or Coast Guard Reserve to active duty to provide assistance in responding to a major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)).[49]

Notice that the National Guard is *not* listed. The language adequately expands the scope of 10 U.S.C. § 12304(b) to allow for the mobilization of the Reserve for natural disaster response, but does so in a manner that does not implicate the National Guard.

Politically, as FY07 and FY08 have so vividly demonstrated, it makes sense to exclude the National Guard. The past demonstrates that states successfully fight attempts in Congress to expand the President's ability to mobilize the states' military force—the National Guard.[50] This is particularly true in times of natural disaster when governors need to establish their authority, competence, and leadership.

Strategically, excluding the National Guard also makes sense. In times of major disaster and national emergency, one of the most important aspects of the National Guard is the fact that the Posse Comitatus Act[51] does not apply to the Guard in state status, enabling

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[48] *See* H.R. 5658, 110th Cong. (2008).

[49] *Id.* sec. 594. The substantive portion of this provision was initially proposed by DOD in its Proposed FY09 NDAA, at § 1031. *See* DOD Proposed FY09 NDAA, *supra* note 4.

[50] The resistance in this area is exemplified by the reaction of the adjutants general of the states and the governors when Public Law Number 109-364 (Enforcement of the Laws to Restore Public Order) was passed in the FY07 NDAA. Their reaction was so negative and vehement that the law was recently repealed in the FY08 NDAA. *See* Pub. L. No. 110-181, § 1068 (Jan. 28, 2008).

[51] 18 U.S.C. § 1385 (2000).

governors to use the Guard for law enforcement missions.[52] Section 594 of House Bill 5658 would give the President needed access to the Reserve, and at the same time would ensure that the Guard remains in its most effective status—a state status under the control of the governors, not subject to the Posse Comitatus Act.

Section 594 represents an amendment to 10 U.S.C. § 12304, therefore, that would authorize the President to employ the Reserve while still honoring the political and strategic advantages of not implicating the National Guard. In other words, it was drafted thoughtfully, and the care in its drafting, presumably, contributed to an overwhelmingly positive vote, 384 to 23, in the House of Representatives on the entire bill.[53] This is encouraging news for the proponents of change to § 12304.

But while it is encouraging news, it is not final news. Even with the House sidestepping the landmine of implicating the Guard, the proposed amendment now finds itself in the Senate, facing a minefield of state resistance.

E. State Resistance: The Minefield

On behalf of the National Governors Association, Governor Michael F. Easley of North Carolina and Governor Mark Sanford of South Carolina sent a letter, dated 10 July 2008, to the Chairmen and Ranking Members of the Committee on Armed Services.[54] The first paragraph of the letter states, in part:

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[52] While it is true that in some disaster situations posse comitatus would not apply, even to the federal forces, those situations are infrequent. Specifically, if the President invokes authority under conditions of insurrection, the Posse Comitatus Act would not apply to any of the military forces. But those times are few and far between. The best solution, therefore, is to amend 10 U.S.C. § 12304(b) in a manner that assumes that the Posse Comitatus Act will remain in force, prohibiting the use of federal military forces for law enforcement functions. House Bill 5658, section 594 does just that.

[53] H.R. 5658, 110th Cong. (2008).

[54] Letter from Governors Michael F. Easley & Mark Sanford to Ike Skelton, Chairman, Committee on the Armed Services, House of Representative; Carl Levin, Chairman, Committee on Armed Services, U.S. Senate; Duncan Hunter, Ranking Member, Committee on Armed Services, House of Representatives; John McCain, Ranking Member, Committee on Armed Services, U.S. Senate (July 10, 2008) (on file with author).

> [W]e write to express our opposition to Section 591 and Section 594 of the National Defense Authorization Act (NDAA) for fiscal year (FY09), as passed by the House of Representatives. These sections would modify the Insurrection Act by expanding the power of the President to order Reserve component forces other than the National Guard to active duty for domestic emergencies.[55]

One week after the governors sent their letter, the Adjutants General Association of the United States (AGAUS) sent a letter to Senator John McCain, stating that the AGAUS "strongly opposes" sections 591 and 594.

Notice that both the governors and AGAUS address not only section 594, but section 591 as well. Section 591 of House Bill 5658 would amend the Insurrection Act by authorizing the President to activate the Reserve to enforce the laws in times of insurrection.[56] Currently, the President can "use" the armed forces to enforce the law during times of insurrection. This includes using any National Guard forces that the President calls into federal service under the Insurrection Act, as well as any of the Reserve forces that are already serving in an activated status. The current Insurrection Act does not, however, act as an independent authority to *activate* the Reserve. To activate the Reserve for an insurrection, at least now, some other authority must be used.[57] Section 591 attempts to change that requirement by changing the Insurrection Act so that it, alone, provides activation authority for the Reserve.

True to form, the governors and adjutants general have launched an aggressive campaign against section 591. Their aggression towards the amendment is not a surprise. After all, the Insurrection Act is an exception to Posse Comitatus[58] and would thus allow federal military

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[55] *Id.*

[56] H.R. 5658, sec. 591.

[57] 10 U.S.C. § 12304(c)(1) explicitly states that it may not be used as an activation authority for insurrection. House Bill 5658, section 594 does not change this aspect of 10 U.S.C. § 12304, which is one very significant reason why House Bill 5658 sections 591 and 594 do not act in tandem as an increase in the President's insurrection authority. Potential activation authorities include 10 U.S.C. §§ 12301(b), 12301(d), and 12302. *See infra* pts. IV–V.

[58] The text of the statute explicitly states that it does not apply in cases expressly authorized by Congress. *See* 18 U.S.C. § 1385.

forces to enforce the law against the citizens of their states. Furthermore, two sections of the Insurrection Act authorize the President to invoke its authorities without a request from a state's governor.[59] Plus, the Insurrection Act does not contain a limit on the amount of time forces may be activated under its authority.[60] Given these features of the Insurrection Act, it is understandable that the governors and adjutants general would resist direct expansion of the President's authority in this area. In fact, the governors and adjutants general are just coming off a resounding victory in this area with the repeal of the Enforcement of the Laws to Restore Public Order (ELRPO).[61]

Why the House decided to amend the Insurrection Act, one year after Congress did away with ELRPO, in a bill in which they were attempting to open access to the Reserve for disaster relief, is bewildering: it simply was not well thought out. The lack of care that went into section 591 is captured in the fact that its language attempts to amend not the current language found in the Insurrection Act, but rather language that existed in the ELRPO that has since been repealed.[62]

But section 594 is not section 591. Throughout their letters, the governors and adjutants general meld the two sections as if no significant differences exist; they insinuate that the sections operate in tandem to increase the President's powers under the Insurrection Act. But, the sections are separate and distinct.

Granted, if the governors and adjutants general are bent on defeating section 594, then fusing their opposition to section 591 with section 594 is adept advocacy. But regardless of how savvy the move may be, their decision to do so is unfortunate. Melding these two sections muddies the issues. In the end, with a busy Congress, the strategy may cause section 594 to be defeated for misleading reasons.

Section 594 does not touch the language of 10 U.S.C. § 12304(c)(1), which explicitly prohibits § 12304 from being used to activate the Reserve to perform duties authorized under the Insurrection Act, i.e., enforcing the laws. Similarly, section 594 does not, in any way, amend the Insurrection Act.

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[59] *See* 10 U.S.C. §§ 332, 333.
[60] *See id.* §§ 331–335.
[61] Pub. L. No. 110-181, § 1068 (Jan. 28, 2008).
[62] *See* H.R. 5658, 110th Cong. sec. 591(c) (2008).

Therefore, to say, as the governors and adjutants general did, that section 594 expands the President's powers under the Insurrection Act, one must accept that simply having more military forces in an active status during natural disasters equals expansion of the President's insurrection authorities. For that reason, the governors and adjutants general "strongly oppose" making the assets in the Reserve available to the public during natural disasters—even, presumably, during the most horrific disasters imaginable. All because the President could possibly in the future (but not at the time of activation, given the prohibition under § 12304(c)(1)) use those same forces under the Insurrection Act.

F. Command and Control

As attenuated as the argument above against section 594 appears once stripped away from section 591, it is still missing one piece. The full argument put forward by the states actually throws in another issue, invariably moving the discussion further and further away from the actual issue of whether making the Reserve accessible for natural disaster relief serves the public good.

Specifically, both the governors and the adjutants general hitch their objections against section 594 to the need for Congress to resolve the issue of command and control, when federal forces operate in states during disaster relief operations.

The command and control issue was addressed by the Commission on the National Guard and Reserves (CNGR) in both its second report and its final report. In its second report, the CNGR made a recommendation for DOD to develop protocols that would allow governors to "direct the efforts of federal military assets responding to an emergency such as a natural disaster."[63] The DOD rejected this recommendation, and as an alternative began developing protocols for federal forces to provide direct assistance to states.[64] The direct

[63] CNGR SECOND REPORT TO CONGRESS, *supra* note 1, Recommendation 8.

[64] CNGR FINAL REPORT, *supra* note 3, at 109; *see* Memorandum from Honorable Robert Gates, Secretary of Defense, to Secretaries of the Military Departments, Chairman of the Joint Chiefs of Staff, Under Secretaries of Defense, Commanders of the Combatant Commands, Assistant Secretaries of Defense, General Counsel of the Deparment of Defense, Assistants to the Secretary of Defense, Director, Administration and Management, Chief, National Guard Bureau, Chairman, Reserve forces Policy Board,

assistance protocols would allow federal forces to coordinate and respond directly to the states, including the National Guard, while maintaining a federal chain of command over federal troops. In its final report, the CNGR stated that while direct assistance protocols were a "step-forward," they did not "solve the problem of having two separate chains of command operating within a state."[65]

This issue of whether federal military forces should be placed under the command and control of governors for disaster relief is not an easy one. It implicates the President's Article II authorities; it implicates concerns over the proper balance of power between the federal and state governments; and it implicates concerns over possibly violating Posse Comitatus.

Moreover, placing federal troops under the command and control of governors modifies the National Response Framework.[66] Federal military forces are part of an integrated federal response. The Administrator of the Federal Emergency Management Agency (FEMA) has the statutory responsibility to "lead the Nation's efforts to prepare for, protect against, respond to, recover from, and mitigate against the risk of natural disasters, acts of terrorism, and other man-made disasters, including catastrophic incidents."[67] Placing federal military forces under the control of governors would circumvent this authority and could eviscerate measures the Administrator of FEMA has set forth in ensuring a coordinated federal response.

Mandating that federal forces fall under the command and control of governors also implicates a host of practical concerns. Currently, for Defense Support of Civil Authorities (DSCA),[68] federal forces primarily fall under the command and control of either United States Northern Command (NORTHCOM) or United States Pacific Command (PACOM).[69] These commands continuously execute their command and

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subject: Implementation of the Recommendations from the Commission on the National Guard and Reserve (10 May 2007) (on file with author).

[65] CNGR FINAL REPORT, *supra* note 3, at 111.

[66] *See* U.S. Dep't of Homeland Security, National Response Framework (2008), *available at* http://www.fema.gov/emergency/nrf/.

[67] 6 U.S.C. § 313(b)(2)(A).

[68] Defense Support of Civil Authorities (DSCA) is a particular form of Civil Support, defined as: "Civil support provided under the auspices of the National Response Plan." JOINT PUB. 3-28, *supra* note 16, glossary, at 7.

[69] *See infra* notes 109–110.

control structures during military operations, and also push the structures to their limits during national level exercises in order to achieve higher levels of effectiveness. In that vein, NORTHCOM is currently undergoing a realignment of its command and control structure, and organizing under functional commanders in an effort to leverage expertise as well as consolidate efforts. Stripping federal forces away from these commands the moment catastrophe hits, to potentially any one of fifty-four different jurisdictions,[70] all with varying degrees of expertise in commanding federal assets, will inevitably create unintended and negative second and third order effects, unnecessarily challenging military operations in ways that would likely outweigh any marginal benefit hoped to be gained from placing all military forces under a state's control.

A shift in command and control of federal forces away from NORTHCOM would also lose the advantage of training synergy that NORTHCOM achieves between its DSCA and Homeland Defense (HD) missions. Currently, NORTHCOM exercises command and control over federal military forces for both missions. This creates a confluence of the DSCA and HD missions, allowing federal forces to quickly transition from one mission to the other, taking full advantage of their training. That is to say, when NORTHCOM exercises its command and control under one mission structure, it naturally trains the same command and control structure needed to execute the other mission. At a time when the threat of terrorism blurs the lines between DSCA and HD, it makes sense to keep a tight nexus between these missions.

For all these reasons, it is unfortunate that the governors and adjutants general have chosen to inextricably link their objection to section 594 to the command and control issue. The governors explicitly admit that the availability of the Reserve during natural disasters would be a "welcomed" change. Given that, where is the necessity to put off that welcomed change for another day? There is no need to delay making relevant assets available to the public during natural disasters, simply because some other structural issue would remain unresolved.

This is especially true given the fact that the command and control issue may be resolved independent of any decision concerning 10 U.S.C. § 12304. For instance, tanking the proposed change to § 12304 will not

[70] The fifty states, the District of Columbia, Puerto Rico, Guam, and the Virgin Islands.

resolve the command and control issue, either for or against the states. Similarly, even if Congress were to enact the change to § 12304, it would in no way inhibit the options available in resolving the command and control debate.

The issues of amending 10 U.S.C. § 12304 and the command and control issue are also separate and distinct in their measure of import. Barricading relevant Reserve assets from the public during a natural disaster must, in good faith, be considered more egregious than not achieving the perfect model of command and control. This is exemplified by the fact that the AC currently operates within the states side-by-side with National Guard forces during disaster relief, as well as during national security special events, such as the upcoming Democratic and Republican Conventions. There is no reason to believe that these relationships cannot continue to be successful, and even incrementally improve, perhaps even to the point of striking an optimal relationship that serves both federal and state interests. Fixing specific issues as they arise, as opposed to creating a new, theoretical command structure, could possibly be the best approach.

In FY07, the states objected to changing 10 U.S.C. § 12304 for the explicit reason that the National Guard was implicated. In FY09, the proposed change intentionally leaves out the National Guard to appease the states. The states are, however, apparently still unsatisfied; the states have come up with a new reason to object: control.[71]

In the end, it will be the public that suffers if Congress continues to wall-off the Reserve from natural disaster relief. Therefore, Congress needs to step forward and rise above the apparent willingness of the states to sacrifice the public good for the sake of winning what essentially boils down to a turf battle. If the Senate wants to *wisely* spend its time on the proposed change to § 12304, then it should spend time on tweaking, not tubing, House Bill 5658, section 594.

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[71] It is an ironic hook for the states to hang their objection on, given that the National Guard regularly operates in a Title 32 status under the command and control of the governors, even when conducting missions that have significant federal, security concerns, such as Operation Noble Eagle.

G. Tweaking House Bill 5658, Section 594

While the current proposed change to § 12304 is a good one, it nonetheless has some room for improvement. As passed by the House of Representatives, the bill authorizes the President to invoke the statute for major disasters and emergencies "as those terms are defined . . . [by the Stafford Act]."[72] The Senate should modify this language slightly.

Instead of specifically referring to the Stafford Act, potentially tying in a host of unintended Stafford Act requirements, or at least risking confusion over the extent to which the Stafford Act must be incorporated, the statute should, instead, explicitly state that the President may invoke the statute's authorities under "actual, or threat of, serious natural or manmade disasters, accidents, or catastrophe in the United States, its territories and possessions, or Puerto Rico." While this language may leave room for discretion, it is similar to what the House proposed in the FY07 NDAA, and would nest nicely in the current structure of the statute that already provides the President wide discretion in deciding when to invoke the statute's authorities.

The breadth of when the President may invoke § 12304 begins with its title and remains consistently broad throughout. In particular, the title states that it was intended for "other than . . . national emergency."[73] The text then immediately buttresses this theme by starting off: "Notwithstanding the provisions of section 12302(a) or any other provision of law, when the President determines . . . ."[74] Given that § 12302 does indeed require the President to first declare a national emergency, there is no question that part of Congress's intent for § 12304 was to create an authority for the President distinguished by the very fact that it does *not* require any type of declaration, either under the National Emergencies Act or the Stafford Act, as a precondition for the statute to apply.[75]

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[72] *See supra* note 49 and accompanying text. The Stafford Act defines these terms at 42 U.S.C. § 5122(1)–(2).
[73] 10 U.S.C. § 12304.
[74] *Id.*
[75] This is one aspect that separates 10 U.S.C. § 12304 from 10 U.S.C. § 12302. The latter has never been, and probably never will be, used for natural disaster relief because it implicates the National Guard and it cannot be invoked until after the President actually declares a national emergency—making a timely response by the Reserve a fairly futile concept. *See infra* note 84 and accompanying text.

In current form, § 12304 applies to certain categories of events, such as operations of armed conflict, threats of weapons of mass destruction, or terrorism, "when the President determines that it is necessary to augment the active forces . . . ." Any change to § 12304 that expands those categories to include natural disasters and manmade accidents, needs to do so with congruent language that provides the President a nimble, anticipatory tool to employ the Reserve. This is critical given the lead time often required to make the Reserve truly relevant in an unpredictable environment.

H. Summary

Title 10, § 12304 is not currently available for natural disaster response. The House of Representatives has recently passed its version of the FY09 NDAA—House Bill 5658. Section 594 of House Bill 5658 would amend 10 U.S.C. § 12304 in a way that would allow the President to activate the Reserve for natural disasters and emergencies, without involving the potential federalization of the National Guard and without amending the Insurrection Act. The proposal would improve 10 U.S.C. § 12304 as a vital tool for the nation in times of great need. The state governors and adjutants general have come forward in an attempt to stop this change. But, the Senate needs to look past the states' attempt to use section 594 as leverage to defeat a separate proposed amendment to the Insurrection Act (section 591) and to resolve the separate issue of command and control. That is, the Senate needs to act in the best interest of the nation by voting for section 594, but only after slightly modifying its language.

The Senate should modify section 594 by eliminating the reference to the Stafford Act and replacing it with explicit language that states that the statute applies to natural disasters/emergencies, manmade accidents, and when the President deems there is a threat of these situations. This slight change would avoid unnecessarily raising questions concerning the extent to which external statutes, such as the Stafford Act, apply. The entire Congress should then enact the proposal with this change.

But, because the Senate might buckle once again under the pressure exerted by the states, the remainder of this article will focus on alternative executive options to activate the Reserve for natural disaster response.

IV. Executive Limited Authorities for Involuntary Mobilization

A. Introduction

Currently, there are only two statutes that provide authority to involuntarily mobilize the Reserve for natural disaster response. The first is 10 U.S.C. § 12301. It essentially has two potential provisions for involuntary mobilization. Title 10, § 12301(a) provides authority for a full mobilization; 10 U.S.C. § 12301(b) is limited to fifteen days, typically used for annual training but also available for operations. The second statute is 10 U.S.C. § 12302, Partial Mobilization. Each statute will be separately addressed.

B. Full Mobilization

Full mobilization of all Reserve Component (RC) forces is authorized under 10 U.S.C. § 12301(a). Before the President can invoke full mobilization, Congress must first declare war or a national emergency. There is no limit on the number of personnel that may be mobilized under this authority, and the duration of mobilization may last up to the duration of the war/national emergency, plus six months.[76] World War II was the last time this authority was invoked, and it has *never* been used for a purely natural disaster response. Nonetheless, nothing explicit in the statute prohibits full mobilization to respond to natural disasters. By the plain language of the statute, full mobilization is available for national emergencies when so declared by Congress; there is no qualifying language limiting the mobilization to any particular type of emergency.

C. Fifteen Day Authority

In addition to full-mobilization authority, 10 U.S.C. § 12301(b) authorizes the Service Secretaries to involuntarily call RC personnel to duty for up to fifteen days a year. This authority may be used to call RC personnel to annual training.[77] The legislative history of this paragraph

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[76] 10 U.S.C. § 12301(a).

[77] *See* U.S. DEP'T OF ARMY, REG. 135-200, ACTIVE DUTY FOR MISSIONS, PROJECTS, AND TRAINING FOR RESERVE COMPONENT SOLDIERS para. 1-11(a)(6) (30 June 1999). A

indicates it was intended only to be used for training and not for operational missions.[78] "As a practical matter, however, the two-week . . . requirements are interpreted broadly and used for both training and operational mission requirements."[79]

Accordingly, while legislative intent may have initially indicated that the authority was meant for training, the statute's language does not explicitly limit its use to training. Current DOD policy agrees. The new DOD Instruction 1215.06, paragraph 6.1.4.1.2 begins by stating that "[t]he primary purpose of [Annual Training (AT)] is to provide individual and/or unit readiness training."[80] But immediately after announcing AT's main purpose as training, the instruction further states that "AT *may* provide support to AC missions and requirements."[81] And nothing excludes natural disaster response from the realm of permissible operational missions under this authority. The Reserve may, therefore, be ordered to active duty for the fifteen-day AT period to perform natural disaster response, so long as the unit has not already expended this time on other active duty training.[82] There is also no requirement for a national emergency declaration prior to using 10 U.S.C. § 12301(b). In fact, 10 U.S.C. § 12301(b) starts off: "[a]t any time"[83] to refer to its applicability.

The fifteen-day limit of 10 U.S.C. § 12301(b) is, however, an explicit and unambiguous boundary. After fifteen days, time runs out, hereby significantly circumscribing its utility for natural disasters. For floods or hurricanes, fifteen days may be enough. If, on the other hand, a pandemic influenza or similar long-lasting calamity exists, fifteen days would only serve as an initial authority to mobilize the Reserve, necessitating follow-on authority for longer periods, such as 10 U.S.C. §

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potential separate authority for Annual Training (AT) is 10 U.S.C. § 12301(d). *See* DODI 1215.06, *supra* note 19, paras. 6.1.4, 6.1.4.1.2.

[78] Captain L. Dow Davis, *Reserve Callup Authorities: Time for Recall?*, ARMY LAW., Apr. 1990, at 4, 8.

[79] *Id.*

[80] DODI 1215.06, *supra* note 19, para. 6.1.4.1.2.

[81] *Id*. (emphasis added).

[82] The Army Reserve AT period is actually fourteen days (exclusive of travel time). *See* DODI 1215.06, *supra* note 19, para. 6.1.4.1.2. For the National Guard, the AT period is fifteen days, including travel. *See id.* para. 6.1.4.1.2. While 10 U.S.C. § 10147(a)(1) requires the Reserve to conduct Active Duty Training (ADT) for at least fourteen days, § 10147(a)(2) allows up to thirty days of ADT per year. *Id.*

[83] 10 U.S.C. § 12301(b) (2000).

12302, discussed immediately below, or 10 U.S.C. § 12301(d), discussed in Part V, below.

D. Partial Mobilization

Partial Mobilization is the President's authority "in times of national emergency declared by the President,"[84] that enables the President to mobilize up to one million RC personnel, not to exceed twenty-four months. More likely to be invoked than full mobilization, it provides authority for support longer than the fifteen days under 10 U.S.C. § 12301(b). But with history as a guide, this statute is more of a safety net than a workhorse for natural disasters.

It is a safety net because it has *never* been used to mobilize RC personnel for a natural disaster response and it likely will never be used for natural disasters. Three reasons account for its lack of relevancy: (1) partial mobilization signals grave circumstances, so much so, Presidents invoke it only when absolutely necessary; (2) it implicates the National Guard; and (3) it requires the President to actually declare a national emergency under the National Emergencies Act[85] before mobilization may occur, reducing its ability to provide a timely response from the Reserve.

Prior to Operation Enduring Freedom (OEF) and Operation Iraqi Freedom (OIF), political considerations have inhibited Presidents from readily activating RC personnel under 10 U.S.C. § 12302 for international matters. Presidents have been wary of unnecessarily escalating tensions in the international arena, which partial mobilization tends to signal.[86]

These same concerns apply domestically. If the President declares an emergency, followed by a partial mobilization, states may become wary. States could interpret the action as federal overreacting or

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[84] *Id.* § 12302.
[85] 50 U.S.C. § 1601–1651 (2000).
[86] *See* Davis, *supra* note 78, at 10 (suggesting that the limited historical use of § 12302 up to 1990 was due to the fact that Presidents were reluctant to invoke it because the act could be interpreted internationally as escalating tensions). The concept of partial mobilization being politically sensitive in the international realm is expanded in this article to highlight its similar potential to create tensions between the states and the federal government.

muscling-in. State governments may also be concerned about a potential public perception of state ineptitude. This is especially true given that Partial Mobilization would enable the President to federalize the National Guard, taking the National Guard away from the governors and placing them under the President's command and control, precisely when the governors would need to demonstrate leadership, effective command, and ultimately, success.

Lastly, 10 U.S.C. § 12302 begins: "In time of national emergency declared by the President . . . ." [87] Lacking is any anticipatory authorization, explicitly or by reference, for the President to mobilize the Reserve prior to declaration. This renders the statute ineffective for natural disaster response. The Reserve requires time to respond; it is the nature of the Reserve as an entity that resides primarily in a non-active duty status. Delaying mobilization until after declaration of a national emergency hamstrings the President from employing the Reserve effectively.

In addition, because 10 U.S.C. § 12302 requires an emergency declaration, it is contingency specific. Typically, it is used for contingency operations such as OEF and OIF.[88] While members who

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[87] *See* 10 U.S.C. § 12302(a).

[88] On 14 September 2001, President Bush issued Executive Order (EO) 13,223 declaring a national emergency by reason of the terrorist attack on 11 September 2001, and delegated authority to the Secretary of Defense and the Secretary of Transportation (later changed from the Secretary of Transportation to the Secretary of Homeland Security) to order "any unit, and any member of the Ready Reserve . . . to active duty for not more than 24 consecutive months." While EO 13,223 does not explicitly reference 10 U.S.C. § 12302, the language was taken directly out of 10 U.S.C. § 12302. Moreover, the Secretary of Defense re-delegated this authority to the Service Secretaries, specifically citing 10 U.S.C. § 12302. *See* Memorandum from the Honorable Donald Rumsfeld, Secretary of Defense, to Secretaries of the Military Departments and Chairman of the Joint Chiefs of Staff, subject: Partial Mobilization (World Trade Center and Pentagon Attacks) and Redelegation of Authority Under Title 10, United States Code, Sections 123, 123a 527, 12006, 12302, and 12305 (Sept. 14, 2001 & Oct. 13, 2001) (on file with author). The total number of Ready Reserve personnel authorized to be mobilized under 10 U.S.C. § 12302 is one million. Executive Order 13,223 is still in effect. The President issued it under the authority of the National Emergencies Act (50 U.S.C. § 1601–1651). Title 50, § 1622(d) requires presidential declarations of national emergencies to terminate after one year from proclamation, unless extended by the President via publication in the *Federal Register*. The President has done so, most recently with a statement signed by the President on 12 September 2007. *See* 72 Fed. Reg. No. 177, FR Doc. 07-4593 (Sept. 12, 2007). This authority, therefore, is still available to mobilize RC personnel when the purpose of mobilization concerns terrorism

were initially mobilized for OEF and OIF under 10 U.S.C. § 12302 may subsequently be used for natural disaster response once on active duty,[89] the President cannot further mobilize RC personnel under the OEF or OIF Executive Order (EO) for natural disaster response.[90] To activate additional RC personnel specifically for natural disaster response, the President would need to declare a national emergency specific to the natural disaster and issue a new executive order activating the RC personnel.[91]

V. Volunteering—Fertile Ground for Cultivation

A. In General

One way to make the Reserve available for natural disaster response is to ask its members to volunteer. Although this sounds unconventional, it actually works. Volunteers from the RC deployed during Just Cause in Panama, Operation Uphold Democracy in Haiti and Desert Shield and Desert Storm in the Persian Gulf and continue to volunteer today for the Global War on Terror.[92]

The Air Force and Army Secretaries have taken this volunteer activation system to a unique level concerning National Guard forces. Specifically, the Secretaries use voluntary activation as a method to activate National Guard Airmen/Soldiers with very little advance notice to conduct some of this nation's most important homeland defense missions. The Air Guard uses "hip pocket orders" to conduct the Mobile Command and Control mission for NORTHCOM,[93] and to fly air sovereignty missions to secure North America (Operation Noble Eagle)

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by groups related to the terrorist attacks on the World Trade Center, i.e., groups related to the Al Qaeda Network.

[89] *See* 10 U.S.C. § 12314.

[90] *See* 50 U.S.C. § 1621.

[91] If this is done, the Reserve officers activated for disaster would not affect strength ceilings in senior grades. 10 U.S.C. § 527 authorizes the President, in times of war and national emergency, to suspend the provisions of 10 U.S.C. §§ 523, 525 and 526. 10 U.S.C. § 527.

[92] *See* JOINT CHIEFS OF STAFF, JOINT PUB. 4-05, JOINT DOCTRINE FOR MOBILIZATION PLANNING (22 June 1995) [hereinafter JOINT PUB. 4-05].

[93] The Wyoming Air National Guard 153rd Command and Control Squadron (CACS) performs the Mobile Command and Control mission for NORTHCOM. *See infra* notes 109–110 and accompanying text (providing more information on NORTHCOM).

for the North American Aerospace Defense Command (NORAD).[94] Just prior to these missions, Air National Guard members perform their duties in a Title 32 status. They then voluntarily transition into a Title 10 status upon the occurrence of some pre-designated event or type of mission or situation.

The mechanics of transitioning National Guard personnel from Title 32 to Title 10 status occurs under 10 U.S.C. § 12301(d) and starts with the Service Secretaries. For instance, with the ONE mission, the Secretary of the Air Force has delegated authority to activate "those members of the Air National Guard who have volunteered to perform federal active service in furtherance of the federal mission" to the Chief of Staff of the Air Force.[95] The Chief of Staff of the Air Force has in turn delegated this authority to the Commander, Air Combat Command,[96] and the Commander of Air Combat Command has further delegated the authority to the Commander, First Air Force.[97]

Similarly, the Army Guard uses the same method to conduct the U.S. Ballistic Missile Defense System (BMDS) mission by voluntarily transferring its members from Title 32 to Title 10 upon entering a BMDS facility.[98] And, like the delegation explained above for ONE missions,

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[94] NORAD is a bi-national command established in 1958 between the United States and Canada. It is located at Peterson Air Force Base, Colorado Springs, Co. The commander is a four-star U.S. general and the deputy commander is a three-star Canadian general. The mission of NORAD has evolved slightly since its inception. The original mission was "to provide a common defense from an air and strategic missile attack from the former Soviet Union." *See* Colonel Mark P. Fitzgerald, NORAD, Bi-National Relations, and the Future (Aug. 2007) (unpublished manuscript) (on file with author). Today, its mission has expanded to include the following three areas: Aerospace Warning, Aerospace Control, and Maritime Warning. *See id.*

[95] Memorandum from James G. Roche**,** Secretary of the Air Force, Order, subject: Delegation of Air National Guard Re-Call Authority (June 11, 2003) (on file with author).

[96] *See* Memorandum from General John P. Jumper, Chief of Staff, Department of the Air Force, to Major Commands, subject: Re-delegation of Authority to Order Air National Guard Members to Federal Active Service Pursuant to Secretary of the Air Force Order (SAFO) 306.1 (June 5, 2003) (on file with author).

[97] *See* Memorandum from General Hal M. Hornburg, Commander, Air Combat Command, subject: Redelegation of Authority to Order Air National Guard Members to Federal Active Service Pursuant to Chief of Staff Redelegation, 5 June 2003 (7 Jan. 2004) (on file with author).

[98] *See* K. SCOTT MCMAHON, WITH LIEUTENANT COLONEL STEPHEN DALZELL (U.S. ARMY), RAY CONLEY, & ROLAND YARDLEY, U.S. STRATEGIC BALLISTIC MISSILE DEFENSE: OPTIONS FOR RESERVE COMPONENT SUPPORT 7 (Rand Corp. Technical Report, Sept. 2004), http://www.rand.org/pubs/technical_reports/2005/RAND_TR140.pdf; *see also*

the Secretary of the Army has delegated the authority to activate Army National Guard members to the Commander, United States Strategic Command (STRATCOM) for BMDS missions.

Under 10 U.S.C. § 12301(d), the governor of the applicable state must agree to activate a Guard member. Obtaining the governor's consent, like obtaining the proper delegation authorities from the Service Secretaries, is best done in advance. Typically, as with ONE, Mobile Command and Control and the BMDS missions, governors express their consent in a Memorandum of Agreement.

The intent behind the memorandum of agreement is to standardize procedures and lay common ground for expectations, creating a degree of comfort and trust that the procedures will work when national security is at stake. Memorandums of Agreement (MOAs) in the past have typically included an agreement by the governors that the primary mission for the designated unit is the federal mission. And for the ONE mission, the agreements have also included a specific provision designating the Commander, First Air Force, as the individual who orders the members into active duty for the purpose of conducting homeland defense missions.

The individual members must also agree to activation under 10 U.S.C. § 12301(d). Consent of military members, of course, is an inherently retractable concept. To ensure stability in the units that depend on the voluntary activation of its members to perform important federal missions, units have generally required the individual members to sign a written agreement. [99] The agreement should set forth the trigger

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Memorandum of Agreement Between National Guard Bureau and U.S. Army Space and Missile Defense Command/U.S. Army Forces Strategic Command and the State of Colorado and the State of Alaska, subject: Concerning the Implementation of the Ground-Based Midcourse Defense Manning Model (Dec. 21, 2007) (on file with author). There are a couple of potential caveats with the volunteer system. One, the response time of the Soldiers will depend on their physical proximity to their unit. Some Army Reservists come from afar to drill with their units. And two, so far, the missions mentioned are ones typically understood in the military community as being enjoyable—"hooah" if you will. If the situation were pandemic influenza, or a CBRNE situation, the experience could differ. In other words, there is a danger that the members would be less willing to go forward with their volunteer duty in a situation with a communicable disease or CBRNE threat. These missions, generally speaking, could create anxiety different from more conventional missions (and understandably so).

[99] *See* Memorandum of Agreement between the Governor of Colorado, Commander First Air Force, and Commander, Continental United States NORAD Region, subject:

that initiates active duty, and should also require the member to give at least forty-eight hours advance notice of intent to withdraw consent. Units conducting the Mobile Command and Control mission, ONE, and BMDS all use MOAs that contain this forty-eight hour advance notice requirement. It has proved to be an adequate measure to ensure availability.

As seen from above, the concept of hip-pocket orders has worked, and continues to work, with the National Guard. It works because the National Guard has taken the time to plan for, and work thorough, the necessary steps for success. With some effort, the Reserve can do the same.

In fact, the hip-pocket orders process can be much easier for the Reserve. For instance, the Reserve process requires one less step than the National Guard in that no gubernatorial consent is required. In addition, there are other considerations inherent to hip-pocket-orders that have not yet been mentioned. Primarily, these considerations stem from the fact that 10 U.S.C. § 12301(d) activates *individuals*, not units. This subtle aspect of the statute implicates funding, equipment, and command and control issues. But these issues are primarily associated with the National Guard transitioning from a state status to a federal status.[100]

For the purposes of this article and the use of hip-pocket orders for the Reserve, the issues of funding, equipment, and command and control are always under Title 10. Service Secretaries, therefore, possess the authority to shift funds, authorize the use of equipment, and designate appropriate command and control relationships as needed for the hip-pocket authority to fulfill its desired intent.[101]

Providing Governor's Consent to Voluntary Federal Military Active Duty (draft) app. A (Dec. 21, 2005) (on file with author).

[100] How the National Guard negotiates its way through these issues is beyond the scope of this article. Suffice to say, the National Guard is able to shift funds, keep control of equipment, and achieve unit integrity using the hip-pocket order scheme when it wants to. Cases in point: Mobile Command and Control mission, ONE, and the BMDS. As for the equipment, the National Guard equipment is primarily federally owned and accountable under the United States Property and Fiscal Officer (USPFO)—a Title 10 officer. Using the equipment upon transitioning into Title 10, therefore, is simply a matter of proper planning and maintaining proper accountability.

[101] *See* U.S. DEP'T OF DEFENSE, DIR. 1225.6, EQUIPPING THE RESERVE FORCES (7 Apr. 2005). At paragraphs 4.3.1 and 4.3.2, the Service Secretaries have an obligation to ensure that units *and* Reserves are equipped properly to accomplish operational objectives when mobilized under 10 U.S.C. § 12301(d). *Id.* paras. 4.3.1, 4.3.2. In

The Reserve already uses 10 U.S.C. § 12301(d) to conduct a multitude of tasks under what used to be called Active Duty Special Work (ADSW), now called Active Duty for Operational Support (ADOS).[102] It would be a small step for the Reserve to go from its current practice of using § 12301(d) in performing miscellaneous projects and missions under ADSW/ADOS, to using the same authorities in combination with hip-pocket orders to pre-designate relevant members and equipment that would be ready for rapid activation and response to natural disasters.

B. Greensburg, Kansas

At approximately 9:45 p.m., 4 May 2007, an F5 tornado, the rating reserved for tornadoes that pack devastating winds in excess of 200 miles per hour,[103] slammed into the small town of Greensburg, Kansas (population 1500). The tornado killed nine people and destroyed 95% of the town's infrastructure.[104] Kansas Governor Kathleen Sebelius requested, and President Bush granted, a federal major disaster

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addition, DODI 1235.12 recognizes a "Volunteer Unit" utilizing 10 U.S.C. § 12301(d). "Volunteer Unit. One or more individual volunteers, organized to perform a particular function whether or not such a unit is part of a larger group, who has consented to perform an active duty mission." DODI 1235.12, *supra* note 18, para. E2.1.18.

[102] *See* Memorandum from David S. C. Chu, Under Sec'y of Def., to Secretaries of Military Departments, et al., subject: Operational Support Duty—Update (Jan. 29, 2007) [hereinafter Operational Support Memorandum] (including attachment). "Operational Support" is defined as "active duty, other than Active Guard and Reserve duty, under § 12301(d) of Title 10, U.S.C.; full-time National Guard duty, other than Active Guard and Reserve duty, under § 502(f)(2) of Title 32, U.S.C.; and active duty, including active duty for training or full-time National Guard duty performed at the request of an organizational or operational commander, or as a result of reimbursable funding." *Id.* at attachment; *see also* DODI 1215.06, *supra* note 19, para. 6.1.4.2.1. The authority to use Operational Support under 10 U.S.C. § 12301(d) comes from DODI 1215.06. *Id.* para. 6.1.4.2. It permits the use of 10 U.S.C. § 12301(d) for Active Duty Other than for Training (ADOT). *Id.* para. 6.1.4.2 states that ADOT is a "category of AD [Active Duty] used to provide RC [Reserve Component] support to either AC [Active Component] or RC missions. *Id.* It includes the categories of ADOS (formerly active duty for special work (ADSW)) . . . ." *Id.* The Operational Support Memorandum, replaces ADSW with Operational Support.

[103] *See* Richard A. Lovett, *How Kansas Tornado Became a Monster*, NAT'L GEOGRAPHIC NEWS, May 8, 2007, http://news.nationalgeographic.com/news/2007/05/0705-08-tornado-kansas.html.

[104] *See* CNN.com, http://www.cnn.com/2007/WEATHER/05/07/severe.weather/index.html (last visited Aug. 6, 2008).

declaration for Kiowa County, triggering the Stafford Act and enabling the federal government to provide disaster assistance.[105]

Almost immediately, Governor Sebelius began to claim that the Iraq war, and in particular the deployment of Kansas National Guardsmen were negatively affecting the state's ability to adequately respond. Specifically, Governor Sebelius stated: "I don't think there is any question if you are missing trucks, Humvees and helicopters that the response is going to be slower. The real victims here will be the residents of Greensburg because the recovery will be at a slower pace."[106]

When the tornado hit, the Kansas Army National Guard had only about 60% of its equipment on hand, with its UH-60 helicopter unit deployed to Iraq.[107] But although the Kansas Army Guard helicopters were deployed overseas, an Army Reserve Aviation unit, B Company, 7-158th Aviation, with CH-47 Chinook heavy-lift helicopters, was located in Olathe, Kansas. Olathe is only about 282 miles away—less than a three-hour flight for those helicopters.[108]

Shortly after Governor Sebelius's allegations that the lack of Guard equipment would negatively affect the recovery, the federal government pushed back, refuting the claim and offering assistance. Governor

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[105] Press Release 07-061, Kansas Adjutant General, Kansas Receives Presidential Disaster Declaration (May 6, 2007), *available at* http://www.kansas.gov/ks adjutantgeneral/News%20Releases/2007/07-061.htm.

[106] Jennifer Loven, *Administration, Sebelius Back Off Argument Over National Guard*, LAWRENCE JOURNAL-WORLD, May 9, 2007, *available at* http://www2.ljworld.com/news/ 2007/may/09/administration_sebelius_back_argument_over_nationa/. Later, Governor Sebelius backed away from her claims that the National Guard deployments were slowing the state response. Specifically, Governor Sebelius's spokeswoman, "Nicole Corcoran, said the governor didn't mean to imply that the state was ill-equipped to deal with this storm. Sebelius' comments about National Guard equipment were instead meant as a warning, she said." *Id.*

[107] *See* Sergeant Sara Wood, *National Guard Responds to Kansas Tornado*, AM. FORCES PRESS SERV., May 7, 2007, *available at* http://www.defenselink.mil/news/newsarticle. aspx?id=33080. The Kansas National Guard Aviation unit deployed was the 1st Battalion, 108th Aviation Regiment, a unit with fifteen UH-60 Blackhawk helicopters, which deployed to Iraq in September 2006 and did not return from Iraq until September 2007. *See* Press Release 07-152, Kansas Adjutant General's Department, Kansas National Guard 1st Battalion, 108th Aviation Regiment Returning Home Sept. 14 (Sept. 12, 2007), *available at* http://www.kansas.gov/ksadjutantgeneral/News%20Releases/ 2007/07-152.htm.

[108] *See* 7-158th Aviation Battalion, http://www.globalsecurity.org/military/agency/army/ 7-158avn.htm (last visitedAug. 6, 2008).

Sebelius cooled her anti-war focus and ended up never requesting federal military aviation. But if she had, a salient question would have been: was B Company, 7-158th ready? Almost certainly the unit was mission ready. But was it positioned to activate, and if so, how, under what authority? Although the Stafford Act does provide for substantial federal assistance to local authorities, it does *not* activate the Reserve.

As previously discussed, with minimal planning the unit could have been prepared to use hip-pocket orders. The process does not involve a complicated formula and may be the only realistic way to nest the Reserve assets, like B Company, 7-158th, in current Civil Support operational planning to provide DSCA.

C. DSCA EXORD

United States Northern Command[109] is the primary federal military command for DSCA to the Continental United States, Alaska, the Virgin Islands, and Puerto Rico.[110] Within those areas, NORTHCOM holds primacy over all other combatant commands (COCOMs) when it comes to performing DSCA, and other COCOMs may support NORTHCOM to help NORTHCOM accomplish its mission. In turn, NORTHCOM's

[109] United States Northern Command (NORTHCOM) was authorized by President George W. Bush on 17 April 2002. It is the first Combatant Command established by the Department of Defense (DOD) that includes the continental United States in its area of responsibility (AOR). Specifically, NORTHCOM's AOR includes air, land, and sea approaches of the continental United States, Alaska, Canada, Mexico, and the surrounding water out to approximately 500 nautical miles. It also includes the Gulf of Mexico and the Straits of Florida. The defense of Hawaii and our territories and possessions in the Pacific is the responsibility of PACOM. The defense of Puerto Rico and the U.S. Virgin Islands is the responsibility of U.S. Southern Command (SOUTHCOM). The commander of NORTHCOM is responsible for theater security cooperation with Canada and Mexico. NORTHCOM is responsible for the DOD missions of homeland defense and civil support within its AOR. Although it has few permanently assigned forces, NORTHCOM receives operational control over units designated by the Secretary of Defense, primarily through Joint Forces Command, whenever necessary to execute missions. *See* About U.S. Northern Command, http://www.northcom.mil/About/index.html (last visited Aug. 6, 2008).

[110] PACOM is the supported COCOM for DSCA in Hawaii. SOUTHCOM is the supported COCOM for DSCA within its area of responsibility, with the exception of natural disasters (and only natural disasters, unless the Secretary of Defense makes a formal change) occurs in the U.S. Virgin Islands and Puerto Rico, which belongs to NORTHCOM.

primary mission in DSCA is to support the lead federal agency—the Department of Homeland Security (DHS), acting through FEMA—to provide an integrated and coordinated federal response in support of local, state, and tribal responders, including the National Guard.[111] The overall goal for NORTHCOM, and the entire integrated federal response, is to help the state, local, and tribal authorities achieve success.

NORTHCOM executes its DSCA missions under orders from the Secretary of Defense through the Chairman of the Joint Chiefs of Staff. These orders are known as execute orders (EXORDs). For DSCA, there is a standing Joint Staff EXORD[112] that the Joint Staff may update each year, typically just before the summer hurricane season. Under this Joint Staff standing DSCA EXORD, NORTHCOM deploys and employs units to disasters for DSCA using a four-category system. Category One involves forces assigned to NORTHCOM and allows the NORTHCOM Commander to *deploy* those forces to the Joint Operation Area (JOA) upon notification to the Chairman, Joint Chiefs of Staff (CJCS) and the Secretary of Defense (SecDef).[113] Category Two involves a package of assets, pre-identified by type (e.g., up to eight Utility Aviation Light/Medium and up to four Medium/Heavy Lift helicopters), that U.S. Joint Forces Command (JFCOM) is required to source once

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[111] Under federal statutory authority, the Administrator of FEMA has responsibilities to "lead the Nation's efforts to prepare for, protect against, respond to, recover from, and mitigate against the risk of natural disasters, acts of terrorism, and other man-made disasters, including catastrophic incidents." 6 U.S.C. § 313(b)(2)(A) (2000). The Administrator of FEMA also has the duties to: "provide funding, training, exercises, technical assistance, planning, and other assistance to build tribal, local, State, regional, and national capabilities (including communications capabilities), necessary to respond to a natural disaster, act of terrorism, or other man-made disaster." *Id.* § 313(b)(2)(G). Under policy, specifically, the Homeland Security Presidential Directive (HSPD-5), the President designated the Secretary of Homeland Security as the "principal Federal official for domestic incident management." U.S. DEP'T OF HOMELAND SECURITY, PRESIDENTIAL DIR. HSPD-5, MANAGEMENT OF DOMESTIC INCIDENTS (Feb. 28, 2003). In addition, HSPD-5 establishes that the Secretary of Homeland Security will establish and conduct consequence management under a National Response Plan (NRP), now known as the National Response Framework (NRF), through a National Incident Management System (NIMS). *Id.* paras. 16 and 15, respectively. HSPD-5 states that the "Secretary of Defense shall provide military support to civil authorities for domestic incidents as directed by the President or when consistent with military readiness and appropriate under the circumstances and the law." *Id.* para. 9.

[112] JOINT CHIEFS OF STAFF EXECUTE ORDER, DOD SUPPORT OF CIVIL AUTHORITIES 2008 (28 May 2008) [hereinafter DSCA EXORD] (on file with author).

[113] *Id.* para. 4(a). The NORTHCOM Commander can employ Tier 1 forces upon receipt of a Request for Assistance, validation, and notification to Chairman, Joint Chiefs of Staff (CJCS) and Secretary of Defense.

NORTHCOM sends a request to place those assets in a status referred to as "Prepare To Deploy Orders" (PTDO).[114]

The third category involves "Resources For Internal Use."[115] A mobile public affairs detachment is an example of a Category Three asset. The unique aspect of this category is that its assets may be deployed and employed without a Request for Assistance (RFA).[116]

Category Four forces are "Large-Scale Response Resources"[117] for disasters, such as Hurricane Katrina and the 2004 Asian Tsunami, that would inevitably overwhelm state resources, including the National Guard and the EMAC process. Under Category Four, the Secretary of Defense must approve prepare-to-deploy orders, deployment, and employment of forces. For any support that does not fall within Categories One through Four, a standard RFA process occurs. The defense coordinating officer (DCO) receives an RFA from the Primary Agency (PA), validates it and sends it to NORTHCOM with a recommendation. NORTHCOM reviews the RFA and forwards it, with a recommendation, to the Joint Staff and the Joint Director of Military Support (JDOMS). The JDOMS reviews the request and then sends it to the Secretary of Defense Executive Secretariat and the Office of the Assistant Secretary of Defense for Homeland Defense and America's Security Affairs (OASD (HD/ASA)) for review and Secretary of Defense decision. Once the Secretary of Defense approves the request, JFCOM sources the requirement with an appropriate unit.[118]

A hip-pocket approach is the most viable option for the Reserve to fit into this DSCA EXORD scheme, as the Greensburg, Kansas example demonstrates. An EXORD, as with the Stafford Act, does not activate the Reserve, not even those units that possess the types of assets identified in the EXORD. So, unless the President invokes a partial mobilization, the individual members must voluntarily activate before assets such as B Company, 7-158th can be activated for a natural disaster. This takes time—time normally not available in disaster situations. But alleviating the time burden only requires some planning.

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[114] *Id*. para. 4(b).
[115] *Id.* para. 4(c).
[116] *Id.*
[117] *Id.* para. 4(d).
[118] *Id.* para. 10(b).

For the future, NORTHCOM, JFCOM, and the Joint Staff could, and should, ensure in advance that all Reserve units possessing assets designated for Tier 2, e.g., helicopters, possess hip-pocket orders. In addition, *all* Reserve units possessing unique capabilities that are likely to be needed in times of natural disasters should ready themselves for quick activation via hip-pocket orders.

D. Strength Limits

When using the Reserve in a volunteer active duty status, there are few concerns about strength limits. Although the Reserve forces activated in this fashion would count against the applicable Reserve Component operational support strength limits, they would not be counted toward the active duty end strength so long as the active duty orders do not specify a period greater than three years, and so long as the actual active duty period does not exceed three years (1095 days) out of the previous four years (1460 days).[119]

E. Volunteering Wrap-Up

As this article explains, combining the § 12301(d) authority with the practice of hip-pocket orders provides the Reserve with a potential activation mechanism that is calculated, measured, responsive, and flexible. It further provides the requisite longevity to ensure mission accomplishment without negatively impacting end strength. Moreover, hip-pocket orders fit within the DSCA EXORD framework. But for the system to work, prior planning is a must. As the saying goes, there is no time like the present. Even assuming that military leaders implement planning for hip-pocket orders, it is still important to understand several other options that provide authority for Reserve support in time of natural disaster.

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[119] Before being rescinded, 10 U.S.C. § 115(h)(6) required that reserve components performing ADSW/Operational Support for more than 180 days must be counted as part of end strength for the total force. Congress saw this as an undue limitation on the Reserves and therefore in the National Defense Authorization Act of 2005 changed the 180 day limitation to a limit of 1095 days out of 1460 days (three out of four years). *See* National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, §§ 415, 416, 118 Stat. 1811 (2004); *see also* Operational Support Memorandum, *supra* note 102; DODI 1215.06, *supra* note 19, para. 6.1.4.2.1.7.

VI. Miscellaneous Authorities & Piggy-Backing

A. General

The immediate response authority (IRA) and mutual aid agreements for firefighting support are two other sources that provide a limited authority for the Reserve to provide support for natural disasters. These authorities may be coupled with, or placed on top of, other authorities to initially justify as well as extend the time permitted for support.[120]

B. Immediate Response Authority

Immediate response authority permits a commander to take "immediate actions in response to requests from domestic civil authorities in order to save lives, prevent human suffering, or mitigate great property damage."[121] It is a limited authority that originates from two sources: the common law concept of necessity,[122] and historical precedent.[123] Department of Defense policy now explicitly authorizes IRA, specifically Department of Defense Directives 3025.1 and 3025.15.[124] Under both directives, the essence of IRA is that the situation must be imminent, where delay would result in harm or damage, and local civil authorities are unable to adequately respond. A request for IRA from civil authorities, therefore, generally should come within the first twenty-four hours of the emergency.[125]

The specific standards for invoking IRA are as follows: (1) civil authorities request assistance; (2) civil authorities are unable to adequately respond; (3) the situation is imminent with life or property in

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[120] This concept is referred to as "piggy-backing" and "tacking" in this article. *See infra* text accompanying note 144.

[121] Memorandum from Paul Wolfowitz, Deputy Sec'y of Defense, to Secretaries of the Military Departments et al., subject: Reporting "Immediate Response" Requests from Civil Authorities (Apr. 25, 2005) [hereinafter Wolfowitz Memorandum, Immediate Response] (on file with author); *see also* DOD DIR. 3025.16, *supra* note 29, paras. 4.5, 4.7.1.

[122] *See* Commander Jim Winthrop, *The Oklahoma City Bombing: Immediate Response Authority and Other Military Assistance to Civil Authority (MACA)*, ARMY LAW., July 1997, at 3, 5 (citing Mitchell v. Harmony, 59 U.S. 115 (1851)).

[123] *Id.*

[124] U.S. DEP'T OF DEFENSE, DIR. 3025.15, MILITARY ASSISTANCE TO CIVIL AUTHORITIES (18 Feb. 1997) hereinafter DOD DIR. 3025.15].

[125] *Id.* at 7.

peril; (4) there is no time to obtain prior approval from higher headquarters;[126] and (5) assistance is provided on a cost-reimbursable basis (but should not be delayed or withheld due to funding).[127] Department of Defense Directive 3025.1 explicitly refers to the "local military commanders and responsible officials of other DOD Components" as being authorized to take action under IRA. At least one commentator has interpreted "local" not so much as limiting support from only a commander/official in the immediate area of the disaster, but rather to the closest commander/official that possesses the requested assets.[128] For instance, immediately after the Oklahoma City bombing, commanders from Fort Sill and Tinker Air Force Base responded with assets.[129]

In addition to the above requirements, commanders executing an IRA mission must notify the National Military Command Center (NMCC) through their chain of command within two hours of responding.[130] When conducting an IRA mission, commanders must remain cognizant that the Posse Comitatus Act continues to apply to Title 10 forces. In addition, prior to deciding to support a request for immediate assistance, commanders must assess the following six criteria: legality, lethality, risk, cost, appropriateness, and readiness.[131] Lastly, the support is not indefinite and should end as soon as local, state, tribal or other federal entities under proper authority are able to take over the mission. The general rule is that IRA should last no more than seventy-two hours,[132] and arguably, in no case should it last more than ten days[133]

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[126] With today's rapid communications, available in all but the worst disasters, one must honestly ask just how many situations where Immediate Response Authority is invoked actually meet the requirement that it is used only when there is no time for higher headquarter approval. If the 2007 Southern California wildfires are a barometer for the future, the military may be taking a fairly aggressive approach to invoking IRA, resulting in its increased use.

[127] DOD DIR. 3025.16, *supra* note 29, paras. 4.5; 4.7.1; *see also* Lieutenant Colonel Mary J. Bradley & Major Kathleen V.E. Reder, *They Asked, But Can We Help? A Judge Advocate's Guide to Immediate Response Authority (IRA)*, ARMY LAW., Feb. 2007, at 30.

[128] *See* Winthrop, *supra* note 122, at 3.

[129] *Id.*

[130] *See* Wolfowitz Memorandum, Immediate Response, *supra* note 121.

[131] *See* DOD DIR. 3025.15, *supra* note 124, para. 4.2.

[132] *See* DOPLAW HANDBOOK, *supra* note 18, at 288 (stating "[t]he JDOMs has indicated that this assistance should not exceed 72 hours"); *see also* U.S. DEP'T OF ARMY, FIELD MANUAL 3-07, STABILITY OPERATIONS AND SUPPORT OPERATIONS para. 6-42 (Feb. 2003) (stating "immediate response authority is generally limited to 72 hours or less"). DSCA EXORD, *supra* note 112112 (limiting IRA to seventy-two hours unless the military departments coordinate with the combatant commander).

or after the President declares a major disaster or emergency under the Stafford Act.[134] After seventy-two hours, the response begins to crack any straight-face argument that the response is "immediate," and also begins to undermine the National Response Framework, with its accompanying fiscal restrictions.

The 2007 Southern California wildfires tested the general rules of IRA perhaps like no other recent emergency. During the fires, military commanders provided support to civil authorities under IRA. Commanders conducted many of those IRA missions well after the President had made an emergency declaration and major disaster declaration.[135] But the California fires were unique in that while the President had declared an emergency and major disaster for the entire situation, each new fire potentially created a new emergency that justified commanders to take independent action under the IRA. As with every general rule, new situations, e.g., the California wildfires, reveal unique twists, expose nuances, and stretch and modify previous understandings. As time separates analysis from the fires, the proper reach of IRA should become more apparent. What is certain, however, is

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[133] The term "arguably" is used because while there is no explicit outer limit to IRA prior to a presidential declaration; it is derived from the President's executive powers. Prior to the President declaring a "major disaster" or "national emergency," the President is limited by the Stafford Act to providing "emergency work" for a maximum of ten days. *See* 42 U.S.C. § 5170b (2000). Given that the President is explicitly limited to a ten-day period prior to a declaration, it would seem that any derivative authority of his power would also be limited to ten days.

[134] Immediate Response Authority is limited by the language of 32 C.F.R. § 185.3. Specifically, it defines immediate response as: Any form of immediate action taken by a DOD component or military commander, under the authority of this part and any supplemental guidance prescribed by the head of a DOD component, to assist civil authorities or the public to save lives, prevent human suffering, or mitigate great property damage under imminently serious conditions occurring where there has not been any declaration of major disaster or emergency by the President or attack." *Id.*; *see also* DOD DIR. 3025.15, *supra* note 124, para. E2.1.7 (defining "Immediate Response" as "[a]ny form of immediate action taken by a DOD Component or military commander, under the authorities outlined in DoD Directive 3025.12, (reference (e)), to assist civil authorities or the public to save lives, prevent human suffering, or mitigate great property damage under imminently serious conditions occurring *where there has not been any declaration of major disaster or emergency by the President* or attack.") (emphasis added).

[135] President Bush initially made an emergency declaration on 23 October 2007. *See* Federal Emergency Management Agency, California Wildfires Emergency Declaration (Oct. 23, 2007), *available at* http://www.fema.gov/news/event.fema?id=9029. The President made a major disaster declaration on 24 October 2007. *See* Press Release, The White House, President Bush Meets with Cabinet, Discusses Fires in California (Oct. 24, 2007), *available at* http://www.whitehouse.gov/news/releases/2007/10/20071024-2.html.

that this is an extremely limited source of authority, insufficient to provide a meaningful remedy to the current lack of authority to effectively use the Reserve in response to such emergencies.

C. Mutual Aid Agreements

A separate form of authority from IRA is the statutory authority for installation commanders to enter into mutual aid agreements with local fire protection agencies for firefighting and emergency services.[136] The types of situations that the installation may respond to under these mutual aid agreements, both on and off the installation, are fairly broad, including "emergencies involving facilities, structures, aircraft, transportation equipment, hazardous materials, and both natural and man-made disasters (including acts of terrorism)."[137] When conducted within the parameters of DODI 6055.6, the mutual aid agreements do not require prior approval from the Secretary of Defense.

Moreover, DODI 6055.6, *The Department of Defense Fire and Emergency Services Program*, states: "In absence of any agreement, installation commanders are authorized to render assistance to preserve life and property in the vicinity of the DOD installation, when, in their opinion, such assistance is in the best interest of the United States."[138] When aid is provided under this paragraph, outside the four corners of any agreement, it is, in essence, IRA. As a matter of DOD policy, it should follow the IRA notice procedures and parameters.

D. Emergency Authority

The next category under this miscellaneous section of authorities is the "emergency authority" under DOD Directive 3015.12.[139] Emergency authority permits military commanders to employ Title 10 forces in response to civil disturbances "to prevent loss of life or wanton destruction of property, or to restore governmental functions and public

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[136] *See* 42 U.S.C. § 1856 (2000); *see also* U.S. DEP'T OF DEFENSE, INSTR. 6055.6, DOD FIRE AND EMERGENCY SERVICES PROGRAM para. E2.5.21 (10 Oct. 2000) [hereinafter DODI 6055.6]; *see also* Bradley & Reder, *supra* note 127, at 30–31.
[137] DODI 6055.6, *supra* note 136, para. E2.5.2.
[138] *Id.* encl. 2, para. E2.5.21.3.
[139] *See* U.S. DEP'T OF DEFENSE, DIR. 3025.15, MILITARY ASSISTANCE FOR CIVIL DISTURBANCES para. 4.2.2.1 (Feb. 4, 1994).

order."[140] It is even more limited than the IRA. Emergency authority applies only to civil disturbance situations when "local authorities are unable to control the situation and circumstances preclude obtaining prior authorization by the President." Contrary to the IRA that requires a request from civil authorities for assistance, emergency authority only comes into play when local authorities are unable or unwilling to respond.[141]

E. AGRs and Technicians

The last area to discuss is not a separate authority but rather a separate personnel status. In particular, there are two types of personnel status that provide a limited means for the Reserve to respond to natural disasters—Active Guard Reserve (AGR) personnel and Civilian Technicians. Both are full-time employees in the Reserve with their primary duties to train, administer and maintain the Reserve force. [142] But so long as their primary duty is not sacrificed, they may also take part in operations and missions.[143] The number of personnel who fall under these categories is relatively small, naturally limiting the degree that these individuals can be counted on for disaster response.

Nonetheless, as full-time employees, they are present for duty, requiring no activation to operate and employ their equipment. This is

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[140] *Id.*

[141] *Id.*

[142] The primary duties of AGRs involve "organizing, administering, recruiting, instructing, or training the reserve components." 10 U.S.C. § 12310(a)(1) (2000). For military technicians, their primary duty is the "administration and training of the Selected Reserve or . . . the maintenance and repair of supplies or equipment issued to the Selected Reserve or the armed forces." *Id.* § 10216(a)(1)(C).

[143] The AGRs may conduct "operations or missions assigned in whole or in part to the reserve components," so long as the operations/missions do not interfere with their primary duties. 10 U.S.C. § 12310(a)(1). Moreover, 10 U.S.C. § 12314 states that

> [n]otwithstanding any other provision of law, a member of a reserve component who is on active duty other than for training may, under regulations prescribed by the Secretary concerned, be detailed or assigned to any duty authorized by law for members of the regular component of the armed force concerned.

Id.; *see* John Warner National Defense Authorization Act, 2007, Pub. L. No. 109-364, subtit. B, § 525, 120 Stat. 2083 (2007) (allowing technicians to perform certain missions/operations).

how some of the technicians of the 302d Airlift Wing, Peterson Air Force Base, deployed to the California fires in a fairly seamless manner. Using AGRs and technicians rarely will be a complete answer to any response situation, but they certainly may provide an initial response or act as a gap-filler, supplementing and supporting the primary Reserve force.

F. Piggy-Backing

The Reserve may use the authorities above to provide initial support to civil authorities and then follow that support with any other applicable authority, such as 10 U.S.C. § 12301(d). This of course is legitimate only to the extent that the subsequent authority is appropriate. In other words, one way to fully engage the Reserve may be by piggy-backing, or tacking, one authority onto another.[144] For instance, a Reserve unit may be justified in initially responding to a natural disaster, pre-declaration, with AGRs under the IRA. The unit may then continue its support under 10 U.S.C. § 12301(b), involuntarily activating members for fifteen days followed by a drill status,[145] or hip-pocket orders under 10 U.S.C. § 12301(d).

VII. Conclusion

Current statutes provide limited access to the Reserve for disaster response. While one rationale behind the current statutory structure is ostensibly to ensure that the Reserve remains just that—a reserve force—the operational tempo of the twenty-first century provides little basis for this justification. Granted, members of the Reserve are deployed overseas regularly. But it makes little sense to exclude the Reserve from natural disaster response duties because of the operational tempo, when the National Guard and AC forces are required to deploy overseas as well as provide DSCA for domestic disasters.

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[144] *See supra* note 120.

[145] Selected Reserve units are required to conduct training (drill) forty-eight periods a year. Four hours is considered one period. Units typically conduct this training on weekends, in blocks of four units. *See* 10 U.S.C. § 10147 (2000); *see also* DODI 1215.06, *supra* note 19, para. 6.1.4.1.2. The EPLOs, in the past, have typically deployed to disasters under drill or annual training status.

If, instead of operational tempo, it turns out to be that parochial and political concerns are the primary impetus for keeping the Reserve assets inaccessible during a natural disaster, it is worth considering the words from the Commission on the National Guard and Reserves in its Second Report to Congress that appear at the beginning of this article: "the public . . . does not care whether the military personnel who come to their aid are active duty or from the National Guard or Reserves."[146]

Indeed, to most of the public a uniform is a uniform. The only thing that matters to the general public, and deservedly so, is that when called upon the military provides adequate support at the right time, in the right place. The assets found in the Reserve are just too tailored for natural disaster response to categorically exclude. Any hurdle that stands in the way of tapping into those assets quickly and seamlessly, when federal military aid is legally permissible, must be challenged and ultimately dismantled.

Currently, the only involuntary methods for activating the Reserve are to use a fifteen-day activation under 10 U.S.C. § 12301(b), or resort to a partial or even full mobilization. These options are either not available until after an emergency/disaster declaration is made, or limited to a mere fifteen days—a period too short for many disasters. Furthermore, the options of partial and full mobilizations appear unrealistic for anything short of a colossal disaster heretofore unseen by mankind.

One option to cure this lack of effective activation authority is for Congress to amend 10 U.S.C. § 12304, providing the President with a practical method to involuntarily order the Reserve to active duty for natural disaster response. Section 594 of the FY09 NDAA passed by the House contains a well thought-out change to 10 U.S.C. § 12304 that would provide this authority. The Senate should pass the proposed change, eliminating the reference to the Stafford Act and replacing it with explicit and general language, setting forth that the statute applies when there is a threat or occurrence of natural disasters/emergencies and manmade accidents. But until statutory change to 10 U.S.C. § 12304 becomes a reality, if ever, cultivating the ability to effectively use 10 U.S.C. § 12301(d) via hip-pocket orders provides a viable method to identify, prepare and ultimately employ timely, strategically located, and relevant Reserve assets to areas in need during natural disasters.

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[146] CNGR SECOND REPORT, *supra* note 1.

TIME TO FINE-TUNE MILITARY RULE OF EVIDENCE 412

MAJOR SHANE R. REEVES*

There is a strong social policy in not only punishing those who engage in sexual misconduct, but in also providing relief to the victim.[1]

In our zeal . . . it is important that we keep in mind the constitutional rights of the defendant to a fair trial. . . . The bill clearly permits the defendant to offer evidence where it is constitutionally required.[2]

I. Introduction

"How many men did you have sex with before this alleged rape?" "So you have serviced 95% of the battalion?"[3] "You enjoy sexual intercourse, don't you?" "How many times have you had premarital sex?" "You have cheated on your spouse quite a few times, haven't you?" Prior to the enactment of The Privacy Protection for Rape Victims

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[1] FED. R. EVID. 412 advisory committee's note (1994).

[2] 124 CONG. REC. 36,256 (1978) (statement of Sen. Biden).

[3] A similar question was asked at an Article 32 prior to the enactment of The Privacy Protection for Rape Victims Act of 1978. *See Privacy of Rape Victims: Hearing on H.R. 14666 Before the Subcomm. on Criminal Justice of the H. Comm. on the Judiciary*, 94th Cong. 56 (1976) [hereinafter *Privacy Hearings*] (testimony of Sergeant Deborah Lieberman, U.S. Marine Corps) (referencing the defense counsel, she stated "he asked me if I had serviced 95% of the battalion . . . .").

Act of 1978, which amended the Federal Rules of Evidence (FRE) to include Rule 412, questions such as these were permissible in federal court and deemed an appropriate manner in which to question a victim's veracity in a rape trial.[4] Federal Rule of Evidence 412 ended this trial tactic and generally gave victims protection from these forms of embarrassing questions concerning their sexual history.[5]

Military Rule of Evidence 412, derived from FRE 412 with some minor modifications,[6] attempts to shields victims of nonconsensual sexual offenses[7] from degrading examination and cross-examination questions during courts-martial by generally excluding any evidence of

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[4] 124 CONG. REC. 36,256 (statement of Sen. Bayh) (noting that "[i]n Federal court and most State courts, the trial judge is free to decide on a case-by-case basis, whether a victim can be cross-examined indiscriminately as to her past sexual relationships. Unfortunately, in many instances such questioning has degenerated into a public humiliation of the victim herself . . . ."); *id*. (statement of Sen. Biden) ("The enactment of this legislation will eliminate the traditional defense strategy, too often permitted by our laws, of placing the victim and her reputation on trial . . . . [t]his legislation will end the practice . . . wherein rape victims are bullied and cross-examined about their prior sexual experiences.").

[5] *See id.* at 34,912 (statement of Rep. Mann) ("The new rule provides that reputation or opinion evidence about a rape victim's prior sexual behavior is not admissible."); *id*. at 34,913 (commenting that "the principal purpose of this legislation is to protect rape victims from the degrading and embarrassing disclosure of intimate details . . . .").

[6] *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 412 analysis, at A22-35 (2008) [hereinafter MCM]. "Although substantially similar in substantive scope to Federal Rule of Evidence 412, the application of the Rule has been somewhat broadened and the procedural aspects of the Federal rule have been modified to adapt them to military practice." *Id*. One stark difference between MRE 412 and FRE 412 is that the federal rule was amended in 1994 to eliminate the unique balancing test retained in MRE 412. *Compare id.* MIL. R. EVID. 412(c)(3) (requiring the military judge to apply the MRE 412 balancing test to defense proffered evidence), *with* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, tit. IV, subtit. A, ch. 4, § 40141(b), 108 Stat. 1796 (eliminating the balancing test in FRE 412), *and* FED. R. EVID. 412. For a discussion on why MRE 412 retained the balancing test see *infra* note 102; for a discussion on why MRE 412 should eliminate its unique balancing test see *infra* Section IV.

[7] Though "nonconsensual sexual offense" remains the terminology in the rule, it is no longer required to protect a victim. *See* United States v. Banker, 60 M.J. 216, 220 (2004) ("M.R.E. 412 is not limited to nonconsensual sexual offenses . . . following the 1998 amendments, the applicability of M.R.E. 412 hinges on whether the subject of the proferred evidence was a victim of the alleged sexual misconduct and not on whether the alleged sexual misconduct was consensual or nonconsensual."). Since the term "nonconsensual sexual offense" remains in the title of MRE 412, this article uses the term throughout.

the victim's prior sexual history.[8] Similar to the federal rule, MRE 412 extensively limits defense evidence in nonconsensual sexual crime prosecutions.[9] Specifically, MRE 412 will not allow "[e]vidence offered to prove that any alleged victim engaged in other sexual behavior" or "[e]vidence offered to prove any alleged victim's sexual predisposition."[10] The rule, however, does not act as an absolute bar to the defense entering evidence of the victim's past behavior. Military Rule of Evidence 412 offers three exceptions where the victim's past sexual behavior may be introduced:

> (A) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence;
>
> (B) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and
>
> (C) evidence the exclusion of which would violate the constitutional rights of the accused.[11]

If a party intends to offer evidence under any of the three exceptions, certain procedural requirements must be met.[12] If all procedural requirements are satisfied, the military judge will conduct a closed hearing where the parties may call witnesses, the victim may be present, all members will be absent, and the motion, related papers, and record of

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[8] *See* MCM, *supra* note 6, MIL. R. EVID. 412 analysis, at A22-35–36 (analyzing MRE 412); *Banker*, 60 M.J. at 219.

[9] *See Banker*, 60 M.J. at 221. *Banker* highlights the broadening scope of MRE 412. *Id*. Over time, through amendments to FRE 412 and assimilation of those amendments to the military rule, the scope and applicability of MRE 412 has been broadened. *See generally id.* Further, the rule has shifted from focusing on the nature of the sexual misconduct to determining the presence of a victim and protecting that victim. *See id*. at 220.

[10] MCM, *supra* note 6, MIL. R. EVID. 412(a)(1)(2).

[11] *Id*. MIL. R. EVID. 412(b)(1)(A)(B)(C).

[12] *See id.* MIL. R. EVID. 412(c)(1)(A)(B) (requiring the party intending to offer the evidence under the exception to "file a written motion at least 5 days prior to entry of pleas specifically describing the evidence and stating the purpose for which it is offered unless the military judge, for good cause shown, requires a different time for filing during trial"; to serve the motion on the opposing party, military judge; and to notify the alleged victim.).

the hearing will remain sealed.[13] After the hearing the military judge will determine if the evidence offered by the accused is "relevant and that the probative value of such evidence outweighs the danger of unfair prejudice."[14] If the evidence passes this threshold, then the evidence may be offered subject to any limitations set by the military judge.[15]

Federal Rule of Evidence 412 was enacted to "protect rape victims from degrading and embarrassing disclosure of intimate details" without "sacrificing any constitutional right possessed by the defendant."[16] Military Rule of Evidence 412 was adopted with a similar goal of "shield[ing] victims of sexual assault from the often embarrassing and degrading cross-examination and evidence presentations common to prosecutions of such offenses" while still recognizing the right of the accused "to present relevant defense evidence."[17] The Federal Rule, and consequently the Military Rule, has been amended since its inception,[18] but the intent has remained clear: protect the victim of a sexual crime without ignoring the compelling constitutional rights of an accused.[19]

Military Rule of Evidence 412, much like its federal counterpart, has generally been successful in meeting the intent behind its enactment.[20] The rule has typically balanced these equally compelling, yet competing interests in a fair manner. However, as with any rule, unforeseen situations arise and unintended consequences can require refining the rule to comply with congressional intent.[21] As currently drafted, and in application, the rule creates complications for both the Government and

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[13] *Id*. MIL. R. EVID. 412(c)(2).
[14] *Id*. MIL. R. EVID. 412(c)(3).
[15] *Id*. MIL. R. EVID. 412(c)(3). "Such evidence shall be admissible in the trial to the extent an order made by the military judge specifies evidence that may be offered and areas with respect to which the alleged victim may be examined or cross-examined." *Id.*
[16] 124 CONG. REC. 34,913 (1978) (statement of Rep. Mann).
[17] MCM, *supra* note 6, MIL. R. EVID. 412 analysis, at A22-35; *see* United States v. Sanchez, 44 M.J. 174, 178 (1996).
[18] *See infra* Section II (discussing the legislative history of FRE 412 and MRE 412).
[19] *See* MCM, *supra* note 6, MIL. R. EVID. 412 analysis, at A22-35; 124 CONG. REC. 36,256 (1978).
[20] *See* MCM, *supra* note 6, MIL. R. EVID. 412, at A22-35.
[21] *See* Pub. L. No. 100-690, tit. VII, subtit. B, § 7046(a), 102 Stat. 4400 (1988); Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, tit. IV, subtit. A, ch. 4, § 40141(b), 108 Stat. 1796 (1994) (examples of recent amendments to FRE 412).

defense in nonconsensual sexual act cases which violate the spirit and intent behind MRE 412.[22]

Due to the current form of the rule, the Government may find that evidence offered to prosecute a nonconsensual sexual offense is excluded, thus unfairly prejudicing a victim. Military Rule of Evidence 412 excludes all testimony of the victim's other sexual behavior or sexual predisposition unless a stated exception applies, regardless of which party is offering the evidence.[23] In certain sexual offense prosecutions, in particular those involving child victims, the Government must rely on other sexual behavior evidence[24] and expert testimony to prove that a nonconsensual sexual offense was committed upon the victim.[25] Yet, a plain reading of MRE 412 coupled with a timely objection from defense counsel will most likely result in the exclusion of the Government-offered "other sexual behavior" evidence. Military Rule Evidence 412 therefore acts as an unintended shield for the accused by excluding any testimony concerning the victim's sexual behavior that is not with the accused, even if offered by the Government. This unforeseen use of MRE 412 as a defense tool to counteract the Government's prosecution violates the intent behind the rule and frustrates prosecution of nonconsensual sexual offenses.[26]

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[22] For a discussion on the unintended, collateral consequences of MRE 412 for Government prosecutions see *infra* Section III. For a discussion on how an accused is unfairly prejudiced by the current form of the rule see *infra* Section IV.

[23] MCM, *supra* note 6, MIL. R. EVID. 412(a)(b).

[24] "Other sexual behavior" includes sexual acts with others besides the accused, masturbation, inappropriate language for a child that age, sexual obsession, or uncommon sexual knowledge. *See* Telephone Interview with Ms. Helen Swan, SRS Forensic Interview Specialist and past Program Director at Sunflower House, in Kansas City, Mo. (Dec. 10, 2007). For a more in-depth discussion on Ms. Swan's qualifications as an expert see *infra* note 115.

[25] *See, e.g.*, Frenzel v. State, 849 P.2d 741, 749 (Wyo. 1993) (holding that a qualified expert may testify concerning Child Sexual Abuse Accommodation Syndrome (CSAAS) to explain why a child victim testifies inconsistently, delays reporting, exhibits strange behavior, or accommodates sexually); United States v. Hadley, 918 F.2d 848, 852–53 (9th Cir. 1990) (noting that expert testimony is admissible to explain the general behavioral characteristics that are exhibited by sexually abused children); Thomas D. Lyon & Jonathon J. Koehler, *The Relevance Ratio: Evaluating the Probative Value of Expert Testimony in Child Sexual Abuse Cases*, 82 CORNELL L. REV. 43, 59 (1996) (stating that "sexual behavior [by a child] is quite relevant for proving that abuse occurred.") .

[26] Besides simply protecting victims of nonconsensual sexual offenses from humiliation, the rule has the ancillary benefit of encouraging victims to come forward and report the offense. *See* FED. R. EVID. 412 advisory committee's note (1994) ("By affording victims protection in most instances, the rule also encourages victims of sexual misconduct to

Military Rule of Evidence 412 also contains an unnecessary and potentially unfair hurdle to the defense in nonconsensual sexual offenses. The accused may only admit evidence of the victim's sexual behavior or sexual predisposition if a stated exception to the rule is met, the evidence is deemed relevant, and the unique MRE 412 balancing test is satisfied.[27] The defense has the burden of establishing that an exception applies and explaining how the evidence falls within the exception.[28] If the defense is capable of articulating a narrow and compelling reason why the victim's other sexual behavior or sexual predisposition is necessary for a defense, it is extremely unlikely that a military judge could justify excluding the evidence.[29] Yet, despite this unlikelihood, the defense-offered evidence is further filtered by the MRE 412 balancing test.[30] This is particularly troubling when the accused attempts to enter evidence that is constitutionally required under MRE 412(b)(1)(C).[31] Requiring the defense to comply with the MRE 412 balancing test creates an unnecessary additional step that is contrary to the congressional intent behind the rule.

The unintended use of the rule by defense to exclude a child victim's inappropriate sexual behavior is clearly contrary to Congress's intent to protect the interests of the victim.[32] Congressional intent to protect the

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institute and to participate in legal proceedings against alleged offenders."); United States v. Banker, 60 M.J. 216, 219 (2004) (quoting *Notes of Advisory Committee on Proposed 1994 Amendment*, FRE 412, 28 U.S.C. App. 412, at 87).

[27] *See supra* notes 14–15 and accompanying text. The MRE 403 balancing test also applies to evidence that satisfies MRE 412. *See Banker*, 60 M.J. at 223 n.3; United States v. One Feather, 702 F.2d 736, 739 (8th Cir. 1983) (holding that the district court did not err by excluding evidence that satisfied an FRE 412 exception under FRE 403). See *infra* note 228 for a discussion on the differences between the MRE 403 and MRE 412 balancing tests.

[28] United States v. Moulton, 47 M.J. 228, 229 (1997).

[29] *See* Cal. v. Trombetta, 467 U.S. 479, 485 (1984) (holding that a criminal defendant has a constitutional right to a "meaningful opportunity to present a complete defense"); Sandoval v. Acevedo, 996 F.2d 145, 149 (7th Cir. 1993) ("[A] rape shield statute cannot constitutionally be employed to deny the defendant an opportunity to introduce vital evidence . . . .").

[30] "If the military judge determines . . . that the evidence that the accused seeks to offer is relevant and that the probative value of such evidence outweighs the danger of unfair prejudice, such evidence shall be admissible . . . ." MCM, *supra* note 6, MIL. R. EVID. 412(c)(3).

[31] *Id*. MIL. R. EVID. 412(b)(C) (stating that one exception to the general inadmissibility of the victim's other sexual behavior would be "evidence the exclusion of which would violate the constitutional rights of the accused.").

[32] For a discussion on congressional intent to protect the interests of victims of nonconsensual sexual offenses, see *infra* notes 66–96 and accompanying text.

constitutional rights of the accused to a fair trial and a complete defense is also contravened by the unnecessary MRE 412 balancing test.[33] The unforeseen use of MRE 412 as a defense shield and the unnecessary nature of the MRE 412 balancing test were most likely never envisioned by the legislation's drafters. Thus, to address these shortcomings and to ensure MRE 412 complies with Congress's intent, the rule must be amended.

To support this proposition this article is divided into five sections. Section I introduces the basic tenets of MRE 412 and the current issues with the rule. Section II examines the legislative history of MRE 412 to illustrate the congressional intent behind the rule. Section III explains how MRE 412 may result in unintended protections for an accused in specific types of prosecutions and why a fourth exception to the rule is needed to end this unforeseen practice. The unique MRE 412 balancing test and why it should be eliminated is discussed in Section IV. Finally, Section V concludes that only by adopting these proposals will MRE 412 comply with the drafter's intent.

II. Legislative History

To illustrate the need for these changes, it is important to appreciate the legislative history of FRE 412 and MRE 412. Specifically, the unintended collateral consequences of MRE 412 for Government prosecutions as well as the unnecessary additional hurdles the rule imposes on an accused are contrary to congressional intent. By understanding the historical background of FRE 412 and MRE 412 the current problems become evident and the necessity to amend the rule to correct these issues becomes apparent.

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[33] *See* 124 CONG. REC. 36,256 (1978) (statement of Sen. Biden) (commenting on the need to protect and not overlook the constitutional rights of the accused); for further discussion on the congressional intent to ensure the accused's constitutional rights are not impeded by FRE 412 see *infra* notes 55–65 and accompanying text.

A. Background

Prior to 1978, in sexual assault cases the federal court system[34] allowed an accused to present evidence of a victim's sexual history in his defense.[35] This often led to humiliating cross-examination questions concerning the victim's prior sexual history in which the trial became "inquisitions into the victim's morality, not trials of the defendant's innocence or guilt."[36] These sexual assault trials yielded "evidence of at best minimal probative value with great potential for distraction and incidentally discourage[d] both the reporting and prosecution of many sexual assaults."[37] Pressure from law enforcement and women's organizations to end the use of a victim's sexual history[38] coupled with

[34] Numerous state laws protecting victims of sexual assaults were enacted prior to the passage of The Privacy Protection for Rape Victims Act of 1978. The first state to pass "rape-shield" legislation was Michigan in 1974. *See* MICH. COMP. LAWS ANN. § 750.520(j) (LexisNexis 2007); Harriett R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763, 765 n.3 (1986) (noting that Michigan passed the first rape-shield law in 1974 and by 1976 "over half of the states had enacted rape-shield statutes in some form") (citing Vivian Berger, *Man's Trial, Women's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 32 (1977)). State statutes foreshadowed the need for federal attention and led to congressional action. *See* 124 CONG. REC. 34,912 (1978) (statement of Rep. Mann) ("[T]he States have taken the lead to change and modernize their evidentiary rules about evidence of a rape victim's prior sexual behavior. The bill before us similarly seeks to modernize the Federal evidentiary rules.").

[35] *See* MCM, *supra* note 6, MIL. R. EVID. 412 analysis, at A22-35 (noting that prior to MRE 412, the defense was allowed to introduce "evidence of the victim's 'unchaste' character regardless of whether he or she has testified."); 124 CONG. REC. 34,912 (1978) (statement of Rep. Mann) (stating "for many years in this country, evidentiary rules have permitted the introduction of evidence about a rape victim's prior sexual conduct."); *see also* Richard A. Wayman, *Lucas Comes to Visit Iowa: Balancing Interests Under Iowa's Rape-Shield Evidentiary Rule*, 77 IOWA L. REV. 865, 869 (1992) ("Rape shield laws reversed the long-standing common-law doctrine which allowed defendants in rape prosecutions to reveal the 'character of unchastity' of any rape victim.").

[36] 124 CONG. REC. 34,913 (1978) (statement of Rep. Holtzman); *see also id.* at 36,256 (statement of Sen. Biden). Referring to the evidentiary rules prior to FRE 412, Senator Biden stated "[t]hese rules of evidence add to the shock and horror of rape by allowing the victim of the rape to be treated as if she somehow encouraged the rape." *Id.*

[37] MCM, *supra* note 6, MIL. R. EVID. 412 analysis, at A22-35.

[38] *See* Galvin, *supra* note 34, at 767–68 ("Police and prosecutors, seeking to remove obstacles to the apprehension and conviction of offenders, joined forces with women's groups; together they pushed reform measures through legislatures with remarkable rapidity and political acumen"); Wayman, *supra* note 35, at 869–73 (discussing the alliance between law enforcement and women's organizations to eliminate the traditional admittance of the victim's sexual history by a defendant).

legislative recognition of the limited relevance of such evidence[39] led Congress to enact The Privacy Protection for Rape Victims Act of 1978 which amended the Federal Rules of Evidence to include Rule 412.[40]

Testimony before Congress and the ensuing debates concerning The Privacy Protection for Rape Victim's Act highlighted two competing interests: the victim's right to not disclose intimate personal information and the accused's right to a fair trial.[41] Those in support of the legislation argued that protecting a victim's privacy was necessary to "eliminate the traditional defense strategy . . . of placing the victim and her reputation on trial in lieu of the defendant."[42] Legislation was needed to discourage "irrelevant and irresponsible foraging into a victim's unrelated past sexual relationships"[43] especially since discussing the victim's sexual history was simply a manner in which to embarrass and

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[39] *See* 124 CONG. REC. 34,913 (1978) (statement of Rep. Mann) ("Such evidence quite often serves no real purpose and only results in embarrassment to the rape victim and unwarranted public intrusion into her private life."); MCM, *supra* note 6, MIL. R. EVID. 412 analysis, at A22-35; *see also* Major Kevin D. Smith, *Navigating the Rape Shield Maze: An Advocate's Guide to MRE 412*, ARMY LAW., Oct./Nov. 2002, at 1, stating:

> Such evidence, after all, sometimes strained even the traditional definition of relevance; it often had only a tenuous connection to the circumstances of the offense being tried. Practitioners and courts observed that the evidence often served no real purpose and needlessly embarrassed victims. At best, it was often of minimal probative value. At worst, it was likely to confuse and distract the fact-finders, discourage the reporting of sexual assaults, and unnecessarily waste the court's time.

Id.

[40] *See* Privacy Protection for Rape Victims Act of 1978, Pub. L. No. 95-540, 92 Stat. 2046, 2046 (1978). The Act amended the federal rules of evidence to protect the privacy of rape victims by adding Rule 412 to the federal rules of evidence on 28 October 1978. *Id.*

[41] *See Privacy Hearings*, *supra* note 3, at 1–2 (statement of Rep. Hungate) ("the issues presented by [this] legislation raise sensitive questions involving not only the rape victim's right of privacy, but also the accused's right to a fair trial."); 124 CONG. REC. 36,256 (1978) (statement of Sen. Biden) (noting that the bill would require an in camera hearing to determine the admissibility of evidence offered by the defense "without harm to the privacy rights of victim or the constitutional rights of the accused"); *id.* at 34,913 (statement of Rep. Mann) ("The bill before us fairly balances the interests involved—the rape victim's interest in protecting her private life from unwarranted public exposure; the defendant's interest in being able adequately to present a defense by offering relevant and probative evidence . . . .").

[42] 124 CONG. REC. 36,256 (1978) (statement of Sen. Biden).

[43] *See Privacy Hearings*, *supra* note 3, at 48 (statement of Cheryl Robinson, Volunteer Supervisor, Rape Victim Companion Program, Alexandria, Va.).

smear the victim in court.[44] Victim's advocates felt that if enacted, the act would end the defense tactic of eliciting evidence of minimally probative value on cross-examination with the intent of prejudicing a jury against the victim.[45] To further support the legislation, proponents presented vignettes and statistics to illustrate how presenting the victim's sexual history in open court directly resulted in the reduction of sexual assault reporting throughout the country due to victims' desire to avoid the degrading aspects of a trial.[46] To victim advocates, the privacy of the victim, and more generally the interest of the victim, was of paramount importance.[47]

In contrast, defense advocates argued that an over-emphasis on the victim's rights would strip the accused of "a fair trial; to confrontation of his accuser; to present all relevant evidence in his defense; and the right to be presumed innocent until guilt is proven beyond a reasonable

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[44] *See id.* at 48–50. Ms. Robinson also noted that "[i]n our trial monitoring and in the cases in which we have assisted victims in court, we have seen glaring examples of misleading questioning that does affect the jury. . . . Jurors on these cases have later confirmed our observations." *Id.* at 49; *id*. at 41(testimony of Mary Ann Largen on behalf of the National Organization of Women (NOW)) ("To limit the admittance of this evidence would, of course, take away from defendants in rape cases an opportunity, unavailable to defendants of any other criminal charge—that of escaping punishment by the stratagem of smearing the victim's reputation . . . ."); MCM, *supra* note 6, MIL. R. EVID. 412 analysis, at A22-35.

[45] *See Privacy Hearings*, *supra* note 3, at 48–50 (statement and testimony of Cheryl Robinson, Volunteer Supervisor, Rape Victim Companion Program, Alexandria, Va.); 124 CONG. REC. 34,913 (1978) (statement of Rep. Mann) (commenting on the Federal Rules prior to FRE 412, Representative Mann noted that "the Federal evidentiary rules permit a wide ranging inquiry into the private conduct of a rape victim, even though that conduct may have at best a tenuous connection to the offense for which the defendant is being tried."); MCM, *supra* note 6, MIL. R. EVID. 412 analysis, at A22-35.

[46] *See Privacy Hearings*, *supra* note 3, at 49 (statement of Cheryl Robinson, Volunteer Supervisor, Rape Victim Companion Program, Alexandria, Va.) (discussing situations where victims of sexual assaults almost did not cooperate with prosecutors due to the possible questioning concerning their sexual history); *id.* at 3 (statement of Roger A. Pauley, Deputy Chief, Legislation and Special Projects Section, Criminal Division on behalf of the Department of Justice) ("There is no question that victims of sex crimes, predominantly women, fail to report large numbers of these crimes because they believe the ensuing legal proceedings will subject them to an ordeal more onerous than the sexual assault itself. Their perceptions are honest and, unhappily, quite valid.").

[47] *See* 124 CONG. REC. 34,913 (1978) (statement of Rep. Mann); *Privacy Hearings*, *supra* note 3, at 3 (statement of Roger A. Pauley, Deputy Chief, Legislation and Special Projects Section, Criminal Division on behalf of the Department of Justice) ("We want to see an end to hostile, callous, and degrading 'processing' of victims of sex crimes.").

doubt after thorough examination of all the evidence."[48] Opponents of the legislation conceded that a victim's privacy was a legitimate concern but argued that the accused's right to a fair trial trumped the victim's interest in privacy.[49] Defense advocates noted that the victim's right to privacy and the accused's right to a fair trial were often in direct conflict, usually could not be reconciled, and were typically "irresolvable."[50] The perceived inability to reconcile these competing interests led opponents of the legislation to argue that the proposed bill had overreaching protections for the victim which came at the expense of the accused's right to a fair trial.[51] To defense advocates, the restriction on the accused's constitutional rights proposed in the legislation could not be supported, regardless of the compelling nature of the victim's right to privacy.[52] Opponents of the legislation argued that the proposed bill inadequately recognized the constitutional concerns of the accused[53] and failed to protect the sanctity of the trial as a forum to gather the truth.[54]

B. Congressional Intent

1. Congressional Intent to Protect the Accused

Recognizing these equally compelling, yet competing interests,[55] Congress attempted to formulate a compromise that dealt with the

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[48] *Privacy Hearings*, *supra* note 3, at 62 (statement of Dovey Roundtree on behalf of the American Civil Liberties Union (ACLU)).

[49] *Id.* ("[T]he right to a fair trial should not be qualified, no matter how compelling the countervailing concerns.") (Ms. Roundtree, during her testimony, quoting from a Policy Statement adopted by the board of directors of the ACLU in 1976). Ms. Roundtree agreed with victims' advocates that in rape trials cross-examination could often be "humiliating, degrading, and brutal." *Id*. at 69. However, Ms. Roundtree noted that the questioning was not pointless since "the defense counsel may have had no other opportunity to attack the complainant's story or even to learn many of the details of the story." *Id*.

[50] *Id*. at 68.

[51] *Id*.

[52] *Id*. at 62.

[53] *Id*. ("[T]he present legislation does not adequately [e]nsure the defendant's right to a fair trial . . . .").

[54] *Id.* ("The keeping of the trial as a vehicle to discover the truth should not be lost.").

[55] The congressional decision to support the legislation, but with modification, was initially proposed during subcommittee testimony of Roger A. Pauley, Deputy Chief, Legislation and Special Projects Section, Criminal Division, speaking on behalf of the Department of Justice. *See id.* at 4. Mr. Pauley noted that the Department of Justice

concerns of both proponents and opponents of the bill.[56] To address the constitutional questions raised by opponents to the legislation, the Subcommittee on Criminal Justice of the House Committee on the Judiciary added a third exception allowing for the introduction of a victim's sexual history at trial.[57] The original bill presented by Representative Elizabeth Holtzman before the subcommittee only allowed for the introduction of evidence of a victim's sexual history if there was a past sexual relationship with the accused and consent was at issue or if the accused presented evidence that another individual caused the physical harm to the victim.[58] In recognition of the constitutional concerns raised by opponents of the original bill and their specific argument that these two exceptions were inadequate protections for an accused,[59] the subcommittee allowed for the introduction of evidence if it was "constitutionally required."[60]

The "constitutionally required" exception added by the subcommittee and eventually included in the enacted legislation, illustrated Congress's intent to fully protect the constitutional right of the

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generally supported the legislation, but serious constitutional concerns were raised including defendants' Sixth Amendment right to confront witnesses and the right to call witnesses in their support. *See id*. at 5. Mr. Pauley offered very specific modifications that the Department of Justice felt would adequately address these constitutional issues. *See id*. at 5–7. Congress did not implement the specific amendments suggested by the Department of Justice and instead decided to adopt the more general and vague "constitutionally required" third exception as an attempt to address all of these concerns without multiple modifications. *See infra* notes 205–19 and accompanying text (discussing the third exception to MRE 412).

[56] *See* 124 CONG. REC. 34,913 (1978) (statement of Rep. Holtzman) ("The bill provides that neither the prosecution nor the defense can introduce any reputation or opinion evidence about the victim's past sexual conduct. It does permit, however, the introduction of specific evidence about the victim's past sexual conduct in three very limited circumstances."); *see also* MCM, *supra* note 6, MIL. R. EVID. 412 analysis, at A22-35.

[57] The third exception was included by the subcommittee out of concern for the accused constitutional rights. *See* 124 CONG. REC. 34,913 (1978) (statement of Rep. Holtzman); *see also infra* notes 61–64 and accompanying text.

[58] *See Privacy Hearings*, *supra* note 3, at 2 (statement of Rep. Holtzman).

[59] Ms. Dovetree, speaking on behalf of the ACLU, stated "we do not believe that the two exceptions to admissibility are sufficient to take account of all situations in which prior sexual conduct may be relevant." *Id*. at 72 (testimony of Dovey Roundtree).

[60] *See* 124 CONG. REC. 34,913 (1978) (statement of Rep. Holtzman) ("[T]he evidence can be introduced if it is constitutionally required. This last exception, added in subcommittee, will [e]nsure that the defendant's constitutional rights are protected."). See *infra* notes 205–19 and accompanying text for a discussion on the meaning of "constitutionally required."

accused.[61] Despite numerous commentators' statements during the committee hearing that the original bill's two specific exceptions allowing for the introduction of the victim's sexual history were sufficient,[62] Congress clearly rejected these arguments.[63] The addition of the third exception coupled with explicit language during debates[64] illustrated Congress's desire to adequately protect the accused's constitutional rights. Clearly, Congress intended with The Privacy Protection for Rape Victims Act of 1978 and FRE 412 to provide the accused with access to all relevant and probative evidence, a fair trial, and an avenue to enter any constitutionally required evidence.[65]

2. Congressional Intent to Protect Victims

Concern for the constitutional rights of the accused, however, did not change congressional intent to offer extensive privacy protections for victims of sexual assaults during trial.[66] Congress agreed with the arguments offered by proponents of the bill that the time had come to

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[61] *See id.*; MCM, *supra* note 6, MIL. R. EVID. 412, at A22-35 ("The Rule recognizes . . . the fundamental right of the defense under the Fifth Amendment of the Constitution of the United States to present relevant defense evidence by admitting evidence that is 'constitutionally required to be admitted.'").

[62] *See, e.g.*, *Privacy Hearings*, *supra* note 3, at 81 (testimony of Judge Patricia Boyle, Detroit Recorder's Court, Detroit, Mich.) (stating that she believed that the two exceptions proposed in the original bill were adequate to address the concerns of the accused); *id.* at 41 (testimony of Mary Ann Largen on behalf of NOW) (urging the subcommittee to vote for the original bill without any amendments or alterations).

[63] *See* 124 CONG. REC. 34,913 (1978) (statement of Rep. Holtzman).

[64] *See, e.g.*, *id*. (statement of Rep. Mann) (noting that no constitutional rights of the defendant are to be compromised); *id.* at 36,256 (statement of Sen. Biden) (arguing that the constitutional rights of the accused cannot be forgotten); MCM, *supra* note 6, MIL. R. EVID. 412 analysis, at A22-35.

[65] *See* 124 CONG. REC. 36,256 (1978) (statement of Sen. Biden) ("[T]his bill has been carefully drafted to keep the reform within constitutional limits. The bill clearly permits the defendant to offer evidence where it is constitutionally required."); *id.* at 34,913 (statement of Rep. Mann) (noting that the bill provides the accused with a defense by allowing him to offer relevant, probative evidence).

[66] *See* 124 CONG. REC. 36,256 (1978) (statement of Sen. Biden); MCM, *supra* note 6, MIL. R. EVID. 412 analysis, at A22-35. Initially, the focus of the original bill was to protect the privacy of the victim. *Id*. Through subsequent amendments to FRE 412 and MRE 412 the rule became broader and protected not only the privacy of the victim, but the general interests of the victim. *See infra* 83–96 and accompanying text.

severely limit introduction of the victim's sexual history into trial.[67] Though this was a radical change from common law and previous federal procedure,[68] the general elimination of evidence concerning a victim's "unchaste"[69] character from trial was viewed by Congress as a requirement to halt the practice of questioning a rape victim's veracity by introducing minimally probative, inflammatory, and embarrassing evidence.[70] The result envisioned by Congress was a "fairer and more effective prosecution of rape crimes"[71] by eliminating jury access to the victim's private sexual history.[72] In addition, Congress agreed with proponents of the legislation that protecting a victim's privacy during trial would have the desired secondary effect of encouraging victims to report sexual offenses and participate in prosecutions of rape.[73]

To implement its intent, Congress crafted the legislation to generally exclude from evidence any discussions concerning the victim's prior sexual history in rape or an assault with intent to commit rape.[74] Only by meeting the criteria expressed in one of the three enumerated exceptions could an accused expose the victim's sexual history to the jury.[75] The legislation added further scrutiny by requiring defense-offered evidence of the victim's prior sexual history, under one of the three exceptions, to

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[67] *See* 124 CONG. REC. 34,912 (1978) (statement of Rep. Mann) (noting that the Federal Rules of Evidence needed to be modernized to generally exclude inquiries into the private conduct of victims).

[68] For a discussion on the evolution of the chastity requirement in rape law and the eventual rejection of this approach in favor of the current state and federal rape shield laws, see generally Michelle J. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 GEO. WASH. L. REV. 51 (2002).

[69] "Chastity" traditionally referred to a woman's abstention from extramarital sexual intercourse. *See* State v. Bird, 302 So. 2d 589, 592 (La. 1974); *see also* Galvin, *supra* note 34, at 765–66 (stating that character for unchastity refers to a woman's "propensity to engage in consensual sexual relations outside of marriage.").

[70] *See* 124 CONG. REC. 36,255 (1978) (statement of Sen. Thurmond) (stating "it is unconscionable when rape cases are tried that they can go back and try to attack a woman's veracity, her virtue, and so forth.").

[71] *Id.* at 36,256 (statement of Sen. Bayh).

[72] *See id.* at 34,913 (statement of Rep. Mann); MCM, *supra* note 6, MIL. R. EVID. 412 analysis, at A22-35.

[73] *See* 124 CONG. REC. 36,256 (1978) (statement of Sen. Biden) (discussing the lack of reporting and willingness to cooperate with prosecutors by victims due to previous rules of evidence).

[74] *See id.* at 34,912 (statement of Rep. Mann) (moving to amend the Federal Rules of Evidence to exclude evidence of a rape victim's prior sexual behavior).

[75] *Id.*

be screened by a judge at an in camera review.[76] At this review the defense was required to present the evidence before the judge and articulate why the evidence should go before the jury.[77] After reviewing the evidence and hearing arguments from the Government and defense, the judge would determine whether the evidence was "relevant and that the probative value of such evidence outweigh[ed] the danger of unfair prejudice . . . ."[78] If the judge determined that the evidence met these thresholds and was admitted, he still had the option to limit the defense use of such evidence by placing an order in which he specified how the evidence could be offered and the areas in which the victim could or could not be cross-examined.[79]

The general exclusion of a victim's sexual history and the stringent procedures required for defense to admit evidence under a stated exception demonstrated clear congressional intent to protect rape victims.[80] Congress's concern for the victim's privacy interest was further illustrated by its willingness to dramatically alter the legal landscape by not giving defense the unfettered ability to raise and explore a victim's "chastity" at trial.[81] However, this radical shift towards limiting jury exposure to a victim's sexual history through the enactment of The Privacy Protection for Rape Victims Act of 1978 and the implementation of FRE 412 was narrowly focused on specifically providing protection to victims of rape.[82]

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[76] "[T]hat is, a proceeding that takes place in the judge's chambers out of the presence of the jury and the general public." *Id*. at 34,913.

[77] *Id.* Rep. Mann noted "[t]he purpose of the in camera hearing is twofold. It gives the defendant an opportunity to demonstrate to the court why certain evidence is admissible and ought to be presented to the jury. At the same time, it protects the privacy of the rape victim . . . ." *Id.* The in camera review also allowed the victim "maximum notice of the questioning that may occur." *Id.* at 36,256 (statement of Sen. Bayh).

[78] *Id.* at 34,912 (statement of Rep. Mann).

[79] *Id*.

[80] *See*, *e.g.*, *id*. at 34,913 (statement of Rep. Holtzman) (noting that the passage of the proposed bill would "protect women from both injustice and indignity"); FED. R. EVID. 412 advisory committee's note (1994) (referring to reasoning behind the enactment of FRE 412, the advisory committee noted that "[t]he rule aims to safeguard the alleged victim against the invasion of privacy, potential embarrassment and sexual stereotyping that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the factfinding process.").

[81] *See supra* notes 68–69.

[82] *See* Privacy Protection for Rape Victims Act of 1978, Pub. L. No. 95-540, 92 Stat. 2046, 2046 (1978). The Act applied only to those criminal cases "in which a person is accused of rape or of assault with intent to commit rape . . . ." *Id.*; *see also Privacy Hearings*, *supra* note 3, at 1 (statement of Rep. Hungate) (introducing the bill before subcommittee as applying specifically to federal rape trials).

Congress began to broaden the definition of "victim" and the protections provided to victims through a 1988 amendment to FRE 412 and the Violent Crime Control and Law Enforcement Act of 1994, which also amended the rule.[83] The 1988 amendment widened the applicability of FRE 412 to all sexual offenses versus simply applying to scenarios involving rape and demonstrated a desire to broaden the protections offered by the rule.[84] The Violent Crime Control and Law Enforcement Act of 1994 amended the rule in an even more expansive manner and illustrated congressional concern for the general interest of all victims or alleged victims of sexual offenses.[85] The changes enacted by the 1994 amendment[86] furthered Congress's original intent to "safeguard the alleged victim against the invasion of privacy, potential embarrassment and sexual stereotyping that is associated with public disclosure of intimate sexual details" while "also encourag[ing] victims of sexual misconduct to institute and to participate in legal proceedings against alleged offenders."[87] The subsequent amendments also clarified and explicitly noted that Congress intended to support a "strong social policy

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[83] *See* Pub. L. No. 100-690, tit. VII, subtit. B, § 7046(a), 102 Stat. 4400 (1988); Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, tit. IV, subtit. A, ch 4, § 40141(b), 108 Stat. 1796 (1994). See also Anderson, *supra* note 68, at 93 n.219 for a brief chronology and discussion on the subsequent amendments to The Privacy Protection for Rape Victims Act of 1978.

[84] *See* Pub. L. No. 100-690, tit. VII, subtit. B, § 7046(a), 102 Stat. 4400 (1988). The amendment made numerous changes including: striking the word "rape" in the heading of the rule and replacing it with "sex offense;" in subdivisions (a) and (b) of the rule replacing the words "rape or of assault with intent to commit rape" with "an offense under chapter 109A of title 18, United States Code;" in subdivision (a) replacing the words "rape or assault" with "offense;" replacing the words "rape or assault with intent to commit rape" with "an offense under chapter 109A of title 18, United States Code" in all places that they appeared, in subdivision (b)(2)(B), replacing the words "rape or assault" with "such offense;" and finally replacing the word "rape" with "sex offense" in the table of contents at the beginning of the Federal Rules of Evidence. *Id*. § 7046(a), 102 Stat. 4400–01.

[85] *See generally* § 40141(b), 108 Stat. at 1796. "Rule 412 has been revised to diminish some of the confusion engendered by the original rule and to expand the protection afforded alleged victims of sexual misconduct." FED. R. EVID. 412 advisory committee's note (1994). For a complete discussion and commentary on the expansive nature of the changes see generally *id.*

[86] One notable change enacted by the Violent Crime Control and Law Enforcement Act of 1994 was the elimination of the unique FRE 412 balancing test in all criminal proceedings while retaining the test in civil proceedings. *See* § 40141(b), 108 Stat. at 1796. For discussion on the reasoning behind eliminating the balancing test, see *infra* notes 173–81 and accompanying text.

[87] FED. R. EVID. 412 advisory committee's note.

in not only punishing those who engage in sexual misconduct, but in also providing relief to the victim."[88]

The initial debates concerning The Privacy Protection for Rape Victim's Act of 1978 implied concern for not only the victim's privacy, but also the victim's willingness to report, the victim's willingness to participate in the proceeding,[89] a desire for the victim to view the trial as fair,[90] and a need to increase the effectiveness of rape prosecutions.[91] The subsequent amendments to FRE 412, in particular the 1994 amendment, expanded the protections offered by the rule by demonstrating greater concern for the victim's general interests.[92] Advisory committee notes to the 1994 amendment explicitly commented on the need to protect not only a victim's right to privacy, but also a right to participate in the proceeding without humiliation, a desire to encourage reporting, and a need to punish sexual offenders.[93] The reasoning behind FRE 412, coupled with the broadening of the protections provided to victims of nonconsensual sexual offenses,[94] clarified Congress's intent to protect a victim's privacy in hopes of creating a fair, minimally intrusive trial that would not be stymied or subverted by a defense tactic.[95] Clearly, Congress envisioned FRE 412 as a tool to protect a victim, thus ensuring reporting, participation, and equity in a sexual assault trial.[96]

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[88] *Id*.

[89] *See* 124 CONG. REC. 36,256 (1978) (statement of Sen. Biden) (commenting that by passing the legislation, victims would be encouraged to report rapes and participate in proceedings).

[90] *See id.* (statement of Sen. Bayh) (discussing how the legislation would increase the fairness of rape trials).

[91] *Id*. ("The practice of subjecting rape victims to such interrogation has been clearly shown to act as a deterrent on effective law enforcement for the crime of rape.").

[92] *See* FED. R. EVID. 412 advisory committee's note.

[93] *Id*. ("By affording victims protection in most instances, the rule also encourages victims of sexual misconduct to institute and to participate in legal proceedings against alleged offenders.").

[94] The protections offered by the rule extend to not only those victim's of nonconsensual sexual offenses but to all victims of alleged sexual misconduct. *See* United States v. Banker, 60 M.J. 216, 220 (2004).

[95] Senator Biden noted that a common defense tactic allowed under the previous rule was to "plac[e] the victim and her reputation on trial in lieu of the defendant" thus effectively reducing prosecutions of rape. 124 CONG. REC. 36,256 (1978).

[96] The advisory committee notes clearly refer to and articulate the social policies behind the enactment of FRE 412. *See, e.g.*, FED. R. EVID. 412 advisory committee's note (discussing the strong social policies protecting the victim's privacy, encouraging victim's to report sexual assaults, punishing those who commit sexual misconduct, and providing relief to the victim). The analysis to MRE 412 also refers to the social policies

C. FRE 412 and MRE 412

Military Rule of Evidence 412 "is substantially similar in substantive scope to Federal Rule of Evidence 412" and exists for the same reasons that FRE 412 was enacted.[97] Under MRE 1102, the military adopted FRE 412 into the military rules of evidence as MRE 412.[98] Military Rule of Evidence 412 has some notable differences from its federal counterpart due to the unique nature of the military environment and practice.[99] In particular, MRE 412 deletes all references to civil proceedings "as these are irrelevant to courts-martial practice," tailors the federal rules procedures to "military practice," and replaces the in camera review with a closed hearing in which the victim "is afforded a reasonable opportunity to attend and be heard."[100] Military Rule of Evidence 412 also retains the unique balancing test[101] originally included in FRE 412 but later omitted in federal criminal trials by the Violent Crime Control and Law Enforcement Act of 1994.[102] Despite these

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that were the foundation for the rule's enactment, stating "[t]here is thus no justification for limiting the scope of the Rule, intended to protect human dignity and to ultimately encourage the reporting and prosecution of sexual offenses . . . ." MCM, *supra* note 6, MIL. R. EVID. 412 analysis, at A22-35. By referring to these social policies, the 1994 amendment clarified Congress's intent and resolved any lingering confusion concerning the reasoning behind the enactment of The Privacy Protection for Rape Victim's Act of 1978. *See supra* note 85.

[97] MCM, *supra* note 6, MIL. R. EVID. 412 analysis, at A22-35.

[98] "Amendments to the Federal Rules of Evidence shall apply to the Military Rules of Evidence eighteen months after the effective date of such amendments, unless action to the contrary is taken by the President." *Id.* MIL. R. EVID. 1102(a); *see also* United States v. Sanchez, 44 M.J. 174, 177 n.4 (1996) ("By operation of MRE 1102, the military has now adopted the new version of FRE 412 which became effective December 1, 1994").

[99] *See generally* MCM, *supra* note 6, MIL. R. EVID. 412 analysis, at A22-35–36. Also of note is that in 1993 "[Rules for Courts-Martial] 405(i) and Mil. R. Evid. 1101(d) were amended to make the provisions of Rule 412 applicable at pretrial investigations" to comply with congressional intent to protect victims of "nonconsensual sex crimes at preliminary hearings as well as at trial . . . ." *Id*. MIL. R. EVID. 412 analysis, at A22-36.

[100] *Id.*

[101] *See* MCM, *supra* note 6, MIL. R. EVID. 412(c)(3).

[102] *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, tit. IV, subtit. A, ch 4, § 40141(b), 108 Stat. 1796 (1994). In 1998, by operation of MRE 1102, MRE 412 was revised to assimilate the majority of the changes made to FRE 412 by the Violent Crime Control and Law Enforcement Act of 1994. *See* MCM, *supra* note 6, MIL. R. EVID. 412 analysis, at A22-36 ("The revisions to Rule 412 reflect changes made to the Federal Rule of Evidence 412 by section 40141 of the Violent Crime Control and Law Enforcement Act of 1994 . . . ."); *see also Sanchez*, 44 M.J. at 177 n.4. Unlike the other differences between MRE 412 and FRE 412 following the 1994 amendment, see *supra* text and accompanying notes 97–100, the reason the MRE 412 balancing test was retained was not explained in the Analysis to the rule. *See, e.g.*, MCM, *supra* note 6,

differences, MRE 412 mirrors FRE 412's general intent to protect victims from degrading trial practices, exclude evidence of minimally probative value, encourage both the reporting and prosecution of sexual assaults, and hold accountable those that commit sexual misconduct.[103] Similarly, MRE 412 recognizes that the rule does not act as an absolute bar to the admission of defense evidence and that an accused has a constitutional right to "present relevant defense evidence" if it falls within one of the stated exceptions.[104]

Despite peripheral differences, the federal rule and the military rule are based upon the same social policies and the congressional intent remains the same for both.[105] Through these rules Congress intends to "protect rape victims from the degrading and embarrassing disclosure of intimate details about their private lives, to encourage reporting of sexual assaults, and to prevent wasting time on distractive collateral and irrelevant matters."[106] Hindering a sexual assault trial through the misuse

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MIL. R. EVID. 412 analysis, at A22-36 (discussing the reasons for the differences between FRE 412 and MRE 412 following the 1994 amendment without mentioning the retention of the balancing test in the military rule). When considering the changes made to FRE 412 and their application to MRE 412 following the 1994 amendment, The Joint Service Committee on Military Justice (JSC) Working Group, noted that "[a]lthough the federal rule doesn't have detailed instructions for the military judge to follow in balancing the needs of the accused and the victim, our current rule does. Consequently, I've left MRE 412(c)(3) as is. There seems to be no good reason to delete it." Memorandum, JSC Working Group, to Working Group Members, subject: MRE 412 Amendments (29 Nov. 1994) (on file with author). In an interview, Colonel (COL) (Retired) Borch stated that the JSC Working Group recommended to the JSC to leave the rule unchanged out of an abundance of caution. *See* Interview with COL (Retired) Frederic L. Borch III, U.S. Army Representative and senior officer on the JSC Working Group 1994–1996, in Charlottesville, Va (Mar. 6, 2008). Colonel Borch noted that following the 1994 amendment to FRE 412 the JSC wanted to ensure military judges understood they were required to balance the victim's and accused's interests. *Id.* At the time, it was unclear whether MRE 403 applied to MRE 412; therefore, to give clear guidance to military judges that some form of balancing was required and to avoid appellate litigation on the issue, retaining the MRE 412 balancing test was recommended. *Id.*

[103] MCM, *supra* note 6, MIL. R. EVID. 412 analysis, at A22-35; *see also* United States v. Banker, 60 M.J. 216, 220 (2004) (discussing the 1998 amendment to MRE 412, which adopted most of the changes in the 1994 amendment to FRE 412, in which the focus of the rule became more about protecting the victim then determining if there was sexual misconduct).

[104] *Banker*, 60 M.J. at 220.

[105] *Compare* FED. R. EVID. 412 advisory committee's note (1994) (stating the intent behind FRE 412), *with* MCM, *supra* note 6, MIL. R. EVID. 412 analysis, at A22-35 (stating the intent behind MRE 412).

[106] United States v. Torres, 937 F.2d 1469, 1472 (9th Cir. 1991); *see also* Michigan v. Lucas, 500 U.S. 145, 150 (1991) (finding that the Michigan rape shield law was a valid

of MRE 412 is clearly contrary to the intent envisioned by Congress[107] and contravenes the strong social policies of encouraging victim reporting, participation in prosecutions, and equity in sexual assault trials.[108] Congress also did not intend to use MRE 412 as an unreasonable bar to the admission of defense evidence[109] and fully intended that an accused retain his constitutional right to "a meaningful opportunity to present a complete defense."[110]

III. The Unintended Consequences of MRE 412

Military Rule of Evidence 412 generally excludes "evidence offered to prove that any alleged victim engaged in other sexual behavior" and "evidence offered to prove any alleged victim's sexual predisposition."[111] The offering party is irrelevant[112] and only evidence that falls within a stated exception may be admitted.[113] The universal applicability of the rule has created an unforeseen opportunity for defense counsel in sexual assault trials involving victims unwilling or unable to testify. This is particularly problematic for Government prosecutions of child sexual abuse.[114]

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legislative determination that rape victims "deserve heightened protection against surprise, harassment, and unnecessary invasions of privacy").

[107] *See, e.g.*, 124 CONG. REC. 36,256 (1978) (statement of Sen. Biden) (noting that one reason for the legislation is to correct the underreporting and prosecution of sex crimes); *id.* (statement of Sen. Bayh) (discussing the need to encourage victim reporting and participation thus improving law enforcement in the area of sexual crimes); FED. R. EVID. 412 advisory committee's note (commenting on need to ensure that prosecution of those that commit sexual misconduct).

[108] *See supra* note 96.

[109] *See* 124 CONG. REC. 36,256 (1978) (statement of Sen. Biden) (commenting on the need to remember the constitutional rights of the accused); *id.* at 34,913 (statement of Rep. Holtzman) (referencing the desire to protect the accused's constitutional rights).

[110] Cal. v. Trombetta, 467 U.S. 479, 485 (1984).

[111] MCM, *supra* note 6, MIL. R. EVID. 412(a)(b).

[112] *But see* PROFESSOR ANTHONY BOCCHINO, COMMENTARY, RULE 412: SEX OFFENSE CASES; RELEVANCE OF ALLEGED VICTIM'S PAST SEXUAL BEHAVIOR OR ALLEGED SEXUAL PREDISPOSITION, NATIONAL INSTITUTE FOR TRIAL ADVOCACY (LexisNexis 2008) (stating that there are "four situations where specific instances of conduct as evidence of sexual behavior or sexual predisposition of the victim may be admissible . . . ." with the fourth exception being that the "sexual conduct of the victim may be admissible when it is offered by the prosecution.").

[113] MCM, *supra* note 6, MIL. R. EVID. 412(a)(b).

[114] *See infra* notes 115–43 and accompanying text.

A. The Need for a Fourth Exception

Typically, child sexual abuse cases are extremely difficult to prosecute due to a lack of physical evidence, delayed reporting, and no eyewitnesses.[115] Many of these trials hinge on the testimony of the child, yet child victims often have difficulty testifying in sexual abuse trials or discussing in open court the sexual misconduct of an accused.[116] It is not uncommon for a child victim to refuse to testify, or in some situations, not to remember the abuse.[117] Though these child victims may be unwilling or unable to testify, there are other indicators that may demonstrate that abuse has occurred that the Government may rely upon

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[115] *See* Telephone Interview with Ms. Helen Swan, SRS Forensic Interview Specialist and past Program Director at Sunflower House in Kansas City, Mo. (10 Dec. 2007) [hereinafter Swan Interview] (Ms. Swan noted that child sex abuse cases are notoriously difficult to prosecute); *see also* Lisa R. Askowitz & Michael H. Graham, *The Reliability of Expert Psychological Testimony in Child Sexual Abuse Prosecutions*, 15 CARDOZO L. REV. 2027, 2028 (1994) (stating "[u]nlike other prosecutions, child sexual abuse prosecutions rarely are supported by physical or medical evidence or a nonparticipant eyewitness to the crime."). Ms. Swan is a social worker who specializes in the area of child sexual abuse and is the supervisor of the child advocacy center forensic interviewing program at the Sunflower House in Kansas City, Missouri. Ms. Swan is a well recognized expert in the field of child sexual abuse and has conducted over 2300 forensic interviews of children who were allegedly sexually abused. Ms. Swan has numerous publications, including: *Dear Elizabeth: Diary of an Incest Survivor (1993)* and *Alone After School (Prevention Manual for Latchkey Children) (1985).* The Kansas Supreme Court has stated that Ms. Swan,

> who is licensed as a clinical specialist, with a master's degree in social work, years of experience in the field of child sexual abuse and with world-wide recognition in the field of child sexual abuse, is imminently qualified as an expert to testify as to common patterns of behavior resulting from child sexual abuse . . . .

State v. Reser, 767 P.2d 1277 (Kan. 1989).

[116] *See* Swan Interview, *supra* note 115.

[117] *Id.* During the interview, Ms. Swan stated that children, in particular boys, will often not testify due to embarrassment, negative connotations concerning homosexual behavior, or out of concern that their testimony may have negative consequences for their family or the accused. *See id.* Though much less common, some children will repress or push away memories of the abuse as a defense mechanism. *Id.*; *see also* R. Christopher Yingling, Note, *The Ohio Supreme Court Sets the Statute of Limitations and Adopts the Discovery Rule for Childhood Sexual Abuse Actions: Now It Is Time for Legislative Action!*, 43 CLEV. ST. L. REV. 499, 502–05 (1995) (noting that most cases of child sexual abuse go unreported for multiple reasons including fear of consequences, personal safety concerns, and repression of memories); Askowitz & Graham, *supra* note 115, at 2033–34 (commenting on the numerous reasons why children victims have difficulty testifying at trial).

to further the prosecution.[118] Among these indicators, one of the strongest signs that a child is a victim of abuse is an exhibition of age-inappropriate sexual behavior.[119] In a situation where a child victim is unwilling or unable to testify, the Government will rely upon evidence of a child victim's age-inappropriate sexual behavior to ensure prosecution.[120]

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[118] *See, e.g.*, Lyon & Koehler, *supra* note 25, at 59 (stating "because gonorrhea is virtually non-existent among nonabused children who have not had sexual contact, it is strong evidence that abuse has occurred"); Yingling, *supra* note 117, at 503–04 ("Although the effects of childhood sexual abuse vary among victims and according to the circumstances surrounding the abuse, researchers have noted common characteristics among victims. During childhood, initial effects of sexual abuse include fear, anxiety, guilt, shame, depression, low self-esteem, and inappropriate sexual behavior") (citing DAVID FINKELHOR ET AL., A SOURCE BOOK ON CHILD SEXUAL ABUSE 144–52 (1986)). However, some argue that since there are no universal symptoms present in all children that sexual abuse has no clear indicators. *See, e.g.*, Lisa R. Askowitz, Comment, *Restricting the Admissibility of Expert Testimony in Child Sexual Abuse Prosecutions: Pennsylvania Takes It to the Extreme*, 47 U. MIAMI L. REV. 201, 208–09 (1992). Ms. Swan agreed not all children will show effects of abuse, or be defined as symptomatic, but of those that did show the typical symptoms, these were clear indicators that a child has most likely been abused. *See* Swan Interview, *supra* note 115; *see also* Lyon & Koehler, *supra* note 25, at 62 (commenting on child sexual abuse symptoms, the authors noted that "many common symptoms are only marginally relevant, and many uncommon symptoms have great probative value.").

[119] Age-inappropriate "other sexual behavior" is the most significant indicator that sexual abuse has occurred. *See* Swan Interview, *supra* note 115. Ms. Swan noted that age-inappropriate sexual behavior is different from normal childhood sexual experimentation. *Id.* Ms. Swan referred generally to WILLIAM N. FRIEDRICH, PSYCHOTHERAPY OF SEXUALLY ABUSED CHILDREN AND THEIR FAMILIES (1990) as one of many sources that help to distinguish when a child has crossed the boundary between normal sexual experimentation and age-inappropriate behavior. *Id.* Mr. Friedrich conducted a child sex abuse inventory with 880 non-abused children aged two to twelve and 260 sexually abused children aged two to twelve. The sexually abused children were significantly more sexualized and demonstrated sexual behaviors including masturbation, sex acts, penetration, and other acts that differed from the normative sample inventory list. *Id.* When discussing sexual acts, Ms. Swan noted a symptom such as depression may result from numerous other reasons besides sexual abuse (for example genetics); however, inappropriate sexual acts by a child are a strong indicator of abuse since this is extremely rare in children that are not abused. *See* Swan Interview, *supra* note 115; *see also* Lyon & Koehler, *supra* note 25, at 59 (stating that "sexual behavior may be one of the most probative symptoms of sexual abuse" and that "certain types of highly sexualized behavior are uncommon among abused children, but are even more uncommon among children who have not been abused. Thus, despite being uncommon among abused children, sexual behavior is quite relevant for proving that abuse occurred.").

[120] For example, the mother of a child victim may testify that the child is overtly sexual toward siblings, masturbates obsessively, or has inappropriate sexual contact with other children. "Other sexual behavior" does not include sexual activity with the accused. *See supra* note 24 for a more detailed definition of "other sexual behavior."

Crucial to child sexual abuse prosecutions, and specifically in a trial in which the Government is relying on evidence of age-inappropriate sexual behavior, is the testimony of an expert.[121] An expert is indispensable in explaining to the fact finder the relevance of the age-inappropriate sexual behavior and whether the behavior is a characteristic that would normally be seen in abused children.[122] Evidence of the child victim's age-inappropriate sexual behavior combined with the expert analysis of that behavior[123] illustrates whether the child has been victimized and assists the fact finder in determining whether the child has been sexually abused.[124]

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[121] *See* Askowitz & Graham, *supra* note 115, at 2034–35 (commenting on the importance of an expert in child sexual abuse trials).

[122] "M.R.E. 702 provides that a witness qualified as an expert may testify as to scientific, technical, or other specialized knowledge if it will assist the factfinder in understanding the evidence or determining a fact at issue." United States v. Hayes, 62 M.J. 158, 165 (2005). Expert testimony is allowed to explain the relevance of a child's "other sexual behavior" and how this may indicate sexual abuse. *See* United States v. Hadley, 918 F.2d 848, 852–53 (9th Cir. 1990) (noting that expert testimony is admissible to explain the general behavioral characteristics that are exhibited by sexually abused children); United States v. Nelson, 25 M.J. 110, 113 (C.M.A. 1987) (stating that "there is a sufficient body of 'specialized knowledge' regarding the typical behavior of sexually abused children and their families, such that the conclusions which an expert draws as to these 'behavioral patterns' are admissible") (quoting United States v. Snipes, 18 M.J. 172, 179 (C.M.A. 1984)).

[123] Expert testimony concerning the general characteristics of sexually abused children and whether the age-inappropriate sexual behavior of the child victim is consistent with a victimized child is typically considered more probative then prejudicial and will pass an MRE 403 balancing test. *See, e.g.*, *Hadley*, 918 F.2d at 853; Frenzel v. State, 849 P.2d 741, 748 (Wyo. 1993) (noting that expert testimony in child sexual abuse cases is "relevant and helpful in explaining to the jury the typical behavior patterns of adolescent victims of sexual assault"); *see also* Lyon & Koehler, *supra* note 25, at 68 n.91 (explaining that age-inappropriate sexual behavior demonstrated by child victims is probative that abuse has occurred).

[124] Testimony of the child victim's other sexual behavior coupled with expert testimony may also be used to rebut a defense that the abuse did not occur. *See* Lyon & Koehler, *supra* note 25, at 55 ("Most courts allow prosecution experts to testify that an alleged victim's behavior is 'consistent with' abuse to rebut defense claims that the behavior proves abuse did not occur.") (citing JOHN E.B. MEYERS, EVIDENCE IN CHILD ABUSE AND NEGLECT CASES 292 (2nd ed. 1992)). Military Rule of Evidence 412, as currently drafted, leaves open the question, could the defense argue that the abuse did not occur and then invoke MRE 412 to prevent the prosecution from offering evidence of the victim's age-inappropriate sexual behavior with a third party in rebuttal? The proposed fourth exception would resolve this issue and allow the Government to offer the rebuttal evidence. *See infra* notes 144–60 and accompanying text (detailing the proposed fourth exception).

It is clear that in a child sexual abuse trial in which the victim is unable or unwilling to testify, evidence of the child's age-inappropriate sexual behavior that is not with the accused coupled with expert testimony concerning that behavior is a necessity to the Government and essential to ensuring prosecution of these difficult child sexual abuse cases.[125] However, a defense attorney may exclude all forms of this "other sexual behavior" evidence through an objection to the proffered Government evidence under MRE 412.[126] Military Rule of Evidence 412 explicitly excludes evidence of the victim's other sexual behavior or sexual predisposition from all proceedings "involving alleged sexual misconduct"[127] unless a stated exception applies.[128] The rule is universal in application and does not differentiate between the Government and the defense when expressing this blanket exclusion.[129] Therefore, introduction of evidence demonstrating other sexual behavior of a victim, or more specifically, a child's age-inappropriate sexual behavior with someone other than the accused, requires the Government to articulate why the evidence fits within a stated exception to MRE 412.[130]

Despite the critical nature of this evidence, the stated exceptions within MRE 412[131] do not provide the Government an avenue to introduce the other sexual behavior of the child victim. The first exception to MRE 412 does not apply to age-inappropriate other sexual behavior by a child victim and is therefore inapplicable.[132] The second

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[125] In Ms. Swan's extensive experience, she noted that when a child victim cannot or will not testify the case is typically dismissed unless there is some other evidence such as eye witness testimony, physical evidence, or age-inappropriate sexual behavior coupled with expert testimony. *See* Swan Interview, *supra* note 115.

[126] *See* MCM, *supra* note 6, MIL. R. EVID. 412(a)(b).

[127] *Id*. MIL. R. EVID. 412(b).

[128] *Id*. MIL. R. EVID. 412(a).

[129] *See generally id.* Despite Professor Anthony Bocchino's commentary, see *supra* note 112, the rule does not differentiate between the Government and defense when excluding evidence of the victim's other sexual behavior or sexual predisposition.

[130] *See id.* MIL. R. EVID. 412(a)(b).

[131] *See id.* MIL. R. EVID. 412(b); *supra* note 11 and accompanying text (detailing the three exceptions to MRE 412).

[132] The first exception allows the defense to rebut allegations that the accused was the source of prosecution offered physical evidence and will admit "evidence of specific instances of sexual behavior by the alleged victim offered to prove that another person other than the accused was the source" of the physical evidence. *Id.* MIL. R. EVID. 412(b)(1)(A). For a more detailed discussion on the first exception, see *infra* notes 193–95, 200–04 and accompanying text.

exception allows the prosecution to admit evidence under MRE 412,[133] but the Government is limited to introducing evidence of a sexual relationship between the accused and victim.[134] This exception is silent concerning the introduction of the victim's sexual activity not with the accused and even liberally interpreted, cannot be construed to allow such evidence.[135] The rule's third exception explicitly applies only to an accused and clearly does not address or allow for the introduction of the victim's sexual history.[136] The three exceptions expressed in the rule are not helpful to the Government in rebutting a defense objection based upon MRE 412, and the result is the exclusion of all evidence of a child

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[133] The second exception will admit the victim's sexual history where the "evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution." *See* MCM, *supra* note 6, MIL. R. EVID. 412(b)(1)(B). This exception focuses on the sexual relationship between the accused and the victim, whether offered by the defense or the Government. *See* FED. R. EVID. 412 advisory committee's note (1994) (discussing various situations in which the accused and the victim's sexual interaction would allow for the admittance of the victim's sexual history).

[134] *See* MCM, *supra* note 6, MIL. R. EVID. 412(b)(1)(B). The prosecution would be allowed to use the second exception, for example, in a child sexual abuse case to introduce "evidence of uncharged sexual activity between the accused and the alleged victim . . . pursuant to Rule 404(b) to show a pattern of behavior." FED. R. EVID. 412 advisory committee's note (1994). The inclusion of this language in the second exception to MRE 412 implicitly illustrates congressional concern that the stringent protections provided in the rule would be misused by the accused to exclude damning evidence of sexual misconduct with the victim.

[135] *See* MCM, *supra* note 6, MIL. R. EVID. 412(b)(1)(B); FED. R. EVID. 412 advisory committee's note (1994) ("Admissible pursuant to this exception might be evidence of prior instances of sexual activities between the alleged victim and the accused, as well as statements in which the alleged victim expressed an intent to engage in sexual intercourse with the accused, or voiced sexual fantasies involving the specific accused."). All examples in the advisory committee notes focus on interaction between the victim and the accused. *See generally id.*

[136] The third exception admits "evidence the exclusion of which would violate the constitutional rights of the accused." MCM, *supra* note 6, MIL. R. EVID. 412(b)(1)(C). This exception expressly applies to the accused, is specifically intended to protect the accused's constitutional right to a fair trial, and will not allow "evidence of specific instances of conduct [to] be excluded if the result would be to deny a criminal defendant the protections afforded by the Constitution." FED. R. EVID. 412 advisory committee's note (citing Olden v. Kentucky, 488 U.S. 227 (1988)) (noting that the Supreme Court recognizes various circumstances where an accused "may have a right to introduce evidence otherwise precluded by an evidence rule under the Confrontation Clause"). For a more detailed discussion on the third exception, see *infra* notes 205–19 and accompanying text.

victim's age-inappropriate other sexual behavior in a child sexual abuse trial.[137]

The exclusion of this form of evidence has obvious negative connotations in the prosecution of these types of child sexual abuse trials.[138] This unforeseen use of MRE 412 as a shield for an accused during a child sexual abuse trial is in violation of the congressional intent behind the rule and contravenes Congress's desire to protect the interests of the victim.[139] When amending FRE 412 in 1994, and by extension MRE 412, Congress recognized the possible misuse of the rule[140] to exclude evidence of uncharged sexual activity between the accused and the victim and addressed that potential prosecutorial roadblock in the second exception.[141] The drafters of the rule, however, did not foresee the use of MRE 412 to exclude evidence of other sexual behavior not with the accused that could be offered by the Government and, contrary to Congress's intent, created an opportunity for defense to use the rule to exclude this form of evidence.[142] The ability of defense counsel to use MRE 412 to impede a child sexual abuse prosecution is a loophole whose existence is unintended and blatantly contradicts the legislative history and vision behind the rule.[143]

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[137] It is possible to envision scenarios outside of a child sexual abuse case where "other sexual behavior" evidence coupled with expert testimony would be relevant and important. Examples might include: a prison sexual assault, male on male rape, or a female rape victim demonstrating rape trauma syndrome.

[138] *See supra* note 125 (discussing when a child sexual abuse case is typically dismissed). If evidence of a child victim's age-inappropriate other sexual behavior is excluded due to a defense objection under MRE 412 it is also difficult to articulate how an expert's testimony is relevant under MRE 401 or helpful to the fact finder under MRE 702. *See generally* MCM, *supra* note 6, MIL. R. EVID. 401, 702.

[139] *See generally supra* notes 66–96 and accompanying text.

[140] *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, title IV, subtit. A, ch 4, § 40141(b), 108 Stat. 1796 (1994) (amending FRE 412 to include the language in the second exception allowing the prosecution to use the exception to admit other sexual behavior evidence); *see also* FED. R. EVID. 412 advisory committee's note (1994) (discussing Government use of the second exception).

[141] *See supra* notes 133–35 and accompanying text.

[142] See generally *supra* Section II for a discussion concerning congressional intent behind FRE 412 and MRE 412.

[143] *See generally id.*

B. The Proposed Fourth Exception

To ensure compliance with congressional intent and to prevent chilling these forms of sexual assault prosecutions, MRE 412 must be amended to include a fourth exception.[144] Currently, MRE 412's general exclusion of the victim's sexual behavior applies to all other sexual behavior of the victim not with the accused, including age-inappropriate sexual behavior of a child victim.[145] The three existing exceptions to MRE 412 do not address this form of evidence and through omission exclude all victim sexual behavior that is not with the accused.[146] This exclusion is inadvertent and can only be corrected by adding a fourth exception to the rule which allows the Government, with the consent of the victim, to introduce evidence of other sexual behavior not with the accused.

To implement this recommendation, MRE 412(b)(1), which states that "the following evidence is admissible"[147] when referring to the existing three exceptions, must add a subsection (D).[148] Military Rule of Evidence 412(b)(1)(D) would make admissible evidence of specific instances of sexual behavior by the alleged victim with respect to other parties offered by the prosecution, with consent of the victim. The military judge would determine whether the other sexual behavior is relevant and whether a victim voluntarily consents to allowing the use of the evidence after conducting a closed hearing similar to the procedure described in MRE 412(c)(2).[149] At the closed hearing, the military judge

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[144] Military Rule of Evidence 412 was amended in 1993 and 1998; therefore, an amendment to reflect needed changes has historical precedent. *See* MCM, *supra* note 6, MIL. R. EVID. 412 analysis, at A22-36 (discussing the 1993 and 1998 amendments to MRE 412).

[145] *See supra* notes 125–30 and accompanying text.

[146] *See supra* notes 131–37 and accompanying text for a discussion on why the three existing exceptions to MRE 412 do not allow other sexual behavior evidence offered by the Government.

[147] *See* MCM, *supra* note 6, MIL. R. EVID. 412(b)(1).

[148] A subsection (D) would be cited as MRE 412(b)(1)(D). *See generally id*.

[149] Military Rule of Evidence 412(c)(2) states:

> Before admitting evidence under this rule, the military judge must conduct a hearing, which shall be closed. At this hearing, the parties may call witnesses, including the alleged victim, and offer relevant evidence. The victim must be afforded a reasonable opportunity to attend and be heard. In a case before a court-martial composed of a military judge and members, the military judge shall conduct the hearing outside the presence of the members pursuant to Article

would conduct a *Reynolds*-type analysis[150] to ensure the other sexual behavior evidence is being offered for the proper purpose by the Government.[151] This scrutiny would force the Government to explain how the other sexual behavior is relevant[152] and allow the military judge to screen the proffered evidence for undue prejudice prior to use in trial.[153]

> 39(a). The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.

Id. MIL. R. EVID. 412(c)(2).

[150] *See* United States v. Reynolds, 29 M.J. 105 (C.M.A. 1989). *Reynolds* established a three-part test that determines the admissibility of uncharged misconduct evidence under MRE 404(b). *See id.* at 108–09. The first prong of the test mirrors MRE 104(b) and requires that the evidence must reasonably support a finding by the court members that the accused committed "prior crimes, wrongs, or acts." *Id*. at 109. The second prong requires the evidence to make a fact of consequence more or less probable, thus complying with the definition for relevancy as described in MRE 401. The third and final prong is an MRE 403 balancing test, in which the probative value of the evidence must not be substantially outweighed by the danger of unfair prejudice. *Id*.; *see also* United States v. Young, 55 M.J. 193, 196 (2001) (stating that the *Reynolds* test is the accepted approach when a court determines whether to admit uncharged misconduct); Major David Edward Coombs, *Uncharged Misconduct: The Edge is Never Dull*, ARMY LAW., May 2007, at 19 (explaining the three parts of the *Reynolds* test).

[151] Coombs, *supra* note 150, at 19 ("To determine whether the proponent is truly offering the uncharged acts for a proper purpose, military courts use the three-part test announced" in *Reynolds*.).

[152] To find the offered evidence relevant, the military judge must find that the first two parts of the *Reynolds* test are satisfied. To comply with MRE 104(d) is not difficult. *See* United States v. Acton, 38 M.J. 330, 333 (C.M.A. 1993) (referring to the first prong of the *Reynolds* test the court stated that "[t]he threshold for this prong of admissibility is low") (citing United States v. Dorsey, 38 M.J. 244, 246 (C.M.A. 1993)). Under the second prong, the military judge must apply the definition of relevance found in MRE 401 and should consider "inferences and conclusions [that] can be drawn from the evidence." Coombs, *supra* note 150, at 19. A non-exhaustive list of scenarios in which evidence of a child's age-inappropriate other sexual behavior could be deemed relevant at the conclusion of the closed hearing include: (1) if the Government is offering the evidence to show that the child is highly sexualized or committing sexual misconduct because of his interaction with the accused and the child's sexual behavior is intertwined with the accused's criminal actions; (2) if the court has admitted evidence under MRE 404(b) in a child molestation trial, for example, that the accused possessed child pornography to show intent (*see, e.g.*, United States v. Mann, 26 M.J. 1 (C.M.A. 1988)), the accused has a known relationship with the child, and the child is demonstrating age-inappropriate sexual behavior; or (3) if the Government is rebutting the defense that abuse never occurred. *See supra* note 124.

[153] All evidence offered as an exception under MRE 412 must also pass an MRE 403 balancing test and thus this is not a departure from current practice. *See supra* note 27.

Similarly, the military judge would need to determine if the victim consented to the use of the evidence. The closed hearing would provide full disclosure of the other sexual behavior evidence intended to be offered, thus giving the victim, or his guardian, an opportunity to make an informed, voluntary decision to waive his MRE 412 protections.[154] To ensure complete transparency in this decision, the military judge would, on the record, elicit from the victim, or his guardian, an express waiver of his MRE 412 right to exclude the evidence and voluntary consent to the use of the evidence.[155] By empowering the victim to choose whether this form of other sexual behavior evidence is used at trial, the rule would fully comply with Congress's intent[156] while simultaneously eliminating the defense use of MRE 412 as a shield.[157]

At the conclusion of the closed hearing, if the military judge found that the evidence passed the *Reynolds*-type analysis and the victim, or guardian, voluntarily waived the MRE 412 protections, the evidence would be introduced under MRE 412(b)(1)(D).[158] The adoption of the fourth exception would be particularly important in child sexual abuse

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[154] One of the original reasons for a closed hearing when discussing an exception under FRE 412 was to ensure the protection of the victim's privacy. *See* 124 CONG. REC. 34,913 (1978) (statement of Rep. Mann) (noting that a closed hearing allowed the defendant to present arguments for admission of the victim's other sexual behavior evidence while still protecting the victim's privacy). Military Rule of Evidence 412 replaced the in camera hearing with an Article 39(a) hearing, but maintained the same intent of limiting dissemination of the victim's other sexual behavior. *See* MCM, *supra* note 6, MIL. R. EVID. 412 analysis, at A22-36 ("The closed hearing . . . fully protects an alleged victim against invasion of privacy and potential embarrassment."). The rule is intended to ensure the victim is protected. *See* United States v. Banker, 60 M.J. 216, 220 (2004). By allowing the victim to control the use of this type of other sexual behavior evidence after full disclosure, congressional intent is most likely met. *But see* MCM, *supra* note 6, MIL. R. EVID. 412(b)(1)(B) (allowing the prosecution to introduce uncharged sexual activity evidence between the victim and the accused without the consent of the victim).

[155] The military judge would elicit waiver and consent from the victim on the record similar to the manner in which an accused, during a guilty plea, is required to fully waive his right against "self-incrimination, to a trial of facts by a courts-martial, and to be confronted by witnesses." U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK para. 2-2-8 (15 Sept. 2002).

[156] *See supra* notes 66–96 and accompanying text (discussing congressional intent to protect the victim's interest when disclosing other sexual behavior evidence).

[157] *See supra* notes 138–43 and accompanying text (discussing how the use of MRE 412 by the defense to exclude other sexual behavior not with the accused is an inadvertent oversight and must be corrected).

[158] The evidence offered under this new exception would still need to comport with the procedural requirements outlined in MRE 412(c). *But see infra* Section IV for a discussion on eliminating the unique MRE 412 balancing test detailed in MRE 412(c)(3).

trials where the Government must rely heavily on other sexual behavior evidence coupled with expert testimony.[159] No longer could the defense exclude relevant, probative and voluntary evidence of the victim's other sexual behavior with a third party, or more specifically age-inappropriate sexual behavior of a child, simply by invoking MRE 412.[160]

As it is currently drafted, MRE 412 allows the defense to exclude the victim's other sexual behavior with a third party and thus acts as an unintended defense tool to frustrate prosecutions.[161] The three existing exceptions to MRE 412 inadequately address this loophole[162] and the result is that the rule acts as a protective shield for the accused.[163] The Government, unable to rely on evidence of the victim's other sexual behavior, often has no choice but to dismiss charges or not to go forward with prosecution.[164] Prosecution of these forms of sexual offenses are effectively limited, accused sexual offenders are not tried, and victims are left with no recourse. These results are directly in conflict with the congressional intent behind the rule and this opportunity for the accused to be shielded from sexual behavior evidence, and in particular evidence of a child's age-inappropriate sexual behavior, is clearly an unintended, as well as unforeseen, misuse of the rule.[165] Only by amending the rule to include the proposed fourth exception can MRE 412 fully comply with Congress's intent to protect the victim's interest, encourage reporting and cooperation in trial, and hold accountable those that have committed sexual misconduct.[166]

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[159] *See supra* notes 115–30 and accompanying text (noting the importance of age-inappropriate other sexual behavior evidence coupled with expert testimony in child sexual abuse trials).

[160] *See supra* notes 125–30 and accompanying text (explaining how the current draft of the rule allows for a defense attorney to exclude other sexual behavior evidence through the use of MRE 412).

[161] *Id*.

[162] *See supra* notes 131–37 and accompanying text.

[163] *See supra* notes 138–43 and accompanying text.

[164] *See* Swan Interview, *supra* note 115. Ms. Swan noted that numerous child molestation trials are dismissed due to lack of evidence. *Id.*

[165] *See supra* notes 89–96 and accompanying text; *supra* notes 105–08 and accompanying text (discussing Congress's desire to craft the rule to incorporate the social policies of encouraging victim reporting, participation in prosecutions, and equity in sexual assault trials).

[166] *See generally supra* 66–96 and accompanying text (discussing congressional intent concerning victim rights when enacting FRE 412 and MRE 412).

IV. Eliminating the MRE 412 Balancing Test

A. Background

Federal Rule of Evidence 412, and by extension MRE 412, attempts to protect victims of nonconsensual sexual offenses while ensuring an accused has a fair and complete trial.[167] Both rules protect the victim's right to privacy by excluding the majority of all evidence concerning her sexual history.[168] This exclusion is not absolute: if a third party was allegedly the source of the physical evidence, if a sexual relationship existed between the victim and the accused, or if there is a constitutional necessity to introduce the victim's sexual history, then in those situations the victim's right to privacy is trumped by the accused's right to admit the evidence in his defense.[169] Prior to the admission of the evidence, the defense is required to demonstrate that the evidence is relevant[170] and that it satisfies the "403 balancing test."[171] The victim's and accused's competing interests are balanced through FRE and MRE 412's overarching exclusion of the victim's sexual behavior, except in these three recognized, compelling situations where the proffered evidence remains subject to normal evidentiary requirements.[172]

However, this attempt at an equitable balancing of interests was upset in the original enacted bill by the additional requirement that an accused, presenting evidence under one of the three exceptions, was required to filter his proffered evidence through a unique balancing

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[167] *See supra* notes 105–10 and accompanying text; *see also* United States v. Sanchez, 44 M.J. 174, 178 (1996) (discussing MRE 412's goal of balancing the competing interests of the victim and the accused).

[168] *See* FED. R. EVID. 412(a); MCM, *supra* note 6, MIL. R. EVID. 412(a).

[169] *See* FED. R. EVID. 412(b); MCM, *supra* note 6, MIL. R. EVID. 412(b).

[170] *See* FED. R. EVID. 412(b)(1); MCM, *supra* note 6, MIL. R. EVID. 412(c)(3).

[171] Federal Rule of Evidence 403 is only applied after FRE 412 is satisfied. *See* United States v. One Feather, 702 F.2d 736, 739 (8th Cir. 1983) (noting that FRE 403 applies to the FRE 412 exceptions). Similarly, MRE 403 is only applied after MRE 412 is satisfied. *See* United States v. Banker, 60 M.J. 216, 223 n.3 (2004) ("the military judge may exclude evidence on MRE 403 grounds even if that evidence would otherwise be admissible under MRE 412."). *But see* notes 218–19 and accompanying text (discussing the practical irrelevance of MRE 403 concerning the third exception to MRE 412).

[172] *See, e.g.*, 124 CONG. REC. 36,256 (1978) (statement of Sen. Biden) (noting the need to balance the victim's and accused's interests when drafting FRE 412); United States v. Dorsey, 16 M.J. 1, 4 (C.M.A. 1983) ("[T]he legislative history of FRE 412 indicates that Congress intended that evidence of a rape victim's past sexual behavior not be routinely admitted at a criminal trial . . . . Yet this new policy of exclusion is couched in terms permitting the admission of such evidence under certain circumstances.").

test.[173] In contrast to the universal applicability and inclusive nature of the FRE 403 balancing test,[174] the FRE 412 balancing test[175] applied only to the defense and leaned in the direction of excluding evidence offered by the accused.[176] This additional evidentiary requirement meant that in a trial involving sexual misconduct, the defense counsel, after successfully articulating why the proffered evidence was relevant and why the evidence fit within one of the three narrow exceptions carved out of the rule by Congress, still faced the possibility of having the

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[173] *See* Privacy Protection for Rape Victims Act of 1978, Pub. L. No. 95-540, 92 Stat. 2046, 2047 (1978) (discussing in FRE 412(c)(3) the unique balancing test required for evidence offered under one of the enumerated exceptions); MCM, *supra* note 6, MIL. R. EVID. 412(c)(3). During the subcommittee hearings prior to the enactment of The Privacy Protection for Rape Victims Act of 1978 the Department of Justice spokesman argued that the unique balancing test created constitutional issues by taking too drastic a departure from the traditional FRE 403 balancing test. *See Privacy Hearings*, *supra* note 3, at 6–7 (statement of Roger A. Pauley, Deputy Chief, Legislation and Special Projects Section, Criminal Division on behalf of the Department of Justice). In an attempt to compromise, Mr. Pauley recommended removing the word "substantially" from the unique FRE 412 balancing test to ensure that relevant evidence that posed a greater risk to the defendant's right to a fair trial versus the victim's right to privacy was not excluded. *See id.*

[174] *See* FED. R. EVID. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."); *see also* MCM, *supra* note 6, MIL. R. EVID. 403. Federal Rule of Evidence 403 is applied to evidence offered by either the Government or the defense and "the policy of the Rule is that if the balance between probative value and countervailing factors is close, the Judge should admit the evidence." FED. R. EVID. 403 advisory committee's note (2008); *see also Banker*, 60 M.J. at 222 (noting that MRE 403 is applied to evidence offered by either the Government or the defense).

[175] *See* Privacy Protection for Rape Victims Act, 92 Stat. at 2047 (outlining the FRE 412 balancing test, the act notes that "evidence that the accused seeks to offer is relevant and that the probative value of such evidence outweighs the danger of unfair prejudice, such evidence shall be admissible . . . ."); *see also* MCM, *supra* note 6, MIL. R. EVID. 412(c)(3) (discussing the MRE 412 balancing test).

[176] *See* Privacy Protection for Rape Victims Act, 92 Stat. at 2047 (noting that the FRE 412 balancing test only applies to evidence offered by the accused); 124 CONG. REC. 34,912 (1978) (statement of Rep. Mann) (stating that the accused's offered evidence will only be admitted if the probative value outweighs the danger of unfair prejudice); *see also Banker*, 60 M.J. at 222 (comparing MRE 403 and the balancing test in MRE 412, the court noted that "the two rules lean in different directions: i.e., toward inclusion in the case of M.R.E. 403 and toward exclusion in the case of M.R.E. 412(c)(3)"). The *Banker* court also noted a second difference between the rules; the MRE 412 balancing test only applies to the accused. *See id.*; *see also infra* note 228 for a discussion concerning the differences between the MRE 412 and MRE 403 balancing tests.

evidence excluded under the FRE 412 balancing test.[177] Further, satisfying the evidentiary requirements of FRE 412, including the unique balancing test, did not absolve the defense from the requirement that the proffered evidence also be screened by the FRE 403 balancing test.[178]

Recognizing the unlikelihood of a judge excluding evidence deemed to fit within one of the limited enumerated exceptions and the multiple levels of scrutiny placed upon defense proffered evidence, Congress determined that the FRE 412 balancing test was an unnecessary, additional filter.[179] The FRE 412 balancing test simply acted as a redundant and unfair hurdle for the defense due to the limited applicability of the FRE 412 exceptions coupled with the adequate protections already provided to both the victim and the accused through existing evidentiary requirements.[180] For these reasons, Congress

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[177] *See* Privacy Protection for Rape Victims Act, 92 Stat. at 2046–47 (discussing the FRE 412 requirements to introduce evidence under one of the three exceptions).

[178] *See* United States v. One Feather, 702 F.2d 736, 739 (8th Cir. 1983) (excluding evidence that satisfied FRE 412 under FRE 403); FED. R. EVID. 412 advisory committee's note (1994) ("In a criminal case, evidence may be admitted under subdivision (b)(1) pursuant to three possible exceptions, provided the evidence also satisfies other requirements for admissibility specified in the Federal Rules of Evidence, including Rule 403."); *see also Banker*, 60 M.J. at 223 n.3 ("M.R.E. 412 does not wholly supplant M.R.E. 403 since the military judge may exclude evidence on M.R.E. 403 grounds even if that evidence would otherwise be admissible under M.R.E. 412.").

[179] *See* STEPHEN A. SALTZBURG ET AL., COMMENTARY, FED. R. EVID. 412 (LexisNexis 2008). When discussing the elimination of the unique 412 balancing test in a criminal trial, the commentators stated:

> [I]n a criminal case, if a specific act is offered for one of the two limited purposes provided, the act is admissible so long as it also satisfies Rule 403. *See, e.g., United States v. One Feather*, 702 F.2d 736 (8th Cir. 1983) (evidence that fits one of the Rule 412 exceptions can nonetheless be excluded if the probative value is substantially outweighed by the prejudicial effect). That is, there is no heightened exclusionary balancing test applied. This makes sense, since if the evidence is narrow enough to fit one of the limited exceptions to subdivision (b)(1), there is little reason to filter it further through a strict exclusionary balancing test.

Id.

[180] The advisory committee to the 1994 amendment noted that "[a]s amended, Rule 412 will be virtually unchanged in criminal cases," thus recognizing the practical insignificance of eliminating the FRE 412 balancing test. FED. R. EVID. 412 advisory committee's note (1994). The commentary to the amended rule explained in more detail

amended FRE 412 in 1994 to eliminate the unique balancing test in criminal trials.[181]

Despite the changes in the federal rule[182] and the similar unlikelihood that a military judge would exclude evidence deemed to fit within an enumerated exception,[183] MRE 412 retains the unique balancing test.[184] More specifically, in a military proceeding prosecuting a nonconsensual sexual offense, evidence deemed to fit within one of MRE 412's three narrow exceptions must still satisfy this unique balancing test.[185] Just as the balancing test was eliminated in the federal rule, the MRE 412 balancing test should be eliminated. The test is unnecessarily redundant, and contrary to the congressional intent behind the rule, acts as an additional obstacle to an accused presenting a complete defense.[186] Therefore, MRE 412 must be further amended to eliminate the unique balancing test found within the rule.

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how the FRE 412 balancing test was redundant and unnecessary. *See* SALTZBURG ET AL., *supra* note 179.

[181] *See* FED. R. EVID. 412(b)(2). Following 1994, the federal rule only retained a unique balancing test for civil trials:

> In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Evidence of an alleged victim's reputation is admissible only if it has been placed in controversy by the alleged victim.

Id.

[182] *See supra* note 102 (discussing why the JCS retained the MRE 412 balancing test following the Violent Crime Control and Law Enforcement Act of 1994 which eliminated the FRE 412 balancing test in criminal trials).

[183] *See* United States v. Andreozzi, 60 M.J. 727, 740 n.32 (Army Ct. Crim. App. 2004) (agreeing that the MRE 412 unique balancing test should be eliminated due to the narrowness of the three MRE 412 exceptions and the applicability of MRE 403).

[184] *See* MCM, *supra* note 6, MIL. R. EVID. 412(c)(3); *see also* United States v. Banker, 60 M.J. 216, 222 (2004) (discussing the applicability of the MRE 412 balancing test when admitting evidence under one of the three enumerated exceptions).

[185] *See* MCM, *supra* note 6, MIL. R. EVID. 412(c)(3).

[186] *See supra* notes 55–65 and accompanying text (explaining Congress's intent when enacting FRE 412 to fully protect the accused right to a fair trial); Cal. v. Trombetta, 467 U.S. 479, 485 (1984) (holding that a criminal defendant has a constitutional right to a "meaningful opportunity to present a complete defense"); Sandoval v. Acevedo, 996 F.2d 145, 147 (7th Cir. 1993) (discussing the limitations of a rape shield statute).

B. The Unnecessary MRE 412 Balancing Test

An accused attempting to introduce evidence under one of the three enumerated MRE 412 exceptions has the burden of establishing that the exception applies and explaining how the exception has been satisfied.[187] The first two exceptions are applicable in very limited situations.[188] The third exception requires the defense to explain in detail how the proffered evidence is relevant, material, and vital to the accused's defense.[189] Further, evidence offered under an exception to MRE 412 is scrutinized for relevance and probative value under MRE 403.[190] If the defense-offered evidence is relevant, specific enough to fit within one of the limited exceptions, and satisfies MRE 403, it is extremely unlikely that a military judge could justify excluding the evidence based upon the MRE 412 balancing test.[191] A brief description of the narrow types of evidence admitted under each exception and the redundant nature of the MRE 412 balancing test illustrates how "there is little reason to filter [the evidence] further through a strict exclusionary balancing test."[192]

1. The First Two Exceptions: MRE 412(b)(1)(A) and MRE 412(b)(1)(B)

The first exception, noted in MRE 412(b)(1)(A), allows for the admission of the victim's sexual behavior where the "evidence of specific instances of sexual behavior by the alleged victim [is] offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence."[193] This exception is intended to allow the accused an opportunity to "prove that another person was responsible" for the physical evidence where the prosecution has

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[187] *See* United States v. Moulton, 47 M.J. 228–29 (1997).
[188] *See generally* MCM, *supra* note 6, MIL. R. EVID. 412(b)(1)(A)(B); *see infra* notes 193–204 and accompanying text.
[189] *See Banker*, 60 M.J. at 222; United States v. Dohrn, No. 200301615, 2007 CCA LEXIS 227 (N-M. Ct. Crim. App. June 26, 2007) (unpublished) (explaining how evidence offered under the third exception must be relevant, material, and vital to be admitted). For a more detailed definition of relevant, material, and vital, see *infra* notes 213–19 and accompanying text.
[190] *See supra* notes 169–70 and accompanying text.
[191] *See* SALTZBURG ET AL., *supra* note 179; *Acevedo*, 996 F.2d at 147 (stating that a rape shield statute cannot hinder the introduction of evidence defined as vital). The MRE 403 balancing test is not applied until evidence has satisfied MRE 412. *See supra* note 171.
[192] SALTZBURG ET AL., *supra* note 179.
[193] MCM, *supra* note 6, MIL. R. EVID. 412(b)(1)(A).

"directly or indirectly asserted that the physical evidence originated with the accused."[194] Thus, evidence is admitted under this first exception in the specific and limited situation where the defense is rebutting an assertion that semen, injury, or physical evidence presented by the Government originated with the accused.[195]

"[E]vidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution" is admitted under the second exception to MRE 412.[196] Though this exception seems to admit any evidence that may imply that the victim consented to sexual contact with the accused, the evidence offered is limited to actual sexual contact between the victim and the accused.[197] Further, the sexual contact between the victim and the accused may still be excluded if it is not relevant and probative to showing consent in the charged incident.[198] This exception is therefore narrow in scope and

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[194] FED. R. EVID. 412 advisory committee's note (1994) (citing United States v. Begay, 937 F.2d 515, 523 n.10 (10th Cir. 1991)).

[195] *See id*. In addition, "evidence offered for the specific purpose identified in this subdivision may still be excluded if it does not satisfy Rules 401 or 403." *Id.* (citing United States v. Azure, 845 F.2d 1503, 1505–06 (8th Cir. 1988)).

[196] *See* MCM, *supra* note 6, MIL. R. EVID. 412(b)(1)(B).

[197] *See* United States v. Saunders, 943 F.2d 388, 392 (4th Cir. 1991). The court found that the second exception

> permits only evidence of the defendant's past experience with the victim. The rule manifests the policy that it is unreasonable for a defendant to base his belief of consent on the victim's past sexual experiences with third persons, since it is intolerable to suggest that because the victim is a prostitute, she automatically is assumed to have consented with anyone at any time.

Id.

[198] *See, e.g.*, United States v. Andreozzi, 60 M.J. 727, 739 (Army Ct. Crim. App. 2004) (holding that evidence of a prior sexual incident between the victim and the accused should not be admitted under the second exception because the "dissimilar characteristics reduce the relevance to a minimal level" and thus the evidence should be excluded under MRE 403); United States v. Ramone, 218 F.3d 1229, 1237 (10th Cir. 2000) (excluding evidence of prior use of inanimate object during sex under FRE 403); People v. Hastings, 72 Ill. App. 3d 816, 821 (Ill. App. Ct. 1979) ("[E]ven if the complainant had consented to intercourse with the defendant in the past, that does not mean that the complainant consented to the acts committed on the night in question."). "Consent" is not relevant if the prosecution is invoking the exception to introduce evidence. *See supra* note 134 (explaining that the Government may use this exception, for example, to introduce MRE 404(b) evidence demonstrating pattern of behavior). The prosecution's use of the second

will only allow evidence of sexual behavior by the victim to be admitted if there is a prior sexual relationship between the parties and its relevance and probative value is transparent to the military judge.[199]

Evidence offered under MRE 412(b)(1)(A) or (B) must be narrow enough to fit within the limited circumstances in which the exceptions apply.[200] The first exception will only allow an accused to admit evidence that rebuts the prosecutions offered physical evidence[201] while the second exception only allows evidence that supports a defense of consent.[202] In addition, an accused attempting to introduce evidence under either of these exceptions is further restricted by the relevancy requirements of MRE 401[203] and the balancing test of MRE 403.[204] The relatively rare circumstance in which evidence offered fits within the limited applicability of the first two exceptions to MRE 412, combined with the MRE 401 and MRE 403 scrutiny placed upon that proffered evidence, makes the additional MRE 412 balancing test unnecessary.

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exception seems to be the drafter's attempt at ensuring that MRE 412 is not misused by the defense to shield the accused. *See supra* notes 140–42 and accompanying text.

[199] *See Ramone*, 218 F.3d at 1237. In *Ramone* the accused attempted to introduce evidence that an inanimate object was used in a previous sexual encounter with the victim under MRE 412(b)(1)(B) to demonstrate consent. *Id.* In its ruling concerning the evidence the court agreed with the lower court's finding that:

> [I]t was not relevant to the issue of consent because the victim's response that the object had been used did not indicate consent to its use . . . . [E]ven if relevant, the evidence should be excluded under FRE 403 as any probative value was substantially outweighed by unfair prejudice, confusion of the issues, and the potential for misleading the jury.

Id.

[200] *See supra* notes 193–99 and accompanying text.

[201] *See supra* notes 193–95 and accompanying text.

[202] *See supra* notes 196–99 and accompanying text.

[203] *See* MCM, *supra* note 6, MIL. R. EVID. 401 (stating "'[r]elevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.").

[204] *See generally supra* notes 193–99 and accompanying text.

2. The Third Exception: MRE 412(b)(1)(C)

The third exception will admit "evidence the exclusion of which would violate the constitutional rights of the accused."[205] For admission under this exception, the offered evidence must be relevant, material, and favorable to the defense.[206] The "relevancy portion of this test is the same as that employed for the other two exceptions of the rule" and thus the offered evidence must comply with MRE 401.[207] If deemed relevant, the evidence must be material to the defense.[208] In determining the materiality of the evidence "it is necessary to consider the importance of the issue for which the evidence was offered in relation to the other issues in [the] case; the extent to which this issue is in dispute; and the nature of other evidence in the case pertaining to this issue."[209] If the evidence is relevant and material, the evidence must also be favorable to the defense.[210] Favorable is "synonymous with the term 'vital'"[211] and refers to evidence that is case dispositive or essential to presenting a complete defense.[212]

Relevant, material, and vital evidence is a constitutional necessity to the accused's defense.[213] Though the evidence that specifically falls

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[205] *See* MCM, *supra* note 6, MIL. R. EVID. 412(b)(1)(C).

[206] *See* United States v. Banker, 60 M.J. 216, 222 (2004). As with the first two exceptions, evidence that is otherwise admissible under MRE 412 may be excluded under MRE 403. *Id*. at 223 n.3. But see *infra* notes 213–19 and accompanying text for a discussion on why the MRE 403 balancing test, similar to the MRE 412 balancing test, is arguably irrelevant under the third exception.

[207] *Banker*, 60 M.J. at 222.

[208] *Id.*

[209] United States v. Dorsey 16 M.J. 1, 6 (C.M.A. 1983).

[210] *See id.* at 5 (citing United States v. Valenzuela-Bernal, 458 U.S. 858 (1982)); *Banker*, 60 M.J. at 222.

[211] *Banker*, 60 M.J. at 222 (citing *Valenzuela-Bernal,* 458 U.S. at 867).

[212] *See Valenzuela-Bernal*, 458 U.S. at 867 (defining favorable or vital evidence as evidence that will affect the outcome of the trial and is necessary to an adequate defense); *see also* United States v. Williams, 37 M.J. 352, 361 (C.M.A. 1993) (Gierke, J., concurring) (noting that *Valenzuela-Berna* held that the defense must show more than simply a "conceivable benefit" to the defense when compulsory production of a witness was required).

[213] *See Banker*, 60 M.J. at 221 ("where evidence is offered pursuant to this exception, it is important for defense counsel to detail an accused's theory of relevance and constitutional necessity"); *see also Williams*, 37 M.J. at 361 (Gierke, J., concurring) (stating that the "phrase 'relevant, material, and favorable to the defense'" means that the evidence must be necessary and "[a]ny lower standard of admissibility is not constitutionally mandated . . . .").

within this constitutional necessity category is not concretely defined,[214] the evidence must clearly have a significant impact on the trial, be of utmost importance to the accused's defense,[215] and be "of consequence to the determination of" the accused's guilt.[216] If a military judge determines that the defense evidence offered under the third exception meets this high burden then the evidence is constitutionally required for admission at trial, subject to the MRE 412 balancing test.[217] However, the constitutional right of the accused to present relevant, material, and vital evidence in his defense is paramount,[218] thus making it difficult to envision a scenario in which such constitutionally required evidence would be excluded due to the MRE 412 balancing test. The overriding constitutional concerns of admitting evidence deemed relevant, material, and vital to the defense seemingly makes the MRE 412 balancing test irrelevant if the third exception is successfully satisfied.[219]

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[214] *See* United States v. Buenaventura, 45 M.J. 72, 79 (1996) ("Whether evidence is 'constitutionally required to be admitted' is reviewed on a case-by-case basis."); *Dorsey*, 16 M.J. at 4 (noting that the meaning of "constitutionally required" is not stated in the evidentiary rules, but the legislative history "makes clear the drafters' intention that this rule should not be applied in derogation of a criminal accused's constitutional rights.").

[215] *See Dorsey*, 16 M.J. at 7 (detailing how the constitutional rights of an accused are impeded if excluded evidence "pertains to an important issue in the case," is "intimately connected to the defense evidence," and if there is no alternative form of evidence available) (referencing Davis v. Alaska, 415 U.S. 308 (1974)); *Valenzuela-Bernal*, 458 U.S. at 867 (noting that vital evidence will affect the outcome of the trial and is necessary to an adequate defense); United States v. Carter, 47 M.J. 395, 396 (1998) (stating that for evidence to be considered constitutionally required "the defense must establish a foundation demonstrating constitutionally required relevance, such as 'testimony proving the existence of a sexual relationship that would have provided significant evidence on an issue of major importance to the case . . . .'") (citing United States v. Moulton, 47 M.J. 229 (1997)).

[216] *Dorsey*, 16 M.J. at 6.

[217] *Id*. at 8.

[218] *Id*. In reference to the MRE 412 balancing test, the Dorsey court stated:

> Assuming that this balancing test is appropriate, we again must note that appellant demonstrated that the excluded evidence was relevant, material, and vital to his defense. In such a situation, we believe the holding of the Supreme Court in Davis v. Alaska, 415 U.S. at 319–20, dictates that the constitutional right of appellant to present such evidence is paramount.

Id.

[219] *Id*.

> MRE 412**(**b)(1) states that "evidence of a victim's past sexual behavior is inadmissible unless . . . admitted in accordance with subdivision (c)(1) and (c)(2) and is constitutionally required to be admitted." In view of this language, the balancing test prescribed in

3. The Redundancy of the MRE 412 Balancing Test

When attempting to enter evidence under an exception to MRE 412, the defense first must establish that an enumerated exception applies[220] and then offer the narrow and compelling type of evidence that is required to be successfully admitted using an MRE 412 exception.[221] If the accused satisfies these stringent requirements, he must further survive the "heightened exclusionary balancing test" of MRE 412.[222] The MRE 412 balancing test is "a rule of exclusion" in which the burden of admissibility "shifts to the proponent of the evidence to demonstrate why the evidence is admissible."[223] The proponent of the evidence will always be the defense, because the MRE 412 balancing test only applies to the accused; therefore, only defense-offered evidence is subject to this heightened scrutiny.[224] Upon successful navigation through the MRE 412 balancing test, a military judge will apply MRE 403 to the evidence

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> MRE 412(c)(3) may not be appropriate to evidence offered under this particular provision.

Id.; *see also* United States v. Andreozzi, 60 M.J. 727, 739 (Army Ct. Crim. App. 2004) ("Ultimately, the Constitution may require admissibility of the evidence."). Similar to the MRE 412 balancing test, the MRE 403 balancing test may be irrelevant under the third exception due to the constitutional interests of the accused. If the evidence offered under MRE 412(b)(1)(C) is determined constitutionally required, than it is inconceivable that a military judge would exclude this evidence under either balancing test. *See id*. (noting that the Constitution trumps all other admissibility tests).

[220] *See Moulton*, 47 M.J. at 228–29.

[221] *See supra* notes 193–219 and accompanying text (discussing the limited applicability of the three MRE 412 exceptions).

[222] *See* United States v. Banker, 60 M.J. 216, 223 (2004); *see also* SALTZBURG ET AL., *supra* note 179 (explaining why heightened scrutiny of proffered evidence is unnecessary).

[223] *Banker*, 60 M.J. at 223.

[224] *See id*. In stating that the MRE 412 balancing test only applies to the accused, the court noted:

> M.R.E. 412(c)(3) requires the military judge to determine "on the basis of the hearing described in paragraph (2) of this subdivision that the evidence that *the accused seeks to offer* is relevant and that the probative value of such evidence outweighs the danger of unfair prejudice[.]" M.R.E.412(c)(3) (emphasis added). It would be illogical if the judge were to evaluate evidence "offered by the accused" for unfair prejudice to the accused.

Id.

prior to admittance.[225] Unlike the MRE 412 balancing test, when conducting the MRE 403 balancing test, the judge will take into account the interests of both parties.[226]

Requiring defense evidence to pass through multiple levels of scrutiny is unnecessary. Prior to the MRE 412 balancing test analysis, extensive judicial scrutiny is required to determine if evidence offered by the defense is the specific type that fits within the limited circumstances in which the three MRE 412 exceptions apply.[227] Additionally, the interests of both the victim and the accused are weighed through the MRE 403 balancing test immediately following the MRE 412 balancing test.[228] The significant burden placed upon the accused to admit evidence under an MRE 412 exception, the limited forms of evidence that will be admitted, and the balancing of the parties interests through MRE 403, make any additional scrutiny placed upon the evidence unnecessary.[229] It makes little sense to require the proffered defense

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[225] *See id*. at 223 n.3; *Andreozzi*, 60 M.J. at 738–39 ("Even if admissible under MRE 412, the evidence may still be excluded under the MRE 403 balancing test."); see also *supra* note 178 for a discussion on the applicability of FRE 403 and MRE 403 to evidence deemed admissible under FRE 412 and MRE 412.

[226] *See Andreozzi*, 60 M.J. at 740; *Banker*, 60 M.J. at 223 (discussing the inclusive nature of MRE 403 and the exclusive nature of MRE 412).

[227] *See supra* notes 193–219.

[228] The MRE 412 and MRE 403 balancing tests are clearly distinct and aimed at different concerns. The MRE 412 balancing test is restrictive and intended to provide protection to victims of nonconsensual sexual offenses. *See Banker*, 60 M.J. at 222. The MRE 403 balancing test is designed to ensure a panel is not determining a case based on unfair evidence. *See generally id.* Congress eliminated the FRE 412 balancing test, not because FRE 403 superseded the FRE 412 balancing test, but rather because the victim was sufficiently protected by the narrowness of the exceptions to FRE 412. *See* SALTZBURG ET AL., *supra* note 179. Similar to the Federal Rule, the limited type of evidence admissible under a MRE 412 exception ensures that defense proffered evidence is strictly screened and filtered, thus making the scrutiny of the MRE 412 balancing test redundant and unnecessary. *See Andreozzi*, 60 M.J. at 740 n.32 ("[a]s noted in the commentary to Federal Rule of Evidence 412 . . . if the evidence is narrow enough to fit one of the limited exceptions to subdivision (b)(1), there is little reason to filter it through a strict exclusionary balancing test." (citing SALTZBURG ET AL., *supra* note 179)). In contrast to the redundancy of the MRE 412 balancing test, the MRE 403 balancing test provides a necessary and independent review of proffered sexual behavior evidence prior to admittance. *See Banker*, 60 M.J. at 223 n.3 (discussing the difference in the application of the MRE 403 balancing test versus the MRE 412 balancing test); MCM, *supra* note 6, MIL. R. EVID. 403 analysis, at A22-33 ("The Rule vests the military judge with wide discretion in determining the admissibility of evidence that comes within the Rule.").

[229] It is questionable how useful the MRE 412 balancing test is to a military judge when screening problematic evidence. The MRE 412 balancing test requires "that the probative value of such evidence outweighs the danger of unfair prejudice . . . ." MCM,

evidence to pass through extensive judicial review only to further scrutinize it with the heightened exclusionary balancing test of MRE 412.[230]

C. Summary and Proposal

The narrow type of evidence required to successfully fit within one of the limited exceptions to MRE 412 make the additional heightened scrutiny of the rule's balancing test clearly redundant and unnecessary.[231] The victim's and accused's interests are properly balanced without the test and an additional filter for defense offered evidence is unfairly prejudicial to the accused.[232] Throughout the legislative history of FRE 412 and MRE 412, congressional intent has consistently focused on providing the accused with a fair trial in which a complete defense is presented.[233] Recognizing that the redundancy of the FRE 412 balancing test acted contrary to this intent by placing unnecessary scrutiny upon the

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supra note 6, MIL. R. EVID. 412(c)(3). The originally proposed, and rejected, balancing test required the "probative value substantially outweigh[] the dangers of unfair prejudice." *Privacy Hearings*, *supra* note 3, at 4 (statement of Roger A. Pauley, Deputy Chief, Legislation and Special Projects Section, Criminal Division on behalf of the Department of Justice); *see also supra* note 173 (discussing the reasons for removing "substantially" from the language of the FRE 412 balancing test). Applying the balancing test enacted in the original FRE 412 and retained in the current MRE 412, the military judge must find that the probative value, however slight, outweighs the danger of unfair prejudice. Evidence determined to fit within an enumerated exception to MRE 412, specifically to rebut the Government's physical evidence, to demonstrate consent, or as a constitutional necessity, most likely has significant probative value. *See generally supra* notes 193–219 and accompanying text; SALTZBURG ET AL., *supra* note 179. Requiring the military judge to apply the MRE 412 balancing test immediately following a finding that one of the narrow MRE 412 exceptions applies is not only redundant, but creates unnecessary work and confusion.

[230] *See* SALTZBURG ET AL., *supra* note 179 (". . .if the evidence is narrow enough to fit one of the limited exceptions to subdivision (b)(1), there is little reason to filter it further through a strict exclusionary balancing test."); *Andreozzi*, 60 M.J. at 740 n.32.

[231] *See generally supra* notes 187–230 and accompanying text.

[232] *See* SALTZBURG ET AL., *supra* note 179.

[233] *See, e.g.*, 124 CONG. REC. 36,256 (1978) (statement of Sen. Biden) (discussing the need to protect the accused's constitutional right to a fair trial); *id.* at 34,913 (statement of Rep. Holtzman) (noting the desire to protect the accused's constitutional rights); California v. Trombetta, 467 U.S. 479, 485 (1984) (stating that an accused has a right to "a meaningful opportunity to present a complete defense."); SALTZBURG ET AL., *supra* note 179 (discussing the accused's right to present vital evidence); MCM, *supra* note 6, MIL. R. EVID. 412 analysis, at A22-35 ("The Rule recognizes . . . the fundamental right of the defense under the Fifth Amendment of the Constitution of the United States to present relevant defense evidence . . . .").

defense proffered evidence, Congress eliminated the test in the 1994 amendment to the federal rule.[234] Similar to a pre-1994 FRE 412, the overlapping and extra level of heightened review created by the MRE 412 balancing test acts contrary to Congress's intent to provide the accused with a fair trial. To comply with congressional intent and to mirror the federal rule, MRE 412 must be amended to eliminate the balancing test.[235]

V. Conclusion

Military Rule of Evidence 412 is a delicate balancing act in which a judge is required to walk a fine line between protecting the victim's interests and ensuring an accused has a fair trial.[236] The legislative history of FRE 412 and MRE 412 makes clear that Congress intended these rules to protect victims of nonconsensual sexual crimes while still recognizing the constitutional rights of an accused.[237] The rules exist to encourage victim reporting, promote victim participation, exclude humiliating disclosure of intimate information, and hold accountable those who are involved in sexual misconduct all while not infringing upon the accused's constitutional right to a fair trial.[238] Yet, despite careful consideration of these interests, the current version of MRE 412 acts contrary to Congress's intent.

The unintended use of MRE 412 to hinder a sexual assault trial, and in particular the exclusion of evidence of a child's age-inappropriate sexual behavior with a third party, is clearly contrary to the social policies that are the foundation for the rule.[239] Repeatedly reviewing and

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[234] *See supra* note 102; *supra* notes 173–77 and accompanying text.
[235] *See Andreozzi*, 60 M.J. at 740 n.32 (discussing the reasoning behind the elimination of the FRE 412 balancing test, the court agreed with the rule being unnecessary and stated "[w]e recommend elimination of the MRE 412(c)(3) balancing test.").
[236] *See* United States v. Majors, No. 36304, 2007 CCA LEXIS 264 (A.F. Ct. Crim. App. June 8, 2007) (unpublished) (noting that in a MRE 412 analysis, a judge must "prohibit the defense from embarrassing or humiliating the victim, yet allow the accused all reasonable opportunity to establish his defense.") (citing United States v. Saipaia, 24 M.J. 172, 175 (C.M.A. 1987)); *see also* United States v. Dorsey 16 M.J. 1, 4 (C.M.A. 1983) (discussing the legislative history of FRE 412 and the intent of Congress to equitably balance the victim's and accused's interests).
[237] *See generally supra* Section II.
[238] *See id.*
[239] *See* FED. R. EVID. 412 advisory committee's note (1994).

scrutinizing defense-proffered evidence is an unnecessary exercise that impedes an accused's right to a complete and fair trial.[240] The unforeseen use of MRE 412 as a defense shield and the unnecessary nature of the MRE 412 balancing test contravene Congress's intent.[241] To ensure compliance with the congressional intent for the rule, MRE 412 must be amended to include a fourth exception and to eliminate the MRE 412 balancing test. By amending the rule and adopting these proposals MRE 412 will be a more just and "constructive addition to the law."[242]

[240] *See generally supra* Section IV.
[241] *See generally supra* Section II.
[242] 124 CONG. REC. 36,257 (1978) (statement of Sen. Biden).

ARE MILITARY TESTAMENTARY INSTRUMENTS UNCONSTITUTIONAL? WHY COMPLIANCE WITH STATE TESTAMENTARY FORMALITY REQUIREMENTS REMAINS ESSENTIAL

NOWELL D. BAMBERGER[†]

I. Introduction

On 30 October 2000, President Clinton signed Public Law 106-398, the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001 (the Act). Among the various appropriations and policies that accompany each year's defense authorization, this Act included a little-recognized provision intended to help military attorneys draft wills for Soldiers and their Families without being overly concerned about the various formality requirements of each of the fifty states. Section 551, entitled "Recognition by States of military testamentary instruments," (§ 551) was codified at 10 U.S.C. § 1044d. It provides that wills executed by members of the Armed Forces that comply with certain federal statutory requirements are "exempt from any requirement of form, formality, or recording before probate that is provided for testamentary instruments under the laws of a State."[1] These new documents were called "military testamentary instruments" (MTIs) and immediately became available to servicemembers and their dependents. In so providing, § 551 essentially created an instrument that has been unknown at law since the inception of the United States: a federal will.

In the eight years since its passage, the Act has generated no litigation and no court has considered its validity. Rather than a commentary on its validity, however, this has been a natural consequence of the fact that an MTI's required formality does in fact comply with the formality requirements of most jurisdictions.[2] This means that a properly

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[1] 10 U.S.C. § 1044d(a)(1) (2000).

[2] *Compare id.* § 1044d(c) (requiring that the document be in writing, signed by the testator, in the presence of two witnesses, in the presence of a presiding official, and accompanied by a self-proving affidavit), *with* UNIF. PROBATE CODE § 2-502, National Conference of Commissioners on Uniform State Laws, *Uniform Probate Code* (rev. 2006), *available at* http://www.law.upenn.edu.bll/archives/ulc/upc/final2005.htm (requiring that the document be in writing, signed by the testator, in the presence of at least two individuals).

drafted MTI will inadvertently comply with the current formality requirements of most states. In addition, of those few instruments that might not comply with the requirements of the states where presented for probate, few relate to estates large enough to trigger significant litigation.[3] Nonetheless, the creation of MTIs should be of concern to both military estate practitioners and to constitutional scholars. While § 551 purports to simplify the process of drafting military wills—assuring uniform acceptance to probate—it actually creates more uncertainty about whether the instrument will hold up in a true will contest. Moreover, it marks the most significant interference by the federal government with the state-controlled probate process to date. In so doing, it promulgates a procedural requirement for state courts to apply during an in rem proceeding on an exclusively state issue—an unprecedented example of federal commandeering of state institutions that appears to violate the vertical separation of powers that is the touchstone of the federal system.

This article discusses the constitutionality of MTIs, ultimately concluding that their authorizing legislation is an unconstitutional overextension of Congress's power to raise and maintain armies and that the instruments need not be recognized by state courts. Part II discusses the nature of the state probate process and the exclusivity of state jurisdiction therein. Part III explains how MTIs create a direct conflict between federal and state law regarding the admission of military wills to probate. Part IV explains how MTIs violate the constitutional concepts prohibiting the federal government from commandeering state institutions and how current Supreme Court case law does not definitively render the exercise of federal war powers in estate law valid. Part V suggests that, even aside from its co-option of the state probate process, § 551 may be constitutionally invalid because it exceeds Congress's Article I, Section 8 legislative authority. Finally, Part VI discusses possible alternatives to § 551 and why attention to state testamentary formality requirements will remain essential under any foreseeable scenario.

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[3] *See infra* Part III (discussing the reasons that § 551 has yet to be constitutionally challenged).

II. The Probate Process Is Constitutionally Reserved to Exclusive State Control Because It Is an Exercise of Inherent Sovereign Authority

The state probate process has long been recognized by both state and federal courts as the exclusive province of state law.[4] This is due in large part to the nature of the probate proceeding. In the vast majority of jurisdictions, probate proceedings are recognized as in rem or quasi in rem proceedings.[5] Unlike many of the actions entertained in state courts, they descend not from the common law, but rather from the ecclesiastical courts of England.[6] The proceeding and process of devising property is thus universally recognized as created by the state and subject to the inherent sovereign police powers of the state legislature.[7] In light of this, the Supreme Court has recognized that every state legislature retains the exclusive jurisdiction to define how property within its realm is devised, by whom, to whom, and under what circumstances.[8] Indeed, it is within the purview of the state government both to deny the probate process altogether and to attach whatever conditions to admission that it deems appropriate.[9]

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[4] *See* Ronald I. Mirvis, *Modern Status of Jurisdiction of Federal Courts, Under 18 U.S.C.A. § 1332(a), of Diversity Actions Affecting Probate or Other Matters Concerning Administration of Decedent's Estates*, 61 A.L.R. FED. 536 (1983) (explaining and collecting federal and state cases on the proposition that pure probate is beyond federal diversity and other jurisdiction); *see also* E.H. Schopler, *Jurisdiction of Federal Courts, in Cases of Diversity of Citizenship, over Suit Affecting Probate or Other Matters Concerning Administration of Decedent's Estate*, 158 A.L.R. 9 (1945) (collecting pre-1945 cases on this proposition).

[5] *See, e.g.*, *In re* Estates of Salas, 734 P.2d 250 (N.M. Ct. App. 1987) ("The procedure for probating wills and testaments in New Mexico is strictly statutory and is an action in rem."); Green v. Higdon, 870 S.W. 2d 513 (Tenn. Ct. App. 1993) ("A will contest is a proceeding in rem, being the estate of the deceased."); Neill v. Yett, 746 S.W. 2d 32 (Tex.App. Austin 1988) ("Probate proceedings are actions in rem").

[6] *Green*, 870 S.W.2d at 513.

[7] *See* Hall v. Vallandingham, 540 A.2d 1162, 1165 (Md. Ct. Spec. App. 1988) ("The right to receive property by devise or descent is not a natural right but a privilege granted by the State.").

[8] Mager v. Grima, 49 U.S. 490, 494 (1850) ("[T]he law in question is nothing more than an exercise of the power which every state and sovereignty possesses, of regulating the manner and term upon which property, real or personal within its dominion may be transmitted by last will and testament, or by inheritance; and of prescribing who shall and who shall not be capable of taking it.").

[9] *Id.* ("[I]f a state may deny the privilege altogether, it follows that, when it grants it, it may annex to the grant any conditions which it supposes to be required by its interests or policy."). It should be noted that the Supreme Court has held in at least one circumstance that a government may not entirely abolish the right to devise property without running afoul of the Just Compensation Clause of the Fifth Amendment. *See* Hodel v. Irving, 481 U.S. 704, 718 (1987) (holding unconstitutional a federal statute eliminating the right to

A. As an In Rem Proceeding, State Adjudication of Will Validity Concerns an Exclusive Question of State Law

The distinguishing characteristic of an in rem proceeding is that it acts upon property rather than upon a person.[10] As such, neither the testator nor any potential heir is a party to the proceeding in the traditional sense. In fact, most states recognize probate proceedings as having no parties at all.[11] The probate of a will is therefore an action based entirely upon a state statute, and the validity of a will is an exclusive question of state law.[12] Because the state creates the right to devise property, it can prescribe whatever formality requirements it thinks proper to assure descent according to the testator's intent. Such formalities are not extrinsic to a will, but rather determine whether or not a given writing constitutes a valid testamentary instrument at all.[13] The practice of barring a nonconforming document from probate is not equitable. It is instead recognition that a nonconforming testamentary instrument is not in fact a legal will.[14]

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devise certain Indian trust lands). In so doing, however, it explained that "[i]n holding that complete abolition of both the descent and devise of a particular class of property may be a taking, we reaffirm the continuing vitality of the long line of cases recognizing the States', and where appropriate, the United States', broad authority to adjust the rules governing the descent and devise of property without implicating the guarantees of the Just Compensation clause." *Id.* The takings analysis in *Irving* is not relevant to this article because there is no indication that any state has attempted to substantively alter the right of servicemembers to devise property, and such legislation would not be effected by § 551's procedural guarantees in any case.

[10] *See* Gelston v. Hoyt, 16 U.S. 246, 313 (1818) (discussing the nature of in rem proceedings in the context of property forfeiture, commenting "the decree of the court act upon the thing in controversy, and settles the title of the property itself").

[11] *See, e.g.*, *In re* Riedlinger's Will, 16 P.3d 549 (Utah 1932) ("[S]uch proceedings are in rem, 'to which strictly there are no parties;' that the purpose is to determine whether the testator died testate or intestate, and if he died testate whether the script propounded, or any part of it is his will."); *see also* Dryden v. Burkhart, 177 P.2d 121 (Okla. 1947) (no parties to probate proceedings); King v. Chase, 115 P. 207 (Cal. 1911).

[12] Spears v. Spears, 162 F.2d 345, 348–49 (6th Cir. 1947) (declining to take jurisdiction of a dispute involving a will, and explaining that the status and validity of a will is an entirely statutory question).

[13] *In re* Seaman's Estate, 80 P. 700 (Cal. 1905) ("The right to make testamentary disposition of one's property is purely of statutory creation, and is available only upon a compliance with the requirements of the statute.").

[14] *Id.* ("The formalities which the legislature has prescribed for the execution of a will are essential to its validity, and cannot be disregarded. The mode so prescribed is the measure for the exercise of the right, and the heir can be deprived of his inheritance only by a compliance with this mode.").

In recognition of the exclusivity of state jurisdiction over the probate process and will adjudication, the federal courts have historically refused to assume jurisdiction. As the Supreme Court explains, "as the authority to make wills is derived from the state, and the requirement of probate is but a regulation to make a will effective, matters of pure probate, in the strict sense of the words, are not within the jurisdiction of courts of the United States."[15] In some sense, federal refusal to obtain jurisdiction has been based on a lack of statutory authority.[16] Both the Judiciary Act of 1789[17] and its English counterpart of the same year, the Judicial Code of the English Court of Chancery, recognized a lack of equity jurisdiction over the probate process.[18] At least one court has concluded, however, that the prohibition on federal meddling in the probate process is constitutional.[19]

In *United States v. Security-First National Bank of Los Angeles*,[20] a district court dismissed a suit by the United States claiming a contractual interest in the bank account of a decedent. The court ruled that the United States was constitutionally prevented from preempting the state probate process, which had exclusive jurisdiction over the will and estate of a California resident.[21] It explained that "[n]owhere in the Constitution or amendments is there the slightest suggestion that the right to administer decedents' estates has been delegated to the United States. . . . The Federal statutes are barren of any like provision for the simple reason that the subject matter of determining heirship is a State and not a Federal procedure."[22]

The federal government has acceded to this position in a number of cases to which it has been a party. For instance, appearing in 1944 to assert a claim against the estate of a deceased veteran who died while under the care of the Veterans Administration (VA), the United States explained to the presiding California court that "the federal government has no power to pass laws regulating succession to property by citizens

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[15] O'Callaghan v. O'Brien, 199 U.S. 89, 110 (1905).
[16] *See* Markham v. Allen, 326 U.S. 490, 493 (1946) (recognizing that federal courts may exercise jurisdiction over creditor's suits against an estate in probate, but may not adjudicate the will itself).
[17] 1 Stat. 73 (1789).
[18] *See* Kerrich v. Bransby, 7 Brown P.C. 437 (1789).
[19] United States v. Security-First Nat'l Bank of L.A., 130 F. Supp. 521 (S.D. Cal. 1955).
[20] *Id.*
[21] *Id.* at 522.
[22] *Id.* at 523 n.2.

of the states, that being a power reserved by the Tenth Amendment to the states."[23] The court ultimately found in favor of the United States' claim on the basis that on admission to a VA hospital, a veteran entered into a contract with the United States providing for disposition of property under the contingency of intestate death.[24]

B. Federal Interference with the Probate Process Has Been Historically Reserved to Adjudication of Claims

In recognition of the lack of federal interest or authority over the state probate process, the federal government's role with respect to testacy has traditionally been limited to two areas: (1) adjudicating claims against the estate over which the federal courts otherwise have either concurrent or exclusive jurisdiction, and (2) enforcing the federal constitutional mandates of due process and equal protection that apply to all state proceedings.[25] With the growth in both the power and reach of federal authority, the national government has made some inroads in using federal law to shape the nature of claims against estates. For instance, the Sundry Appropriations Act of 1910[26] gave the United States a paramount claim against the estates of certain veterans while the Soldiers' and Sailors' Civil Relief Act of 1940 (the SSCRA)[27] placed limits on the types of claims and statutes of limitations applicable to those currently in service—thereby affecting which claims survive to be actionable against a deceased Soldier's estate.

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[23] *In re* Lindquist's Estate, 144 P.2d 438 (Cal. App. 1 Dist. 1944).

[24] *Id.* The "contract" theory of the application of the statute in question, 38 U.S.C. § 17-17j, was later rejected in favor of a self-executing interpretation in *United States v. Oregon*, 366 U.S. 643 (1961), on grounds that are distinguishable from the issue at hand. *See infra* Part III.

[25] Sianis v. Jensen, 294 F.3d 994 (8th Cir. 2002) (explaining the difference between those probate-related actions that sound exclusively in state law, and those over which a federal court may exercise jurisdiction); *see also* McKibben v. Chubb, 840 F.2d 1525, 1529 (10th Cir. 1988) ("The standard for determining whether federal jurisdiction may be exercised is whether under state law the dispute would be cognizable only by the probate court.").

[26] 36 Stat. 703, 736 (1910).

[27] Originally codified at 50 U.S.C. app. § 525 and reenacted as the Servicemembers Civil Relief Act, Pub. L. No. 108-189, 117 Stat. 2835 (2003) (codified at 50 U.S.C. app. §§ 501–594).

A fundamental problem associated with federal *legislation* in the area of probate law is that the federal courts lack constitutional *judicial* authority to adjudicate non-constitutional probate claims—primary evidence that federal action in the area is extraconstitutional. Although the federal courts often exercise jurisdiction over claims against estates, they have no jurisdiction over wills or the state probate process itself.[28] As the former Fifth Circuit explains, "[b]y a long series of federal decisions it is established that generally probate matters such as the validity of a will and the administration of a decedent's estate are so far proceedings in rem as not to be among the 'controversies' of which the district courts may be given jurisdiction under Article Three of the Constitution."[29] Even when parties to a probate proceeding enjoy diversity of state citizenship, the federal courts do not have jurisdiction. "Under the probate exception to diversity jurisdiction," the First Circuit explains, "a federal court may not probate a will, administer an estate, or entertain an action that would interfere with pending probate proceedings in state court or with a state court's control of property in its custody."[30] Moreover, federal jurisdiction is not created by a federal interest in claim preservation (other than with respect to debts owing the United States) because potential heirs have no vested property interest in inheritance until the testator dies and the estate is probated.[31]

The bright line delineating the outer limits of federal authority is reached when adjudication or legislation leaves the realm of defining claims at law and attempts to define how the probate process itself will proceed. While the federal government undoubtedly has the authority to adjudicate claims against an estate—just as it does when the testator is alive—it lacks constitutional authority to instruct state courts on how to treat those claims. The Supreme Court explained this distinction in *Commonwealth Trust Co. of Pittsburgh v. Bradford*, concluding that the district court was not divested of jurisdiction to adjudicate a claim by a receiver of a national bank solely because the subject matter was a fund held by a trustee appointed by a state orphan's court.[32] Similarly, the

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[28] *See* Schopler, *supra* note 4 at 37 ("Where no question as to the existence or formal validity of a will is involved Federal courts have undoubtedly jurisdiction to establish an interest in or claims against a decedent's estate.").

[29] Heath v. Jones, 168 F.2d 460, 463 (Former 5th Cir. 1948).

[30] Mangieri v. Mangieri, 226 F.3d 1 (1st Cir. 2000).

[31] *See* McFadden v. McNorton, 69 S.E.2d 445 (Va. 1952).

[32] Commonwealth Trust Co. of Pittsburgh v. Bradford, 297 U.S. 613 (1936) ("The jurisdiction of federal courts to entertain suits against [property held in probate] is clear, when instituted in order to determine the validity of claims against the estate or

federal courts have the power to enforce the due process and other similar requirements that the Constitution imposes on all state proceedings.[33]

The constitutional uncertainty of the Act authorizing MTIs rests on its treatment of the validity of a will executed contrary to state formality requirements, rather than on a claim against or interest in an estate.[34] Because this represents a new federal foray into an area traditionally reserved exclusively to state control, there is likely to be a significant state interest in challenging application of the law.

III. MTIs Create a Potential Conflict Between Federal and State Law as to the Validity of a Servicemember's Will

One of the questions that quickly arises is why MTIs have never been tested in court. One possible explanation is that Army legal assistance and Navy Code 16 attorneys typically draft state-specific instruments notwithstanding their authority under § 551.[35] Another is the relatively modest size of the average deceased servicemember's estate. While the families of Soldiers who die in combat are entitled to life insurance and survivor's benefits, those benefits are typically not subject to probate.[36] By contrast, the average enlisted Soldier's salary was

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claimants' interests therein. Such proceedings are not in rem; they seek only to establish rights; judgments therein do not deal with the property and other distribution; they adjudicate questions which precede distribution.").

[33] *See, e.g.*, Labine v. Vincent, 401 U.S. 532 (1971) (considering whether Louisiana's intestate succession law violated the Equal Protection Clause by denying inheritance to illegitimate children, ultimately concluding that it did not). Although the precedent has been collaterally undermined by later decisions, the Court's jurisdiction was never challenged.

[34] The application of this federal law against the state's judicial *process,* rather than claims or rights themselves, is illustrated by the preamble that the Department of Defense suggests be included in any such instrument, advising "Federal law exempts this document from any requirement of form, formality, or recording that is provided for testamentary instruments under the laws of a State, the District of Columbia, or a commonwealth, territory, or possession of the United States. Federal law specifies that this document shall receive the same legal effect as a testamentary instrument prepared and executed in accordance with the laws of the State in which it is presented for probate." U.S. DEP'T OF DEFENSE, DIR. 1350.4, LEGAL ASSISTANCE MATTERS encl. 1 (28 Apr. 2001) [hereinafter DOD DIR. 1350.4].

[35] *See infra* Part IIIc.

[36] Although Servicemembers' Group Life Insurance (SGLI) benefits are passed directly to a named beneficiary outside of probate, their dispensation may be controlled by an instrument that is subject to probate, such as when SGLI benefits are passed to a

estimated to be between 1.6 and 2.4 times the federal poverty level in fiscal year 2006,[37] making it very difficult to acquire a substantial estate. In addition, nearly 42% of servicemembers are single without dependents, leaving relatively simple estates that are unlikely to be challenged in probate.[38]

In addition to practical considerations, there are procedural reasons that § 551 is difficult to challenge. First, because the federal courts lack jurisdiction over probate questions, the validity of an MTI would first have to be determined in a state court. The majority of states delegate such authority to a court of limited jurisdiction, which might be hesitant to rule unconstitutional a federal statute enacted under congressional war powers.[39] Only after a state court finds the Act to be unconstitutional would a sufficient federal question arise to merit federal jurisdiction. Second, because state intestacy laws would govern if a will was not admitted to probate, any challenge would necessarily have to come from a non-intestate heir attempting to collect what was promised in a will.[40] Most simple wills, by contrast, simply specify the manner in which assets are to be divided among those who would benefit under intestacy anyway.[41] Finally, under most states' comity statutes, wills are admitted

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testamentary trust created in a will. *See* Captain Wojciech Z. Kornacki, *What Every Soldier and Legal Assistance Attorney Should Know About Servicemembers' Group Life Insurance*, ARMY LAW., Nov. 2006, at 51; *see also* Captain Kevin P. Flood, *Estate Planning for the Military*, ABA GEN. PRAC., SOLO & SMALL FIRM DIV. PUBL'N, http://www.abanet.org/genpractice/legalface/pdf/flood.pdf (last visited May 2, 2008) (SGLI not subject to state probate laws). In the Army, naming one's own estate as the beneficiary of SGLI ("by will" beneficiary designation) is prohibited where the testator is a Soldier. U.S. DEP'T OF ARMY, REG. 600-8-1, ARMY CASUALTY PROGRAM para. 12–17a (30 Apr. 2007).

[37] William O. Brown, Jr. & Charles B. Cushman, *Compensation and Short-Term Credit Needs of U.S. Military Enlisted Personnel*, CONSUMER CREDIT RES. FOUND., *available at* http://www.cfsa.net/downloads/compensation_military.pdf (last visited Feb. 10, 2008).

[38] *Id.*

[39] EUNICE L. ROSS & THOMAS J. REED, WILL CONTESTS 2D ED. § 4:3, *Will Contests Before Probate* (2007) (about two-thirds of American jurisdictions follow this practice; the remainder assign probate to their trial courts).

[40] *See id.* § 3:1 (To establish standing in a will contest, a party must have a pecuniary interest in the matter. Because a state's intestate succession law would control in the absence of a valid will, the only parties with standing would be those who would have inherited greater than their intestate share under the will, or those who would not inherit under the state's statute at all.).

[41] Of course, specifying the beneficiaries of an estate is not the only—or often even primary—purpose for drafting a will. Often, such documents are drafted to establish how property will be managed after the testator's death and to establish conditions on inheritance. A will contest on these matters seems less likely when a will is dishonored,

to probate notwithstanding their failure to comply with a state's formality requirements provided that the will complies with the requirements of the jurisdiction where the will was executed.[42]

A. Although Potential Conflicts Between State Formality Requirements and MTI Provisions Are Limited, Strict Application of Some State Provisions Could Render MTIs Invalid

Because it seems so unlikely that a MTI would ever be challenged on the basis of nonconformity with state formality procedures, it is enticing to consider the question of their constitutionality simply moot. Take the following foreseeable example, however: Imagine a Soldier stationed at Fort Sill, Oklahoma, who is also an Oklahoma resident. Before deploying to combat duty overseas, he executes an MTI that complies with § 551. As provided in the statute, the will is witnessed by two disinterested persons, also Soldiers in his unit, who sign self-executing affidavits. Assume further that the Soldier is killed in action halfway through his one-year deployment, his family submits his testamentary instrument for probate in Oklahoma, and the will is contested by his ex-wife. Finally, consider that the witnesses to the Soldier's will execution are not available, because they continue to serve overseas.

Under federal law, this Soldier's testamentary instrument must be admitted to probate because it complies with the requirements of the statute.[43] Under Oklahoma law, however, the instrument may not be a valid will. Oklahoma does not recognize self-proving affidavits in contested will situations.[44] Thus, assuming that the will's validity cannot

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however, because the beneficiary is likely to benefit from intestacy and the testator is not present to vindicate his wishes.

[42] *See, e.g.*, WASH. REV. CODE. § 11.12.020(1) (1990) (recognizing wills valid where executed); MONT. CODE ANN. § 72-2-526 (1993) (same); MD. CODE ANN. ESTATES AND TRUSTS § 4-104 (1974) (recognizing wills valid where executed or where testator is domiciled, if executed outside of Maryland). The same is true in many common law jurisdictions internationally. *See* JAMES SCHOULER, LAW OF WILLS EXECUTORS AND ADMINISTRATORS 893 (1915) ("[T]he English statute 24 & 25 Vict. C. 114, provides that wills made by British subjects out of the kingdom shall be admitted to probate, if made according to the law of the place where made, or where the testator was domiciled or had his domicile of origin.").

[43] 10 U.S.C. § 1044d(a)(2) (2000).

[44] OLKA. STAT. WILLS AND SUCCESSION 84, § 55(5) (1998); *see also* ROBERT L HOFF & VARLEY H. TAYLOR, JR., OKLAHOMA PROBATE LAW AND PRACTICE § 150 (2008) ("In the

be proven without the testimony of witnesses, the court is left with a question as to whether to follow its own probate law or federal law when deciding whether to admit the will. Application of Oklahoma law might result in invalidity if witnesses cannot be produced or the validity of the will cannot otherwise be proved, while federal law requires the acceptance of properly executed self-executing affidavits.

There are many other foreseeable situations where a will might be considered invalid under the law of the state where it is executed, but is purportedly valid under the MTI Act. Among other discrepancies, the Act makes no mention of where on the testament the testator must sign, while many states require it to be signed at the end.[45] The Act also provides for certification of affidavits by a military officer or "presiding attorney," while many states require certification by a notary public.[46]

Finally, premising § 551's validity on the fact that its requirements mirror those of state law does not answer the constitutional question.[47] If § 551's state-recognition mandate is constitutionally within Congress's powers, then Congress could just as easily require recognition of an entirely different style of instrument. Moreover, even those states that have adopted the Uniform Probate Code retain virtually unlimited authority to alter the formality requirements applied to instruments presented in their courts.[48] Section 551 provides no mechanism for modification of its execution procedure in light of changes to state law.[49] Even if § 551's only effect is to federally codify the current state of testamentary formality law among the various states, it both gives rise to unforeseen future conflicts and unconstitutionally infringes on the right of state governments to evolve their formality requirements if they desire to do so. The fundamental question of whether federal law can control this area is important because it determines the prospective validity of

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event there is a contest, the affidavit is not admissible and the witnesses or their depositions will have to be produced.").

[45] 79 AM. JUR. 2D *Wills* § 222 (2007) (reviewing state attestation requirements).

[46] This is one reason that the Air Force advises military attorneys to use civilian notaries even when drafting MTIs. *See* U.S. DEP'T OF AIR FORCE, INSTR. 51-504, LEGAL ASSISTANCE, NOTARY, AND PREVENTIVE LAW PROGRAMS (27 Oct. 2003) [hereinafter AFI 51-504].

[47] Indeed, the argument that § 551 is valid *because* it complies with existing state law appears less compelling with respect to the provision's constitutionality than as a commentary on its irrelevance.

[48] *See supra* Part II.

[49] *See* 10 U.S.C. § 1044d(c) (2000) (statutorily prescribing an execution procedure).

many military wills currently in existence or soon to be drafted that could just as easily be made to conform with state requirements.

B. Section 551 Was Initially Passed to Guarantee State Recognition of Otherwise Nonconforming Wills by Military Servicemembers

Far from hypothetical, the question of whether a will hastily drafted by a Soldier or Sailor is valid has been litigated recurrently throughout the history of the state-administered probate process. For instance, in 1939 a New York probate court refused to admit to probate an unattested testamentary letter written by a Soldier while in service during World War II.[50] The court reasoned that although the New York Probate Code made provision for recognition of the unwritten will of a Soldier or Sailor while in actual military service, that exception did not dispose of the requirement that the will be subscribed by two witnesses.[51] The court explained, "In the face of these provisions it is difficult to see how an unattested letter can be probated as a will even when written by a Soldier."[52] Recognizing the injustice of such decisions, many states have enacted statutes allowing for probate of wills executed by Soldiers and Sailors while in actual service, notwithstanding their noncompliance with state formality provisions.[53] In many states, this was an extension of a pre-existing equitable doctrine granting Soldiers and mariners privileged status to make enforceable informal testamentary gifts.[54]

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[50] *In re* Zaiac's Will, 18 N.E.2d 848 (N.Y. 1939).
[51] *Id.* at 850.
[52] *Id.*
[53] *See, e.g.*, WASH. REV. CODE § 11.12.025 (1965); N.Y. ESTATE POWERS & TRUSTS § 3-2.1 (1974) (recognizing nuncupative wills made inter alia by a member of the Armed Forces); N.C. GEN. STAT. § 31-18.4 (1919).
[54] This privilege, the current status of which is discussed in Part VI *infra*, is a relic of the original Statute of Frauds, 1677, 29 Car. II, c. 3, sec. V, and the English Wills Act of 1837, 7 Wm. IV and I Vict., c. 26 § IX. While the first required a writing for the disposition of real property, the second modified this requirement to exempt certain testamentary transfers by Soldiers and Sailors in actual military service. For some American authority explaining the adoption of the concept, see, e.g., *In re* O'Connor's Will, 121 N.Y.S. 903, 905 (1909) ("Soldiers and mariners were regarded as a favored or privileged class of testators; and there was no suggestion that their right to make an oral testament when, in one case, upon actual military service or, in the other case, at sea, was dependent upon illness or fear of death therefrom."); *see also* Leathers v. Greenacres, 53 Me. 561, 570 (1866) (recognizing that the right to make nuncupative wills was restricted to mariners in actual service at sea).

While they did a great deal to solve the problem of battlefield testamentary gifts, such provisions did little to remedy the ambiguous circumstance where a non-conforming will is written prior to deployment or actual combat. In addition, while Soldiers themselves may enjoy privileged testamentary status, their Families typically do not enjoy such standing—yet the complications associated with executing wills for military Family members are just as pronounced.

In 1988, the need for a formal resolution of the problem of military wills was made plain. On 11 December 1985, an Arrow Air DC-8 chartered by the U.S. Army crashed on takeoff from Gander, Newfoundland.[55] The flight was bound for Fort Campbell, Kentucky carrying 248 members of the 101st Airborne Division on rotation back from Cairo, Egypt.[56] In what proved to be the worst peacetime aviation disaster in U.S. military history, everyone on board was killed.[57]

The most surprising part of the Gander disaster was that several of the wills of the deceased servicemembers were later found to be invalid, prompting some state courts to distribute property contrary to the wishes of testators.[58] In the one published decision to come out of the incident, an Arkansas court refused to recognize a copy of a will that was drafted for one of the deceased Soldiers by a Judge Advocate officer because insufficient testimony was available to establish that the will was actually executed.[59]

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[55] CANADIAN AVIATION SAFETY BD., AVIATION OCCURRENCE REP. NO. 85-H50902 (28 Oct. 1988), *available at* http://www.sandford.org/gandercrash/investigations/majority_/majority_report/html/_i.shtml.

[56] *Id.*

[57] Ed Magnuson, *The Fall of the Screaming Eagles*, TIME MAG. (Dec. 23, 1985). Although the Canadian Aviation Safety Board conducted the longest investigation in its history, it was unable to definitively determine the cause of the incident, resulting in a split accident report. The majority concluded that the crash was caused by leading-edge wing icing, while the minority credited claims of responsibility from various terrorist groups, concluding that the incident was retribution for the U.S. role in shipping arms to Iran. Roy Rowan, *Gander: Different Crash, Same Answers*, TIME MAG. (Apr. 27, 1992).

[58] Gerry W. Beyer, *Introduction to Military Wills* (2003), *available at* http://www.professorbeyer.com/Articles/Military_Wills.htm.

[59] Conkle v. Walker, 742 S.W.2d 892 (Ark. 1988).

In response to the apparent injustice that resulted when American Soldiers died in service only to have their last wishes dishonored by state courts, and after years of inaction, Congress included § 551 in the 2001 Authorization Act without much discussion.[60] Its purpose was to guarantee acceptance of military wills, but it may in fact serve as an inducement for military attorneys to ignore state formality requirements that they otherwise would carefully heed. Thus, § 551 may make it more—not less—likely that some military testaments will be enforced.

C. The Services' Current Policies Regarding Use of MTIs Reflect Operational Realities Rather than Constitutional Considerations

Among the offices that establish policy for drafting testamentary instruments in each of the military services there is a difference of opinion regarding the usefulness of § 551.[61] While the Air Force requires the drafting of MTIs,[62] Army legal assistance[63] and Navy-Marine Corps Code 16 attorneys[64] draft state-specific testamentary instruments. Only the Coast Guard leaves the decision of whether to draft an MTI or state-specific will to the legal assistance attorney's discretion in all cases.[65] These respective policy differences, however, reflect operational decisions made by each of the services rather than concern over the constitutional validity of MTIs in general.[66]

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[60] Federal legislation on this matter had been proposed for a number of years both by military practitioners and scholarly observers. *See*, *e.g.*, Edwin A. Wahlen, *Soldier's and Sailor's Wills: A Proposal for Federal Legislation*, 15 U. CHI. L. REV. 702 (1948).

[61] E-mail from Major Dana Chase, Trusts & Estates Professor, Admin. & Civil Law Dep't, The Judge Advocate General's Legal Ctr. & Sch., to author (Apr. 10, 2008) (on file with author).

[62] AFI 51-504, *supra* note 46.

[63] U.S. DEP'T OF ARMY, REG. 27-3, THE ARMY LEGAL ASSISTANCE PROGRAM (21 Feb. 1996) [hereinafter AR 27-3].

[64] U.S. DEP'T OF NAVY, JUDGE ADVOCATE GENERAL INSTR. 5801.2A, NAVY-MARINE CORPS LEGAL ASSISTANCE PROGRAM (26 Oct. 2005) [hereinafter NI 5801.2A].

[65] *See* U.S. DEP'T OF HOMELAND SECURITY, COMMANDANT INSTR. 5801.4E, LEGAL ASSISTANCE PROGRAM (26 Oct. 2005) [hereinafter CGI 5801.4E].

[66] Letter from George Reilly, Deputy Division Director, Navy OJAG Legal Assistance, to author (12 May 2008) [hereinafter Reilly Letter] (explaining that the Navy's decision to use state specific instruments was for practical, rather than Constitutional, reasons).

The differences in approach are in part explained by the circumstances under which each of the services operates. The Army and Navy-Marine Corps are the largest service branches,[67] with the largest legal assistance operations, and the most clients. By contrast, the Coast Guard relies much more substantially than the other services on reserve officers, civilian attorneys, and other military legal assistance offices to provide services,[68] making the provision of a uniform policy more difficult.

As demonstrated by the promulgation of regulations under § 551, the various military departments believe that the section is constitutional, and those responsible for promulgation of such regulations do not believe that using § 551 authority presents a risk to military testators.[69] Rather, the hesitance of the services to use the instruments appears to reflect two operational realities: (1) the majority of testamentary instruments are drafted with the assistance of commercially-developed will-drafting software, such as "DL Wills," that necessarily produce state-specific instruments,[70] and (2) compared to the instruments typically drafted by military practitioners using such software, MTIs are relatively simplistic instruments that may not meet the more complicated needs of servicemembers and their Families.[71]

In contrast to civilian practice, military legal assistance attorneys face unique drafting difficulties. Any given legal assistance attorney will draft instruments for any U.S. jurisdiction, although he is likely admitted to only one. Although the military services advise servicemembers to draft wills before deployment, instruments are often written during deployment or mobilization, in which case attorneys must attempt to meet the same standards of client counseling and drafting under often

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[67] U.S. DEP'T OF DEFENSE, STATISTICAL ANALYSIS DIVISION, ACTIVE DUTY MILITARY PERSONNEL STRENGTHS BY REGIONAL AREA AND BY COUNTRY (309A) (31 Dec. 2007), *available at* http://siadapp.dmdc.osd.mil/personel/MILITARY/history/hst0712.pdf.

[68] *See* CGI 5801.4E (7), *supra* note 65.

[69] There is no instruction or policy promulgated by the Department of Defense or other military departments warning or otherwise indicating that MTIs are constitutionally questionable.

[70] *See, e.g.*, NI 5801.2A, *supra* note 64, para. 7-2.b (2) (requiring the use of will drafting software approved and distributed by the Navy); AR 27-3, *supra* note 63, para. 1-4 (requiring Army legal assistance offices to provide computer software, such as the Legal Automation Army-Wide System (LAAWS), for drafting of instruments such as wills).

[71] Reilly Letter, *supra* note 66.

unusual circumstances.[72] Moreover, the controlling state law is not always apparent because the testator is very likely outside of his home state and may be outside of the country when the instrument is executed.[73]

In this complicated environment, MTIs may be considered by some as an acceptable "basic" or "form" instrument that can be drafted without the use of software or under emergency situations.[74] Although MTIs are intrinsically superior to the holographic or nuncupative wills that might otherwise be drafted under such circumstances, the latter are statutorily recognized by many states while the former are likely not.[75] The § 551 statutory will is not a substitute for these more crude instruments because they are never hand-drafted by the testator[76] and do not otherwise comply with the state statutes that authorize holographic instruments.

Notwithstanding the differences of approach, the extent to which the various military services use MTIs rather than drafting state-specific instruments is not relevant to the question of their constitutionality,

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[72] *See* AR 27-3, *supra* note 63, para. 3-6 (b)(2) ("The same legal and professional standards that apply to preparing and executing wills within an Army legal office apply to those that are prepared and executed during EDREs, REMOBEs, MODREs, SRPs, and NEOs"); NI 5801.2A, *supra* note 64, para 7-2(b), ("it is recognized that in some emergency situations or under field conditions, "individually and privately" [the requirement for client consultation] may involve the attorney and client meeting at a table in a gymnasium or in a mess tent, for example, instead of a private office").

[73] Indeed, there is a question as to whether a will prepared by a military attorney on a military base is even prepared "within" a given state for purposes of probate. Although logic would suggest the application of state law where no corresponding federal law addresses the matter, the federal courts have long recognized a complete lack of state jurisdiction over matters occurring on federal property. *See, e.g.*, W. Union Tele. Co. v. Chiles, 214 U.S. 274 (1909) (Virginia has no jurisdiction to prescribe requirements for commercial matters on military bases); Miller v. Hickory Grove Sch. Bd., 178 P.2d 214 (Kan. 1947) (recognizing a military base as outside of the jurisdiction of the state); Lowe v. Lowe, 133 A. 729 (Md. 1926) (resident of military base not a resident of the state and therefore not entitled to state divorce proceeding); Chaney v. Chaney, 201 P.2d 782 (N.M. 1949) (parties residing on military base not entitled to family law proceedings before state courts).

[74] Because the § 551 preamble and execution requirements can be pre-printed and used for all servicemembers—regardless of the state of residency—this is an attractive option for simple estates, particularly during deployments.

[75] *See infra* Part VI (discussing recent changes in state law and the trend toward recognition of nuncupative wills).

[76] *See* RESTATEMENT (THIRD) OF PROPERTY § 3.2 (1999) (setting forth the general requirements of holographic wills, including that they must be drafted and in some cases dated in the handwriting of the testator).

except that the low rate of utilization may explain why their use has not yet been tested in court.

IV. Because the MTI Authorizing Legislation Requires State Courts to Follow Federal Policy in Applying State Law, It Unconstitutionally Commandeers State Institutions

MTIs exist at the murky intersection of Congress's virtually unlimited authority over all things military and the constitutional doctrine that it cannot commandeer state government to accomplish its policy objectives, however legitimate. Of course, the federal government is one of delegated powers. Thus, "the powers which the general government may exercise are only those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the numerated powers."[77] When Congress acts within the realm of powers that it can properly wield, however, it has broad discretion to select the means of achieving its purposes. It has been observed that "to a constitutional end many ways are open; but to an end not within the terms of the Constitution, all ways are closed."[78] Although this appears fundamental to any seasoned practitioner, it is important to recall that the creation of a federal government of limited authority was a conscious decision by the Framers not to create a government of general jurisdiction, as the various states all were at the time.[79] Review of Article I, Section 8 of the Constitution thus reveals only one possible constitutional hook on which federal enactment of §

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[77] Carter v. Carter Coal Co., 298 U.S. 238 (1936) (ruling the Bituminous Coal Conservation Act of 1935 unconstitutional on the grounds that Congress's power to regulate interstate commerce did not extend to regulation of local industry). Although the Court's ultimate interpretation of the Congress's Commerce Clause powers has expanded over ensuing decades, its insistence that exercise of legislative authority be rooted in constitutional authorization has not.

[78] *Id.* at 291.

[79] *See* Martin v. Hunter's Lessee, 14 U.S. 304, 326 (1816). In the foundational case outlining the limited nature of American national government, Justice Story explained "[t]he constitution was not, therefore, necessarily carved out of existing state sovereignties, nor a surrender of powers already existing in state institutions, for the powers of the states depend on their own constitutions . . . the sovereign powers vested in the state governments, by their respective constitutions, remain unaltered and unimpaired, except so far as they were granted to the government of the United States." *Id.*

551 could plausibly be hung: the power to raise and maintain armies and navies.[80]

A. The Tenth Amendment Prohibits Congress From Using State Governments Or Institutions To Affect Federal Policy

In recognition that a primary motive for the creation of a national government was to provide for the common defense, Congress is granted extensive leeway in interpreting and applying its power over military affairs. Congress's authority in this area has been described as "broad and sweeping." [81] When Congress exercises its power over military affairs, its actions are subject to much greater judicial respect than when it legislates on commercial or other matters of general interest. As the Court has explained, "Congress is permitted to legislate both with greater breadth and with greater flexibility" when the statute involved relates to military affairs because "the military mission requires a different application of [constitutional] protections."[82] Thus, courts "must give particular deference to the determination of Congress, made under its authority to regulate the land and naval forces."[83] Congressional authority in the realm of military affairs is not limitless, however, and cloaking congressional action with the aura of military necessity will not excuse legislative overreaching.[84]

Opposite to Congress's admittedly pervasive legislative authority in the realm of military affairs is the so-called "anti-commandeering"

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[80] Article I, Section 8 of the Constitution provides "The Congress shall have power . . .To raise and support armies . . . To provide and maintain a navy." U.S. CONST. art. I, sec. 8. Although the legislative catch-all of the Commerce Clause may provide a basis for regulating disposition of property—particularly that of a commercial nature—it has not yet been read to extend to the regulation of purely intrastate state court proceedings.

[81] Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 547 U.S. 47, 58 (2006) (Congress's power to raise armies includes power to require high schools that accept federal funds to admit military recruiters) (citing United States v. O'Brien, 391 U.S. 367, 377 (1968) (congressional authority over military affairs supersedes First Amendment right to destroy Selective Service registration certificates)).

[82] Parker v. Levy, 414 U.S. 733, 756 (1974).

[83] Middendorf v. Henry, 425 U.S. 25 (1976) (dismissing a due process claim in the context of summary court-martial procedures).

[84] Rostker v. Goldberg, 453 U.S. 57, 67 (1981) (refusing to set aside the exclusion of women from military combat positions under the due process clause, commenting, "None of this is to say that Congress is free to disregard the Constitution when it acts in the area of military affairs. In that area, as any other, Congress remains subject to the limitations of the Due Process Clause.").

principle of American federalism. The doctrine comes from *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*,[85] wherein the Court noted that Congress could not simply "commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." Striking down a section of the Low-Level Radioactive Waste Policy Amendments Act of 1985, the Court gave teeth to the doctrine in *New York v. United States*,[86] explaining that "[w]hile Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress's instructions."[87] Justice Kennedy explained the distinction, dissenting in *Alaska Dep't of Envtl. Conservation v. EPA* and commenting that "[t]he Federal Government is free, within its vast legislative authority to impose federal standards. For States to have a role, however, their own governing process must be respected."[88] The point here is fundamental: an act of Congress may be within Congress's legislative authority, but may *still* be unconstitutional because it commands the action of state governments rather than acts upon the people directly.

The Court in *New York* admitted that federal Tenth Amendment jurisprudence had "traveled an unsteady path."[89] Yet, it noted that "this Court never has sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations,"[90] and "even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts."[91] Ultimately, the Court held that a provision requiring state governments to take title of low-level radioactive waste within their jurisdictions was unconstitutional. Although the regulation of radioactive waste—particularly that in interstate commerce—was an accepted matter of federal legislative

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[85] 452 U.S. 264, 288 (1981) (upholding the Surface Mining and Reclamation Act on the basis that state enactment of complimentary legislation was optional, without which the Federal government would exercise its own Commerce Clause powers to regulate questioned steep-slope mining practices).
[86] 505 U.S. 144 (1992).
[87] *Id.* at 162.
[88] 540 U.S. 461 (2004) (Kennedy, J., dissenting).
[89] 505 U.S. at 160.
[90] *Id*. (quoting *Hodel*, 456 U.S. at 761–62).
[91] *Id.* (quoting FERC v. Mississippi, 456 U.S. 742, 762 (1982) (striking down the Public Utility Regulatory Policies Act of 1978 on the basis that it required state public utilities to comply with certain federal standards)).

action, Congress was not permitted to use state governments to accomplish its policies.[92]

B. The Supreme Court Has Recognized Congressional Authority to Regulate the Intestate Disposition of Veterans' Estates

Congressional authority in the area of estate law has been tested repeatedly since the founding of the Republic.[93] The tension arises because the right to control disposition of the estates of citizens is one of the paramount and most fundamental sovereign rights of their government.[94] Indeed, state power over the property of a deceased person within its territory has been recognized as "plenary" and "unlimited."[95] As World War II came to a close, however, Congress began to recognize a federal interest in the estates of the unprecedented number of veterans who were receiving care from the VA.[96] In 1941, it

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[92] *Id.* at 177. It should be noted that the Court acknowledged that in certain circumstances federal legislation does act upon state governments. For instance, when Congress enacts a law of general application that acts upon the citizenry, it may have implications on the ability of a state to legislate in the same area. *See* EEOC v. Wyoming, 460 U.S. 226 (1983). Similarly, under the Supremacy Clause Congress may pass federal laws that are enforceable in state courts. This authority is limited to situations, however, where the *substance* of the federal law enacted is proper—such as where state courts are called upon to adjudicate property disputes arising from federal treaties. *See* Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 695 (1979). Finally, the federal courts undoubtedly have the power to take action *against* state governments for violations of federal constitutional mandates.

[93] *See supra*, Part II B.

[94] *See* 23 AM. JUR. 2D *Descent and Distribution* § 7 (2007); *see also* Irving Trust Co. v. Day, 314 U.S. 556 (1942) ("Rights of succession to the property of a deceased, whether by will or by intestacy, are of a statutory creation, and the dead hand rules succession only by sufferance. Nothing in the Federal Constitution forbids the legislature of a state to limit, condition, or even abolish the power of testamentary disposition over property within its jurisdiction.").

[95] Dep't of Soc. & Health Servs. v. Olver (*In re* Estate of Burns), 928 P.2d 1094, 1105 n.11 (Wash. 1997) (quoting *In re* Estate of Sherwood, 211 P.2d 734, 737 (Wash. 1922) ("The right of the owner of property to direct what disposition shall be made of it after his death is not a natural right which follows from mere ownership. On the contrary, the right has its sanction in the laws of the state . . . the state may, if it so chooses, take to itself the whole of such property, or it may take any part thereof less than the whole and direct the disposition of the remainder; and this without regard to the wishes or direction of the person who died possessed of it, and without regard to the claims of those whom he has directed that it be given. Stated in another way, the states' power over such property is plenary, and its right to direct its disposition is unlimited.")).

[96] During the two years following the war, the number of veterans receiving some benefit from the Veterans Administration increased by a record fifteen million. In the same

amended the 1910 Sundry Appropriations Act[97] to provide that the estates of veterans who die intestate while under the care of the VA would escheat to the benefit of the operating fund of the facility, rather than according to state intestacy law.[98] The revision was designed to take advantage of veterans' estates to increase financial support for the VA hospital system. As Representative Jennings explained, "would it not be much better to let that money go into a fund that would inure to the benefit of other veterans than to let some State clear across the continent undertake to [obtain it]?"[99] With Congress's enactment of a new federal intestacy provision directly at odds with the laws of every state, it was virtually inevitable that the new law would be challenged.

On 1 March 1956, Adam Warpouske, a veteran of the first World War, was admitted to the Marquam Hill VA hospital in Portland, Oregon.[100] On admission, Warpouske was brain dead as a result of a severe cerebral hemorrhage.[101] He never regained consciousness, passing away on 19 March 1956—only eighteen days after admission.[102] Warpouske died intestate and, while his personal assets at death totaled only $28, it turned out that his estate had inherited $12,727.67 from a brother who had predeceased him by a few days.[103]

Appearing in Multnomah County Probate Court, the United States claimed an exclusive interest in Warpouske's estate based on the escheat provisions of the Sundry Appropriations Act.[104] The State of Oregon, citing its own escheat law,[105] also claimed an interest, setting the stage

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period, the number of VA staff members increased from 16,966 to 20,008. Resources were scarce as construction of facilities to meet emerging needs taxed federal coffers. U.S. Dep't of Veterans Affairs, *History of the Department of Veterans Affairs*, ch. 5, at 1, http://www1.va.gov/opa/feature/history/docs/history5.pdf (last visited Apr. 18, 2008).

[97] The original act was enacted as 36 Stat. 703, 736 (1910). The 1941 amendments were enacted as 55 Stat. 868 (1941) and codified at 38 U.S.C. § 17–17j (1952) (repealed 1958).

[98] *See* 38 U.S.C. § 17 (1952) (repealed 1958).

[99] 87 CONG. REC. 5203-04 (1941) (statement of Rep. Jennings).

[100] Warpouske v. United States, 352 P.2d 539, 541 (Or. 1960).

[101] *Id.*

[102] *Id.* at 541.

[103] *Id.*

[104] 38 U.S.C. § 17a (1952) (repealed 1958).

[105] OR. REV. STAT. § 120.10 (1951) (repealed 1969) ("Immediately upon the death of any person who dies intestate without heirs, leaving any real, personal or mixed property, interest or estate in this state, the same escheats to and vests in the state, subject only to the claims of the creditors and as provided in *ORS 120.06* to *120.13*; and the clear proceeds derived therefrom shall be paid into and become a part of the Common School Fund of this state and be loaned or invested by the State Land Board, as provided by

for Oregon and federal courts to finally resolve whether the federal government could regulate the disposition of veterans' estates.

The Oregon courts ultimately dodged the constitutional question, choosing instead to determine that the federal escheat provision did not apply to the facts at issue.[106] The Oregon Supreme Court relied on § 17a of the Sundry Appropriations Act, which provided that a contractual agreement between the veteran and the United States was to be "conclusively presumed" from his death in a VA administered facility.[107] The court applied Oregon's ordinary contract law to conclude that Warpouske could not have acceded to any such contract because, given his lack of brain activity, he lacked capacity to contract.[108]

Granting certiorari in 1961, the United States Supreme Court overruled the Oregon decision, finding that the act operated automatically.[109] In the very concise reasoning of *United States v. Oregon*, far from an intrusion on states' sovereignty, the escheat provisions reflected "[t]he solicitude of Congress for veterans."[110] Much of the opinion written by Justice Black was a recitation of the services and other benefits granted to veterans by the government, and a policy justification of the intrinsic equity of allowing the United States to provide veterans' services with "whatever little personal property veterans without wills or kin happen to leave when they die."[111] The

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law."). Oregon's current escheat provision is codified at OR. REV. STAT. § 112.055 (1969).

[106] *Warpouske*, 352 P.2d at 542 ("the Act of 1941 by its four corners it sounds in contract").

[107] "§17a. . . . The fact of death of the veteran (admitted as such) in a facility or hospital, while being furnished care or treatment therein by the Veterans' Administration . . . shall give rise to a conclusive presumption of a valid contract for the disposition in accordance with this subchapter." 38 U.S.C. § 17a (1952) (repealed 1958).

[108] *Warpouske*, 352 P.2d at 542 ("There is no record indicating who made the decision for the transfer. Certainly, the veteran had no capacity to do so nor did he then have a guardian or relatives to act in his behalf. His presence in the Veterans Hospital can only be said to have been an involuntary admission, even though there was no question as to his right to be there by reason of his disabilities and war service status.").

[109] Part of the Court's rationale was that the contractual language was added to the statute in part as a saving provision in the event that the automatic vesting provision was found unconstitutional. As the Court explained "it seems plain to us that these 'contractual' provisions were included . . . for the purpose of reinforcing . . . the provisions of § 1—the thought apparently being that there was some chance that the Act would be attacked as unconstitutional." United States v. Oregon, 366 U.S. 643, 646 (1961).

[110] *Oregon*, 366 U.S. at 647.

[111] *Id*.

extent of the Court's constitutional analysis could be found in just two sentences:

> Congress undoubtedly has the power—under its constitutional powers to raise armies and navies and to conduct wars—to pay pensions, and to build hospitals for veterans. We think it plain that the same sources of power authorize Congress to require that the personal property left by its wards when they die in government facilities shall be devoted to the comfort and recreation of other ex-service people . . . .[112]

Although devoid of the usual analysis of the limits of Congress's war powers, Black's conclusory decision in *Oregon* established the foundation of congressional power to meddle in state's probate processes for the coming half-century. Justices Douglas and Whittaker, in a stinging and constitutionally-charged dissent, pointed to the many flaws in Justice Black's analysis, with Douglas commenting "[n]ever before, I believe, has a federal law governing the property of one dying intestate been allowed to override a state law."[113] Reaching the logical conclusion that Justice Black's analysis was not limited to veterans who die intestate, or even those whose deaths occur in VA facilities, Douglas explained "if the United States can go as far as we allow it to go today, it can[] supersede any will a veteran makes."[114]

Despite Douglas's impassioned dissent, *United States v. Oregon* remains the law of the land and appears to confirm Congress's authority to enact that legislation which it believes is necessary and proper to provide for the care of veterans—even to the extent that it conflicts with state law or policy.[115]

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[112] *Id.* at 648–49. Black added, "Although it is true that this is an area normally left to the States, it is not immune under the Tenth Amendment from laws passed by the Federal Government which are, as is the law here, necessary and proper to the exercise of a delegated power."

[113] *Id.* at 650 (Douglas, J., dissenting).

[114] *Id.* at 653 (Douglas, J., dissenting).

[115] Preemption of Oregon's escheat provision was recognized by the Court under the Supremacy Clause based on Article I, Section 8's grant of the power to raise armies and navies, as well as under the Necessary and Proper Clause. As Justice Douglas noted, "the Supremacy Clause is not without limits. For a federal law to have supremacy it must be made 'in pursuance' of the Constitution. The Court, of course, recognizes this; and it justifies this federal law governing devolution of property under the Necessary and Proper Clause. . . . Only recently we warned against an expansive construction of [that

C. Because They Act upon the Probate Process, Rather than a Claim Against the Estate, MTIs Are an Unconstitutional Commandeering of the State Probate Process

In light of *Oregon*, it seems an entirely reasonable conclusion that Congress's authority to enact § 551 is firmly established under the Necessary and Proper Clause as ancillary to Congress's plenary authority over the Armed Forces. Indeed, this is the analysis promulgated by most scholars[116] and government practitioners.[117] Yet such analysis fails to recognize the strict distinction in federal jurisprudence between regulation of claims against decedents' estates—a proper subject of federal action—and federal intrusion into the procedural integrity of the probate process itself. Both the majority and dissent in *Oregon* conflate the two, with even Justice Douglas commenting, "I do not see how a scheme for administration of decedents' estates . . . can possibly be necessary and proper."[118] What Douglas failed to point out, however, was that the federal provision for veteran decedents' estates escheat to the United States—though constitutionally suspect—was not in fact a *scheme* for disposition of assets, but rather a *claim* against Mr. Warpouske's estate. This fact is reflected both in the legislative history of the Act[119] and in the venue where the United States' claim was initially propounded: Oregon State Probate Court. Procedurally, *Oregon* took the same course as any creditor's claim against an estate. The only question was whether or not the United States' claim on Warpouske's estate superseded Oregon's claim by virtue of the Supremacy Clause. Although the Supreme Court concluded that it did, no attempt was made

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clause, stating] . . . it is 'not a grant of power, but a *caveat* that the Congress posses all the means necessary to carry out' its enumerated powers." *Id.* at 651-53 (Douglas, J., dissenting).

[116] *See, e.g.*, Beyer, *supra* note 58 ("In light of the precedence established in *United States v. Oregon*, a challenge to § 1044d seems unlikely under the Tenth Amendment").

[117] *But see* Major Jonathan E. Cheney, *Beyond DL Wills: Preparing Wills for Domiciliaries of Louisiana, Puerto Rico, Guam, American Samoa, Northern Mariana Islands, and the U.S. Virgin Islands*, ARMY LAW., Oct. 2005, at 2 (explaining that the question of § 551's constitutionality is not definitively resolved).

[118] *Oregon*, 366 U.S. at 654 (Douglas, J., dissenting).

[119] Considering whether the proposed legislation would be constitutional, Representative Pheiffer noted "there is a chance of there being a serious conflict in some cases between the State laws and the Federal laws. In practically every State, the property would naturally escheat to the State." Representative Rankin replied, "there cannot possibly be any conflict, because the veteran agrees to this arrangement when he enters the hospital . . . If he does not agree, then this does not apply." 87 CONG. REC. 5203 (1941).

in the case to circumvent or procedurally alter Oregon's probate process.[120]

The history of the Tenth Amendment suggests, appropriately, greater constitutional scrutiny of those provisions directed *at* state government than those that simply have an incidental effect on the administration of state processes. The Sundry Appropriations Act[121] is a provision of the latter variety. As opposed to state government itself, that Act was directed at the estates of deceased veterans—superimposing the United States' claim ahead of the state's remainder escheat provision.[122] By contrast, § 551 cannot be said to be directed at anyone or anything *other* than the states. The Department of Defense's implementing directive confirms this fact, providing for a mandatory preamble on each document directing "[f]ederal law specifies that this document shall receive the same legal effect as a testamentary instrument prepared and executed in accordance with the laws of the state in which it is presented for probate."[123] This command recognizes the inherent tension between § 551 and the formality requirements enacted by each state, and directs the state government through its probate court to implement the federal, rather than state, policy.

The proscription on federal commandeering of the state to implement its policy is not a mere federalist nicety. On the contrary, it undergirds the founders' concern that a federal government could implement unpopular policies using state governments as its executor and thus insulate itself from electoral ramifications.[124] Even accepting the *Oregon* analysis as valid in allowing the federal government to implement its own policy with respect to decedent veterans, under the *New York* precedent Congress is given only two constitutional choices: "offer the States the choice of regulating that activity according to federal standards or have[] state law pre-empted by federal regulation."[125] Under this

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[120] That the *Oregon* decision did not alter the fundamental nature of the probate process should not have rendered it constitutionally permissible. Rather, this distinguishing feature of the decision simply limits its controlling authority over § 551.
[121] 55 Stat. 868 (1941).
[122] 38 U.S.C. § 17 (1952) (repealed 1958).
[123] DOD DIR. 1350.4, *supra* note 34.
[124] Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 61 (1988) ("Federal attempts to appropriate state governmental resources in this manner deny the states a republican form of government. . . . Directives that the states consider, adopt, or enforce federal programs, moreover, permit federal officials to escape responsibility for their own initiatives.").
[125] New York v. United States, 505 U.S. 144, 167 (1992).

choice, Congress could direct states either to provide in their own law for the recognition of military wills,[126] or, failing that, it could implement its own probate process for deceased members of the Armed Forces.[127] What Congress cannot do—and what § 551 does—is require states to bear the resources burden of implementing their own probate processes, but require that they be administered according to federal mandates.

Admittedly, the burden on state resources of probating a will that varies slightly from state formality requirements is not great. Many states would admit a non-conforming military will to probate anyway, yielding no incremental cost.[128] Other states would have accepted the will if it had conformed, making any "cost" merely theoretical.[129] A relatively insignificant demand on state resources cannot, however, be used to justify federal hijacking of the state's sovereign right to administer its own probate process. The Supreme Court instructs "[t]here are no *de minimis* violations of the Constitution—no constitutional harms so slight that the courts are obliged to ignore them."[130]

The most obvious criticism of the theory that a federal dictate to state probate courts violates the anti-commandeering principle is that virtually all of the Supreme Court's decisions on that matter have involved dictates to the legislative and executive branches.[131] Indeed, it is rather common for state courts to both interpret and enforce federal law in the course of exercising their ordinary jurisdiction.[132] Early in the Republic, state judicial forums were routinely invoked to enforce, inter alia, the

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[126] Indeed, many states currently have such provisions. *See infra* Part VI.

[127] In the context of estate law, this latter proposition would raise additional constitutional questions—such as the ability of the federal government to obtain jurisdiction over those portions of servicemembers' estates not located on federal property—that are not addressed in this article.

[128] *See infra* Part VI.

[129] It is difficult to characterize the probate of a non-conforming will as an additional "cost" to state government because doing so suggests a state financial interest in invalidating wills. Therefore, it appears that the increased cost of admitting a non-conforming instrument to probate does not exceed that which the state has already undertaken to accept.

[130] Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 37 (2004).

[131] *See, e.g.*, New York v. United States, 505 U.S. 144, 144 (1992) (collecting cases).

[132] *See* Printz v. United States, 321 U.S. 898, 907 (1996) ("the Constitution was originally understood to permit imposition of an obligation on state judges to enforce federal prescriptions, insofar as those prescriptions related to matters appropriate for the judicial power").

Carriage Tax Act,[133] the Fugitive Slave Act,[134] the Naturalization Act,[135] the Alien Enemies Act,[136] and offenses under the postal laws.[137] More recently, state courts have been empowered to enforce airline safety regulations,[138] manage federally-regulated retirement accounts,[139] and implement consumer protection measures.[140] By contrast, the Supreme Court's enunciation of the anti-comandeering principle has been based primarily on interferences with the state executive function: requiring states to take title to low-level radioactive waste in *New York*[141] and participate in a federally-administered firearm background check program in *Printz*.[142]

The failure of the federal courts to strike down mandates directed at states' judicial authority, however, is more a reflection of Congress's propensity to direct its mandates at the executive than an exception to the anti-commandeering principle. The jurisdiction of state courts is defined by the state legislature and state constitutions. To the extent that Congress calls upon the state courts to enforce federal mandates, it may do so only to the extent that such mandates are themselves constitutional and where the state legislature has granted the state court judicial authority to consider questions of the sort.[143]

Yet, like the justification of § 551 under Congress's war powers, an analysis that places interpretation of wills within the judicial authority of state courts fails to comprehend what a probate court actually does when it decides whether to admit a will to probate or not. The sovereign authority that breathes legal life into a testamentary instrument is of a legislative, not judicial, character. The very right to devise property is

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[133] 1 Stat. 373 (1794).
[134] 1 Stat. 302 (1794).
[135] 1 Stat. 414 (1795).
[136] 1 Stat. 577 (1798).
[137] *See, e.g.*, 1 Stat. 728-33 (1799).
[138] Manfredonia v. Am. Airlines, Inc., 68 A.D.2d 131, 139 (N.Y. App. 1979).
[139] *Ex Parte* Gurganus, 603 So. 2d 903, 906 (Ala. 1992) (construing the Employee Retirement Income Security Act of 1974 (ERISA)).
[140] Smith v. Walt Bennett Ford, Inc., 864 S.W. 2d 817, 822 (Ark. 1993) (state court providing civil private cause of action under federal odometer-tampering laws).
[141] New York v. United States, 505 U.S. 144 (1992).
[142] Printz v. United States, 521 U.S. 898 (1996).
[143] *See* United States v. Jones, 109 U.S. 513, 519–20 (1883) (considering state enforcement of naturalization policy, and explaining "though the jurisdiction thus conferred could not be enforced against the consent of the States, yet, when its exercise was not incompatible with State duties, and the States made no objection to it, the decisions rendered by the State tribunals were upheld").

statutory in nature, and it is the legislative branch alone that is empowered to exercise statutory authority.[144] As the California Supreme Court explained in an often-cited 1926 case, "[t]he right of any person to execute a will, as well as the form in which it must be executed, or the manner in which it may be revoked, are matters of statutory regulation. The power of the legislature to limit the class of persons who shall be competent to make a will [etc.] . . . is unquestioned."[145] This legislative authority is one of inherent state rather than federal competency. Indeed, "[t]here is nothing more deeply imbedded in the Tenth Amendment . . . than the disposition of the estates of deceased people."[146]

The right of the state legislature to set its own policies for both the administration of its probate courts and the descent of its citizens' assets has been historically inviolable. Even in those cases where the federal government has given state courts authority to enforce federal actions, it has always done so subject to the procedural rules of each state. Indeed, only when procedural requirements are central to the substance of a federal cause of action have the federal courts insisted that states apply federal procedures.[147]

Viewing § 551 within the proper context of the probate process as defined by state statutes, Congress's purpose in substituting federal for state policy, and then requiring states to use their probate apparatus to accomplish it, is unmistakable. A "will" is simply a piece of paper without the state legislation and processes that give it effect. At least in the context of such documents, what "the legislature giveth, . . . the

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[144] *See* 16 AM. JUR. *Descent and Distribution* § 12, *cited with approval in* McFadden v. McNorton, 193 Va. 455, 460 (1952) ("any participation in the estate of a deceased person is by grace of the sovereign power which alone has any natural or inherent right to succeed to such property").

[145] *In re* Estate of Berger, 243 P. 862, 863 (Cal. 1926), *cited with approval in* Parker v. Foreman, 39 So. 2d 574 (Ala. 1949); White v. Conference of Claimants Endowment Comm'n, 366 P.2d 674 (Idaho 1959); *In re* Estate of Stolte, 226 N.E.2d 615 (Ill. 1967); *In re* Estate of Hemmingsen, 333 N.W.2d 880 (Minn. 1983); *In re* Will of McCauley, 565 S.E.2d 88 (N.C. 2002); *In re* Mo-Se-Che-He's Estate, 107 P.2d 999 (Okla. 1940); *In re* Ziegner's Estate, 264 P.2d 12 (Wash. 1928).

[146] Oregon v. United States, 366 U.S. 643, 654 (1961) (Douglas, J., dissenting).

[147] *See* Sanchez-Llamas v. Oregon, 548 U.S. 331 (2006) (explaining that the federal courts do not enjoy supervisory authority over the state courts, and therefore have no authority to impose the Fourth Amendment exclusionary rule in state court proceedings, except to the extent that it is mandated by the Vienna Convention on Consular Relations, enacted under the executive treaty-making power).

legislature [may] taketh away."[148] Such state legislation does not automatically become a matter of congressional concern simply because the legislature taketh from the estate of a member of the Armed Forces. Neither does the state legislative process come under the plenary military authority of Congress simply because a statute may hypothetically operate upon Soldier, Sailor, or Airman.

Even the SCRA,[149] which operates to limit certain state actions against current service members, is limited in its application to matters of strict federal concern. That Act operates primarily on matters of interstate commerce, including market interest rates, mortgage foreclosure, and civil law suits, to enhance readiness by protecting servicemembers from certain state actions during deployment.[150] Similarly, § 551 could be characterized as tending to the psychological readiness of Soldiers during deployment. Such a rationale, however, would provide an extremely overbroad justification for federal legislation. While the SCRA prevents Soldiers from being penalized in a state proceeding by the very fact of their inability to appear in court due to military service, § 551 affirmatively changes the status of a purported testament under state law. Thus, although the SCRA simply perpetuates a claim that already exists, § 551 creates one that never did. Because it would be irrational to suggest that the nonconformity of Soldiers' testament resulted from their military service, § 551 cannot properly be characterized as remedial in the same way that the SCRA undoubtedly is. Most important, the SCRA operates to protect the current assets of *current* members of the Armed Forces. As the New Jersey Supreme Court[151] noted, Congress has the power under the Constitution to prevent state courts from taking action against current Soldiers and Sailors. Without such authority, the several states would be empowered to constructively dismantle both the membership and the morale of the Armed Forces by operation of their civil laws. By contrast, § 551, to the extent that it affects servicemembers at all, operates only on those who

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[148] Hall v. Vallandingham, 540 A.2d 1162, 1165 (Md. Ct. Spec. App. 1988). For application of the same principal, see Cape Coral v. GAC Utils., Inc., 281 So. 2d 493 (Fla. 1973); Veterans of Foreign Wars v. Childers, 171 P.2d 618 (1946).

[149] Servicemembers Civil Relief Act, 50 U.S.C. app. §§ 501–594.

[150] *See id.* §§ 521–571.

[151] The only court to pass on constitutionality of the SSCRA was the Supreme Court of New Jersey. *See* Van Heest v. Veech, 58 N.J. Super. 427, 431–35 (Law Div. 1959) (justifying the act under Congress's war powers as designed "to provide persons in military service with peace of mind so far as the cares and burdens of civil litigation are concerned, so that they may more successfully devote their energies to the military needs of the nation").

are deceased. Unlike when a state enters default judgment against a currently deployed Soldier, deceased servicemembers, by definition, will not be handicapped in their ability to "successfully devote their energies to the military needs of the nation"[152] by application of state law to their estates. Absent any military necessity, Congress treads on very thin Constitutional ground justifying passage of the Act under its war powers.

At its most basic level, § 551 substitutes a federal interpretation of state law to assure that military wills are probated—violating the federalist truism that "state courts have the final authority to interpret a state's legislation."[153] That Congress believes it to be wise policy does not save its statute from constitutional scrutiny. In the end, § 551 is not supported by the federalist structure of American government. There are any number of matters on which Soldiers and their Families interact with their state governments. Probate of wills is among the most fundamental. The constitution simply does not permit Congress to dictate the terms of those interactions any more than it may instruct the states on how to administer any of the myriad policies and programs that constitute the exercise of state sovereign powers.

V. Federal Legislation to Guarantee Probate of Military Wills Is Not "Necessary and Proper" Because It Bears No Rational Relationship to Congress's Ability to Raise and Maintain the Armed Forces

There is an alternative analysis. Section 551 may be facially unconstitutional if, subject to the extreme deference owed Congress's exercise of war powers, the admission of military wills to state probate process is neither a necessary nor proper corollary to the power to raise armies and navies. In other words, even if § 551 does not commandeer state institutions, it may be facially invalid because Congress simply lacks authority over the subject matter of the legislation. In light of *Oregon*, however, such an argument would undoubtedly be an uphill battle.

Unfortunately, the Supreme Court's analyses of what constitutes a necessary and proper extension of Congress's war powers have been largely perfunctory. In *Oregon*, for instance, the Court made no effort to

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[152] *Id.*

[153] United States v. Dixon, 509 U.S. 688, 745 (1993) (citing Brown v. Ohio, 432 U.S. 161, 165 (1977).

define precisely how confiscation of the intestate estates of veterans is necessary and proper—leaving Justice Douglas to conclude "[t]he need of the Government to enter upon the administration of veterans' estates—made up of funds not owing the United States—is no crucial phase of the ability of the United States to care for ex-service men and women or to manage federal fiscal affairs."[154] Judicial application of the Necessary and Proper clause has placed primary emphasis on the constitutionality of the *purpose* for the legislative enactment rather than the means employed, on which Congress is granted substantial deference.[155]

What, then, is a plausible constitutional purpose for § 551? The legislative history of the Act provides little guidance, as the provision appears to have been introduced and passed without discussion in either the House or Senate.[156] In *Oregon*, the Court relied on the legitimate federal purpose of providing for the "comfort and recreation" of veterans in retirement homes.[157] In the SCRA congress considered it proper that military servicemembers should not be deprived of their state legal rights simply because they were currently serving and could not assert them.[158] Both of these appear facially, and without substantial analysis, to be legitimate concerns ancillary to the maintenance of the Armed Forces. Section 551, however, neither protects Soldiers' legal interests from the interference of federal military service (as in the SCRA), nor does it purport to raise funds for the maintenance of federal services for the retired (as in *Oregon*). As such, there appears little constitutional justification for its passage.

Indeed, in the present military environment where wills are typically written in advance of deployment,[159] it is no more difficult for a military

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[154] Oregon v. United States, 366 U.S. 643, 654 (1961) (Douglas, J., dissenting).

[155] *See* Katzenbach v. Morgan, 384 U.S. 641, 650 (1966) (discussing the Equal Protection Clause, "Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain . . . is brought within the domain of congressional power.") (citing McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819) ("Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional")).

[156] *See* 146 CONG. REC. H9053-01 (Oct. 6, 2000), H.R. No. 5408 (Conf. Rep.).

[157] *Oregon*, 366 U.S. at 649.

[158] Van Heest v. Veech, 156 A.2d 301, 303 (N.J. Super. 1959).

[159] The Army Judge Advocate General's Corps's Legal Assistance Policy Division, for instance, strongly advises that members eligible for services under 10 U.S.C. § 1044

servicemember to conform his will to state law requirements than it is for any other person to do so. That said, the preparation of wills during deployment remains a significant obstacle for military attorneys. Moreover, the burden on military attorneys of preparing wills that comply with the legal technicalities of over fifty jurisdictions presents a unique challenge that is unheard of in civilian practice.

It should also be noted that Congress's purpose in enacting § 551 is consistent both with a desire to safeguard the interests of its servicemembers, and with state law presumptions against intestacy.[160] Yet, that presumption coupled with congressional goodwill is not constitutionally sufficient to overcome the principle that testacy law is the exclusive province of the states.[161] The federal interest in the disposition of military estates—particularly where the United States is not claiming an interest in those estates—is properly characterized as minimal. Benefits that include federal funds, such as those provided by the VA, are not affected by servicemembers' wills.[162] Indeed, such benefits cannot be directed by testament even where a will is recognized.[163] Similarly, there is no federal concern about the government undertaking a financial obligation in the event of a servicemember's intestate death. Unlike in *Oregon*, failure of a state to probate a servicemember's will would not give rise to a federal

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(which includes uniformed servicemembers and their families) prepare and execute a will before they are even given notice of an upcoming deployment. *See* DEP'T OF ARMY, ESTATE PLANNING TOOL KIT FOR MILITARY & FAMILY MEMBERS (2002), *available at* https://www.jagcnet.army.mil/Legal.

[160] *See, e.g.*, Swearingen v. Giles, 565 S.W.2d 574 (Tex. App. 1978) ("strong presumption against intestacy"); Mercantile-Safe-Deposit & Trust Co. v. Mercantile-Safe Deposit & Trust Co., 228 A.2d 289 (Md. 1967) (same); *In re* Estate of Gundelach, 263 Cal. App. 2d 825 (1968) ("There is a strong presumption against intestacy, total or partial"); Harrison v. Harrison, 120 S.W.3d 144 (Ark. App. 2003) (same); Graham v. Patton, 202 S.E.2d 58 (Ga. 1973) ("The strong presumption against intestacy is but one of many guides utilized in the construction of a will, and it may be overcome where the intention of the testator to do otherwise is plain and unambiguous, or necessarily implied."); *In re* Gill, 11 N.Y.2d 463 (N.Y. 1962) ("An interpretation that produces intestacy as to any part of an estate is to be avoided. The making of the will in statutory formality raises a very strong presumption against leaving property undisposed by will.").

[161] Indeed, even the state preference for testacy is not absolute. *See In re* Estate of Bellamore, 33 Misc. 2d 256 (N.J. Surr. Ct. 1962) ("while it is true that there is a strong presumption against intestacy it is not so strong that in a particular instance it could not be held to be inapplicable"); *In re* Englis' Will, 141 N.E.2d 556 (N.Y. 1957) ("This is not a case where the presumption against intestacy is available.").

[162] Department of Veterans Affairs, *Federal Benefits for Veterans and Dependents* 80 (2007 ed.), *available at* http://www1.va.gov/opa/vadocs/Fedben.pdf.

[163] *Id.*

obligation to ascertain and transport the person's household possessions to a distant jurisdiction. Finally, unlike with the SCRA, the intestate death of a servicemember is unlikely to affect the morale of servicemembers because, through intestacy, that person's assets will devise to immediate family anyway.[164]

Finally, the Supreme Court has explained a significant policy reason for not upholding this type of statute: electoral responsibility. In *New York*, considering a commandeering challenge, the Court explained that it was important for local legislators to be held responsible for the policies they enact—and for Congress to be similarly evaluated.[165] In the case of military wills, each state's legislature has considered whether honoring the last wishes of its citizens-turned-Soldiers is sufficiently important that their wills should be specially exempted from testamentary formality requirements. Several states have decided that it is.[166] Those that have not are held accountable, not to Congress but to their own constituencies. For Congress to circumvent that process by implementing its own requirements, it must show that the Constitution grants it legislative power to deal with this matter. Lacking a rational justification under its power to raise and maintain armies and navies, however, Congress has likely facially exceeded its constitutional authority in enacting § 551.

Ultimately, the question of whether a court would consider this statute to be "necessary and proper" difficult to predict with any accuracy. That question depends, in large part, on the facts of the case presented and whether or not the judge or justices consider providing military members peace of mind in knowing that their wills will be probated trumps the states' interest in preserving the state-law integrity

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[164] *See*, *e.g.*, UNIF. PROBATE CODE § 2-101, National Conference of Commissioners on Uniform State Laws, *Uniform Probate Code 2006 rev.*, *available at* http://www.law.upenn.edu.bll/archives/ulc/upc/final2005.htm. ("The intestate share of a decedent's surviving spouse is (1) the entire estate if: (i) no descendant or parent of the decedent survives the decedent; or (ii) all of the decedents surviving descendents are also descendants of the surviving spouse and there is no other descendant of the surviving spouse who survives the decedent . . . .").

[165] New York v. United States, 505 U.S. 144, 168 (1992) ("[W]here the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished. . . . [W]here the Federal Government directs the States to regulate, it may be sate officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision.").

[166] *See infra* Part VI (surveying state testamentary privileges for military wills).

of the probate process. This is a value judgment without a legally calculable solution.

VI. Attention to State Testamentary Formality Requirements Will Remain Essential Under Any Foreseeable Legislative Solution

Enactment of § 551 recognizes the importance of providing testamentary security to members of the Armed Forces under unique circumstances. While a uniform federal policy would create obvious efficiencies, such a solution does not appear viable in light of very real constitutional questions. The most attractive alternative to federal action would be uniform state action. Adoption of a uniform state policy exempting military wills from certain testamentary formality provisions would be consistent both with constitutional federalism and with the existing policies of many states. While such a policy would still require that military attorneys consult state law in drafting wills, it would make state law more forgiving by granting military wills privileged status and admitting them to probate notwithstanding minor formality nonconformities.

Although the Uniform Probate Code (UPC), which has currently been adopted by eighteen states,[167] does not grant privileged status to military testators,[168] a declining number of states currently do. In 1979 twenty-nine states and the District of Columbia had statutory provisions granting a testamentary privilege to servicemembers' wills that did not conform with testamentary formality requirements.[169] Since then, eleven of those states have repealed the provisions.[170] Little evidence explains

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[167]Cornell University Law School Legal Information Institute, *Uniform Probate Code Locator*, http://www.law.cornell.edu/uniform/probate.html (last visited May 1, 2008).

[168] National Conference of Commissioners on Uniform State Laws, *Uniform Probate Code 2006 rev.*, *available at* http://www.law.upenn.edu.bll/archives/ulc /upc/final2005.htm.

[169] *See* Major Steven F. Lancaster, *Probate and the Military: What's It All About*, 85 MIL. L. REV. 60 (1979) (reviewing state probate code provisions addressing nonconforming wills made by Soldiers in military service).

[170] These states are Alabama (ALA. CODE § 43-1-35 (1975) (repealed 1981)); Alaska (ALASKA STAT. § 13.11.158 (1933) (repealed 1996)); California (CAL. PROB. CODE § 55 (1931) (repealed 1982)); Kentucky (KY. REV. STAT. § 394.050 (1942) (repealed 1972)); Maine, though it added a provision recognizing holographic wills (ME. REV. STAT. tit. 18, § 51 (1954) (amended 1979)); Michigan (MICH. COMP. LAWS § 702.6 (1948) (repealed 1978)); Nevada (NEV. REV. STAT. §133.100 (1929) (amended 1999)); New Jersey (N.J.

this phenomenon, except that many of these provisions were repealed in the context of adopting the UPC (which does not include such a provision) or recognizing holographic wills (which may have been seen as an effective substitute). [171]

Even when such statutes exist, they are of little value to military practitioners because their provisions vary so widely. For instance, while some states will probate any writing by a servicemember that evidences testamentary intent,[172] other states only provide an exception that covers oral wills, applying ordinary formality requirements to those instruments that are in fact written.[173] Moreover, state laws vary in their requirement that servicemembers have been in actual military service at the time of execution, and on what satisfies actual military service.[174] Finally, most states limit nonconforming military wills to disposition of a limited amount of personal property, leaving excess and real property to disposition through intestacy.[175]

In consideration of the constitutional deficiencies of § 551, there is a pressing need for state legislatures and the National Conference of Commissioners on Uniform State Laws, which drafts the UPC, to consider enactment or re-enactment of provisions exempting instruments drafted by military attorneys from testamentary formality

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STAT. ANN. § 3A:3-5 (1952) (repealed 1982)); South Dakota (S.D. COMP. LAWS § 29-2-9 (1939) (repealed 1995)); and Texas (TEX. PROB. CODE §§ 64, 65 (1955) (repealed 2007)).

[171] In at least two states, the statute providing special recognition for military wills was literally substituted with a provision recognizing holographic wills, indicating that one was viewed as a substitute for the other. *See* CAL. PROB. CODE § 55 (1931) (repealed 1982); ME. REV. STAT. 18, § 51 (1979).

[172] *See, e.g.*, WASH. REV. CODE § 11.12.025 (1965).

[173] *See, e.g.*, N.Y. ESTATES, POWERS, & TRUSTS § 3-2.1 (1974).

[174] For instance, while New Jersey has held that a Soldier who has embarked to join his unit in active combat is in actual military service, *In re* Knight's Estate, 93 A.2d 359 (N.J. 1952), Rhode Island does not apply the privilege to mariners embarked as passengers on vessels traveling through a war zone enroute to take command of another vessel, *Warren v. Harding*, 2 R.I. 133 (1852). In some states a Soldier's will is only privileged if executed in fear of impending death, *In re* Hickey's Estate, 184 N.Y.S. 399 (N.Y. Sup. Ct. 1920), while in others there is no such requirement. *See* Ray v. Wiley, 69 P. 809 (Okla. 1902).

[175] *See, e.g.*, IND. CODE § 29-1-5-4 (1999) (limiting application to personal property under $10,000); TENN. CODE ANN. § 31-1-106 (1976)(same limitation); D.C. STAT. § 18-107 (1981) (limiting application to personal property, but with no value limit). *But see* MISS. CODE ANN. § 91-5-21 (1968) (providing no limit on disposition of real or personal property directed by a decedent while on active duty).

requirements.[176] Since § 551 made them seem irrelevant, these provisions have not attracted significant attention.[177] Their mootness, however, is undermined by the questionable constitutionality of § 551. If that provision is ever invalidated the next logical inquiry would be whether a given non-conforming instrument was exempted under state law. Even under existing state law provisions, the circumstances required for probate of a nonconforming instrument (often including execution in fear of impending death, actual combat, or during deployment)[178] render the provisions virtually useless to the military in establishing a prospective uniform policy for drafting military testaments.

Notwithstanding the desirability of states ratifying military will exemption statutes, it will remain essential that military attorneys continue to consult the provisions of the state laws applicable to their clients. Even if the states do exempt military instruments from their formality requirements, it is improbable (and in any case undesirable) that they would devise *different* requirements for military instruments the way § 551 has. In the absence of a uniform federal policy, military attorneys would need to continue to draft state-specific instruments relying on the state exemption statutes only in case of error. In addition, while there is a tradition of providing exemption for Soldiers and mariners, there is no legal tradition of exempting wills prepared by military practitioners for servicemembers' dependents. Because drafting wills for dependents is a substantial part of a legal assistance attorney's workload, attention to state formality requirements cannot be avoided. Finally, as with all uniform state laws, it will remain necessary for attorneys to first determine if, and to what extent, such an exemption has been enacted and modified by each state's respective legislature.

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[176] The current language of Mississippi's statute, which is similar to that of other states, is a sound model:

> Any person of sound mind eighteen years of age or older and being in the Armed Forces of the United States of America, in active service at home or abroad or being a mariner at sea, may devise, dispose of, and bequeath his goods and chattels or property, real and personal, anything in this chapter to the contrary notwithstanding.

MISS. CODE ANN. § 91-5-21 (1968). *Compare* 14 VT. STAT. ANN. § 7 (2005) *and* VA. CODE § 64.1-53 (1950) (both providing similar language).

[177] Indeed, there are no published decisions addressing state servicemember exemption statutes in the last decade.

[178] *See* Lancaster, *supra* note 169, at 12.

While state exemption statutes for nonconforming military instruments would not create the same drafting efficiencies as § 551, they would provide security to members of the military and their families that testamentary wishes will be honored. This technical fix to state probate codes would accomplish the major objective of § 551 while promoting military readiness. Yet, given the extent to which the states exercise exclusive legislative authority over their probate processes, it appears certain that compliance with state testamentary formality requirements will remain essential.

VII. Conclusion

The problem of how to assure that deceased servicemembers' wills are admitted to probate notwithstanding slight nonconformity with state formality requirements is one without a federal solution. It is also an example of how congressional attempts to redress all ills through legislation can result in an erosion of the federalist principle that legislative action be taken at the political level closest to the citizen.

There is no more basic principle of the federal structure of the Constitution than that the states are the repository of the general sovereign power granted by the people. The federal government, by contrast, is one of delegated authority. Within the realm of Congress's powers are those to raise, maintain, equip, and provide for the Armed Forces. Congressional action justified under these "war powers" is subject to extreme judicial deference because the courts view themselves as ill-equipped to make the national security decisions that were delegated to Congress and the Executive by the Constitution. An equally basic principle of federalism is that Congress is not empowered to use its legislative authority against state governments. Rather, the founders intended that both the federal and state governments operate directly upon the citizen—leaving each government's independent sovereign legislative process intact.

Federal and state precedent firmly establishes wills and the probate process that implements them as the exclusive province of state law. Probate, as an in rem proceeding operating without formal parties on the estate of a deceased state resident, is a privilege granted by the state in its sovereign capacity. This privilege can be removed, modified, or withheld entirely at any time without affecting any vested right or obligation. Because wills and the probate process are created by state

government, they do not fall within the legislative authority of Congress except to the extent that Congress defines claims against decedents' estates under another enumerated power.

Section 551 violates Tenth Amendment separation of powers by directing state governments on implementation and operation of their probate processes. Through the operation of federal law, Congress intends that a document which the state would otherwise not recognize as testamentary be given legal effect. Because Congress lacks the authority to pass legislation directed at the disposition of estates under the state probate process—particularly where no federal interest is asserted—§ 551 is facially unconstitutional. Because, in any case, Congress cannot short-circuit a state's legislative process and judgment to accomplish its goals, § 551 is not respectful of the constitutional vertical separation of powers. Finally, because Congress cannot involuntarily commandeer a state-created regulatory paradigm to enforce its policy objectives—no matter how laudable—a reviewing court is likely to find § 551 unconstitutional.

In light of § 551's constitutional questionability, it is increasingly important that state legislatures turn their attention to the problems faced by military practitioners. With exclusive legislative authority over their probate processes comes an electoral and moral responsibility for states to provide mechanisms for the recognition of military testaments notwithstanding technical deficiencies. Yet, even if the states do enact exemptions for military testaments, it is likely that their value will be to save otherwise invalid instruments rather than to provide a prescription for prospective drafting of a multi-state instrument. To avoid the invalidation of a servicemember's will in any event, it remains essential that military attorneys conform military wills to the requirements of the state where the will is expected to be presented for probate.

THE FIRST ANNUAL SOLF-WARREN LECTURE IN INTERNATIONAL AND OPERATIONAL LAW[†]

COLONEL (RETIRED) MARC L. WARREN[*]

[†] The Waldemar A. Solf Chair of International Law was established at The Judge Advocate General's School, U.S. Army (TJAGSA) on 8 October 1982 in honor of Colonel (COL) Waldemar A. Solf. On 16 August 2007, the Chair was renamed the Waldemar A. Solf and Marc L. Warren Chair in International and Operational Law.

Colonel Waldemar Solf (1913–1987) was commissioned in the Field Artillery in 1941. He became a member of the Judge Advocate General's Corps in 1946. He served in increasingly important positions until his retirement twenty-two years later.

Colonel Solf's career highlights include assignments as the Senior Military Judge in Korea and at installations in the United States; Staff Judge Advocate (SJA) of both the Eighth U.S. Army/U.S. Forces Korea/United Nations Command and the U.S. Strategic Command; Chief Judicial Officer, U.S. Army Judiciary; and Chief, Military Justice Division, Office of The Judge Advocate General (OTJAG).

After two years lecturing with American University, COL Solf rejoined the Corps in 1970 as a civilian employee. Over the next ten years, he served as Chief of the International Law Team in the International Affairs Division, OTJAG, and later as chief of that division. During this period, he served as a U.S. delegate to the International Committee of the Red Cross (ICRC) Conference of Government Experts on Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts. He also served as Chairman of the U.S. delegation to the ICRC Meeting of Experts on Signaling and Identification Systems for Medical Transports by Land and Sea.

He was a representative of the United States to all four of the diplomatic conferences that prepared the 1977 Protocols Additional to the 1949 Geneva Conventions. After his successful efforts in completing the Protocol negotiations, he returned to Washington and was appointed the Special Assistant to The Judge Advocate General for Law of War Matters. Having been instrumental in promoting law of war programs throughout the Department of Defense, COL Solf again retired in August 1979.

In addition to teaching at American University, COL Solf wrote numerous scholarly articles. He also served as a director of several international law societies, and was active in the International Law Section of the American Bar Association and the Federal Bar Association.

[*] This lecture is an edited transcript of a lecture delivered on 5 March 2008 by COL (Retired) Marc L. Warren to members of the staff and faculty, distinguished guests, and officers attending the 56th Graduate Course at The Judge Advocate General's Legal Center and School (TJAGLCS), Charlottesville, Virginia.

Colonel Marc Warren was appointed as the FAA's Deputy Chief Counsel for Operations in November 2007. He assists the Chief Counsel in overseeing all aspects of the FAA's legal activities with special focus on nationwide enforcement, airports and environmental, personnel and labor law, and Regional and Center Counsel office activities.

A native of Florida, COL Warren received both a B.A. (1978) and a J.D. (1981, with honors) from the University of Florida; LL.M., 1993, TJAGSA, Charlottesville, Va.; and Master of Strategic Studies, 2002, U.S. Army War College, Carlisle Barracks, Pa. He is a member of the bars of Florida and the U.S. Supreme Court.

Prior to his FAA appointment, COL Warren served in the U.S. Army. Commissioned as an ROTC Distinguished Military Graduate in 1979, his military

General Black and Mr. Cohen, general officers, distinguished guests, fellow members of the Regiment, ladies and gentlemen, it is a great pleasure to be with you today. I appreciate the kind invitation to speak with you, and I appreciate the hospitality of the students, faculty, and staff of the Legal Center and School. General Black, thank you so much for this honor.

It is always a pleasure to come home to Charlottesville. I am honored to be here and I am particularly honored to be associated with Colonel Wally Solf, an officer, gentleman, and scholar of the first order who envisioned and championed the Department of Defense (DOD) Law of War Program. If Dave Graham is the father of operational law, Wally Solf is one of its grandfathers.

I hope to deliver a memorable lecture and the "best ever" Solf-Warren lecture. I know it can never compare to the one given by William H. Taft IV, former Legal Adviser of the Department of State, who was interrupted while at the podium by the sudden onset of a violent stomach flu. I don't want it to be that memorable.

Today, I will talk about the work of Judge Advocates in the first year or so of Operation Iraqi Freedom. During my tenure in Iraq with V Corps and Combined Joint Task Force-7 (CJTF-7), we were prematurely congratulated for a mission accomplished and excoriated for Abu Ghraib. For CJTF-7, the latter largely eclipsed the former. And the great and historic work done by Judge Advocates that first year has not gotten the positive attention it merits.

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schooling includes the Infantry Officer Basic Course; Judge Advocate Officer Basic, Advanced and Graduate Courses; Command and General Staff College; U.S. Army War College; and Airborne, Air Assault, Jumpmaster, Pathfinder, and High Risk Survival, Evasion, Resistance and Escape (SERE) Schools.

In the JAG Corps, he served as the Special Assistant to The Judge Advocate General and as the Staff Judge Advocate (SJA) for Combined Joint Task Force 7/Multi-National Forces in Iraq, V Corps in Iraq and Germany, and the 101st Airborne Division (Air Assault). He was the Legal Advisor for the worldwide activities of the Joint Special Operations Command, and Regimental Judge Advocate for the 11th Armored Cavalry Regiment. He served in numerous other assignments in the United States, Germany, Grenada, Bosnia, Kuwait, and Iraq, including Instructor in the International and Operational Law Department of TJAGSA.

His awards and decorations include the Distinguished Service Medal, Defense Superior Service Medal, Legion of Merit, Bronze Star Medal, Defense Meritorious Medal, and Meritorious Service Medal.

I've organized this presentation into five areas that I call the myths concerning the first year in Iraq, after which I will offer some conclusions. These are only my personal perspectives, based on my experiences and perceptions as a Soldier and nothing more. I've intentionally refrained from using slides or photos, because I do not want this to be a military style briefing or travelogue. Much has been written about some of the events I've been involved in and some of what has been reported is accurate. Much of it is not. If some of what I say may differ from what you've read or heard, and if you have questions about that, please ask me.

I will address, and attempt to refute, each of the five myths in turn, but I think it is fair to ask how they became widespread at the least and commonly accepted as fact at the most.

First, it is obvious that the war in Iraq did not go as planned. Of course, this can and often does happen in a war. Once the hounds of war are unleashed, they go where they want to go, despite our assumptions and efforts to the contrary. Speaking of assumptions, it seems that we assumed the worst about Iraq's capabilities and intentions in deciding whether to go to war, and assumed the best case as to what would happen once we crossed the LD.[1]

In fairness, the Vietnam and Somalia experiences notwithstanding, our recent operations in Grenada, Panama, the first Gulf War, and Kosovo achieved relatively rapid success at modest cost. We got accustomed to winning. The failure to win quickly in Iraq caused many observers to look more for scapegoats than root causes. These myths became convenient to those who wanted to distance themselves from that first year, who wanted to criticize the decision to go to war in the first place, or who wanted to propose a fresh start or a new strategy, but without looking too deeply at what really happened in the first year and why.

As almost always happens, the commanders and Soldiers on the ground became the easy and convenient objects of mythology—but not

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[1] Line of Departure: "1. In land warfare, a line designated to coordinate the departure of attack elements. 2. In amphibious warfare, a suitably marked offshore coordinating line to assist assault craft to land on designated beaches at scheduled times." JOINT CHIEFS OF STAFF, JOINT PUB. 1-02, DOD DICTIONARY OF MILITARY AND ASSOCIATED TERMS 314 (12 Apr. 2001, as amended through 8 May 2008).

in a positive way in this instance. CJTF-7 became a particular target of some special interest groups, politicians, and the media. It was an organization with no patron or constituency, a temporary and short term amalgam of a headquarters. Unlike an Army corps or division, it had no alumni base, no history, no future, and no defenders. It never even got a patch. It has not had the benefit of study, only scrutiny and investigation. There has, to my knowledge, been no meaningful after-action review or lessons learned conference on CJTF-7. Even the Army's official history of the first year in Iraq, *On Point II*, was delayed in publication because of the possibility of affecting courts-martial arising from the Abu Ghraib debacle.

CJTF-7 was critically under-resourced, never at more than fifty percent strength. It was built on a Corps headquarters (minus) and by itself did the work now done by MNF-I, MNC-I, MNSTC-I, and TF-134,[2] all the while in direct support of the Coalition Provisional Authority (the CPA). CJTF-7 envisioned, justified, and built its successor organizations and the command, control, and administrative architecture and processes now in Iraq; and, by the way, fought a war as the senior joint and combined headquarters. By analogy, building an airplane in flight would have been easy. While building the plane, CJTF-7 was also writing the pilot and instruction manuals while up in the air, and taking a lot of flak at the same time. It was placed in an impossible relation with the CPA that fractured unity of command and made unity of effort impossible. It was the odd man in the middle between the Army and Marine divisions beneath it and Central Command above it. Worse, as a joint command, it could expect no defense from the services. It was the Task Force Smith of the new millennium—out-manned, out-gunned, and left to die in the field.

The Abu Ghraib scandal engulfed the headquarters in the late spring of 2004, diluting its focus and sapping its strength. This happened at the same time that Sadr's Shiite militia attacked Coalition forces, the Sunni insurgency exploded, Al Qaeda in Iraq emerged, Iranian adventurism increased, and key actions had to be taken to end the occupation, disestablish the CPA, and enable the Interim Iraqi Government.

CJTF-7 went out of existence in May 2004. There was nothing to be gained by any remaining headquarters or the services attempting to

[2] Multi-National Forces Iraq, Multi-National Corps Iraq, Multi-National Security Transition Command Iraq, and Task Force 134.

clarify CJTF-7's positions, policies, or responsibilities; correct inaccuracies made in the media about CJTF-7; or simply tell the CJTF-7 story. Contrast the situation with what occurs when there are unfavorable allegations made about the Marine Corps, for example—the effort to at least correct, if not shape, the public record is enormous. CJTF-7's leaders could not defend it, or themselves for that matter, for a couple of years after its disestablishment. They were the object of investigations and congressional hearings, and actual or potential witnesses in courts-martial, and thus constrained from public statements to clarify or explain their actions. Certainly, their situation and active duty status made writing self-serving books, participating in speaking tours, and interacting with many special interest groups an impossibility.

The myths were gleefully perpetuated by some special interest groups that had an actual economic or perceived moral agenda to assume the worst about the U.S. military. They were aided by some people, some of whom who had served in uniform, who should have known better. In some cases, the ulterior motives of these special interest groups should have been clear as they announced conferences on their websites that were to be held in places like Havana, Cuba, or trumpeted "war crimes" indictments against U.S. leaders for everything from global warming to Hurricane Katrina, and from the AIDS epidemic to systematic detainee abuse in Iraq, Afghanistan, and Guantanamo. In extreme cases, some of them are party to "lawfare" waged against the United States, twisting legal principles, making outrageous assertions, and abusing legal process to bring lawsuits or make requests for prosecution of U.S. civilian leaders and military personnel for alleged crimes.

However, our own government is not without blame. For example, there was a failure to adequately plan, execute, and resource the occupation of Iraq; a failure to stick to a condition-based rather than an essentially arbitrary end to occupation; a failure to defer to the advice and experience of the military, including senior Judge Advocates; a failure to follow the letter and spirit of the law of war by not setting universal interrogation and detainee treatment standards for U.S. forces on the battlefield, whether special operations, conventional, or non-DOD forces; and a failure to categorically prohibit detainee abuse, even if committed by non-DOD forces in urgent circumstances and arguably not rising to the level of torture. In some cases, our government deserved to be criticized and sued, whether by special interests or others.

With regard to detainee abuse and interrogation practices in Iraq, there were a series of flawed and very public investigations, from Taguba to Fay-Jones, Schlesinger to Church, that have been at best diffused and incomplete. The very nature of multiple investigations means that they create enough gaps, seams, and inconsistencies to fuel a veritable cottage industry of conspiracy theorists. At least one of the investigations is simply a compilation of the others and repeats some of their incorrect information. Another kept no record of interviews.

The investigations failed to address some of the real root causes of the problem, such as the lack of relevant doctrine and training afforded to military intelligence interrogators; the absence of sufficient capable Military Police Corps detention and correction expertise during the first year in Iraq; the failure of Central Command to plan for, resource, and execute detention and interrogation operations in Iraq, even after previous experience in Afghanistan portended many of the same problems that were later repeated in Iraq; and the broad interrogation authorities granted to some special operations and non-DOD forces, neither of which were under the command and control of CJTF-7. The most thorough investigation on the topic has not been publicly released, even in a redacted form, because it deals with professional responsibility. Notably and sadly, the one common conclusion of the investigations—that there was no systematic practice or command policy of abuse by the military in Iraq—has been lost in the noise.

Instead, investigative reports were frequently prematurely released and briefed to Congress and the media, where they were dissected for sound bites and political advantage, and triggered a demand for more hearings, more information, and media opportunities. Leaders were hauled before cameras, editorial boards, and circus-style congressional hearings, and often forced to answer questions before facts were fully known. To some degree, this may have been inevitable as Abu Ghraib created what some have described as the perfect storm, and earnest military officers were unarmed opponents in battles with Capitol Hill and the media.

Regardless of the origin, the myths were born. The first myth is that there was uncertainty or confusion as to whether the Geneva Conventions applied in Iraq. From my perspective, there was never any uncertainty or confusion, at least on the part of senior commanders and their staffs. The war in Iraq was an international armed conflict between two High Contracting Parties, followed by a state of belligerent

occupation. The Geneva Conventions applied as a matter of law. Notwithstanding the legal positions taken by some Executive Branch lawyers on issues pertaining to interrogations, detentions, and renditions, Judge Advocates in Iraq were clear on the point that the Geneva Conventions applied and had to be adhered to. There were individual failures to apply them, but none were a matter of command policy. The Geneva Conventions were referenced in numerous operations plans, orders, policies, and standard operating procedures (SOPs) issued by CENTCOM,[3] CFLCC,[4] V Corps, and CJTF-7. In his 6 September 2003 letter to the International Committee of the Red Cross (ICRC), the CJTF-7 commander wrote, "Coalition Forces remain committed to adherence to the spirit and letter of the Geneva Conventions."

The principles of the Geneva Conventions are the bedrock of mandatory training for all Soldiers and Marines, and they are the basis of the "Soldiers' Rules" that are taught in basic training. Law of war refresher training was required as part of pre-combat training. In several exercises conducted before the war, considerable effort was put into training to apply the law of war in targeting decisions and in the rules of engagement, the ROE. Starting with the ROE development conference in London in November 2002, much attention was paid to methodologies and modeling tools to try to estimate and minimize collateral damage. The control of fires was a major focus of exercises in Poland in October 2002 and in Kuwait in November and December 2002. Judge Advocates were placed in all corps and division level (and many brigade-level) fire centers to assist in the clearance of fires by ensuring compliance with the collateral damage methodologies, ROE, and law of war. Within V Corps, Judge Advocates were placed down to the Military Police (MP) battalion level to help resolve prisoner of war and detainee issues.

Although the assumption that Iraqi forces would capitulate *en masse* never became a reality, the considerable effort that went into the detailed planning for capitulated forces was not wasted. A key point in the planning was that these forces enjoyed the legal status of prisoners of war and the Third Geneva Convention was a well-briefed and well-understood topic in the headquarters. At the start of the war, one of the first fragmentary orders (FRAGOs) issued by V Corps, Order Number 007, dealt with prisoners and detainees. It cited the Third and Fourth Geneva Conventions and established a review and release mechanism for

[3] United States Central Command.
[4] Coalition Forces Land Component Command.

detainees that exceeded the requirements of the Fourth Convention and adopted best practices from Haiti and Kosovo, including a review of all detentions by a Judge Advocate. Of course, this was the first large-scale implementation of the Fourth Convention, new in 1949, and the sheer number of detainees would overwhelm our process. Regardless, in our frequent interaction with the ICRC, there was never any dispute over the legal applicability of the Conventions, only in our ability to implement them completely.

This myth of ambiguity was advanced by Soldiers who, facing court-martial for detainee abuse, asserted that they were confused over the rules (or, for that matter, who raised the defense of superior orders or command policy to justify their actions). Their assertions have been extensively covered and amplified in the media, and are the stuff of books and movies. The fact that the assertions have been spectacularly unsuccessful, despite the opportunity of extensive pre-trial discovery to uncover any supporting evidence, has been much less reported. But in fairness there is a point to be made concerning the possibility of confusion at the Soldiers' level. There were Soldiers who served in Afghanistan where rules and principles were relaxed, and then redeployed to Iraq where the Geneva Conventions fully applied. There were also Soldiers who interacted with non-DOD forces who were apparently operating under relaxed rules and principles, even in Iraq. So, I think it is possible that some at the junior level might have been confused about the applicability of the Geneva Conventions, at least until they received the refresher training on the law of war that was mandated by CJTF-7. But none of those Soldiers should have reasonably believed that detainee abuse was ever authorized, and any who had questions should have sought clarification from a responsible leader.

More broadly, our government should have never deviated from the long-standing policy—championed by Wally Solf—that our Forces will apply the law of war, regardless of how a conflict is characterized, and our Army has since taken strong steps to reestablish this position and inculcate it into our training, doctrine, and culture. Over objections from some within our government, the Army—even before the *Hamdan* decision[5]—rightly insisted that the principles of Common Article 3 of the Geneva Conventions remain as the minimum standards for the treatment

[5] Hamdan v. Rumsfeld, 548 U.S. 557 (2006) (holding that Common Article 3 of the Geneva Conventions applies to Al Qaeda detainees during the Global War on Terror).

of all prisoners, regardless of the context of their captivity, unless higher standards apply.

The second myth is that the occupation of Iraq was not anticipated. The occupation was certainly anticipated at the level of the operating forces. However, higher-level planning was inadequate or did not occur, strategic policy decisions were not timely made, and the requirements for occupation were not adequately resourced. The problem was not in failing to forecast the occupation as governed by the Fourth Convention; it was in failing to set the conditions for its meaningful execution. The situation was analogous to the dog chasing the car. The real difficulty comes when he catches it.

In the Victory Scrimmage exercise and its follow-on before the war, V Corps war-gamed what we termed "transitional occupation" issues. By this I mean problems such as rioters, criminal conduct, looting, humanitarian relief requirements, and civilian population movement that would impede offensive operations as our forces moved through Iraqi territory. These issues so concerned the Corps commander, General Scott Wallace, that he directed an immediate follow-on exercise in Grafenwoehr to try to develop responses to the problems.

The result was stunning in several respects. First, it was clear that transitional occupation issues could appreciably slow offensive forces and potentially require substantial additional forces to deal with them. Unfortunately, it was also clear that these additional forces did not exist. The Corps had developed a Time Phased Force Deployment List, called a TPFDL, over the past year of exercises and mission analyses. The TPFDL identifies the amount and flow of forces necessary to accomplish the mission. In Grafenwoehr, we learned that the Corps TPFDL had been scrapped by DOD and replaced by a much smaller force. The Corps commander was deeply concerned about the reduction in combat power. The reduction meant that the Corps commander had to do a "rolling start" of the ground offensive with forces available and with the expectation that additional divisions would arrive over time, instead of being able to mass all of his forces at once. The Corps commander was also concerned, and I was deeply concerned, about the cuts in combat support and combat service support forces, particularly MP units.

Second, Victory Scrimmage and its follow-on demonstrated a potentially huge planning and capability deficit if the assumptions concerning what we called Phase 4, the phase of the operation after

decisive combat operations, proved to be invalid. These assumptions were premised on the belief that many Iraqi military forces would capitulate, that is surrender *en masse* without a fight, and would be available to serve as a constabulary or security force; that Iraq's physical and social infrastructure would remain intact; and that a capable interim Iraqi government, probably under Ahmed Chalabi, would quickly emerge. If these assumptions were invalid (and, of course, every one of them proved to be invalid), and if our forces encountered problems like those identified in Victory Scrimmage (as, of course, we did), it was clear that we needed to plan for and resource a sustained occupation.

Accordingly, V Corps dutifully identified numerous issues and requirements, and sent them up to higher headquarters. Some of our subordinate divisions, particularly 3d Infantry Division, did the same. In the legal arena, these included requests for decisions on what law was to be applied in Iraq, what parts of the Iraqi Penal Code could be suspended in accordance with the terms of the Fourth Convention, whether we should remove Iraqi judges from the bench and establish occupation courts convened by commanders with military judges, and what the occupation proclamation and ordinances should say. On a basic level, we asked for an Iraq Country Law Study and a translated copy of the Iraqi Penal Code. These questions and requests were received sympathetically by our higher headquarters, CFLCC in Kuwait, and the CFLCC Staff Judge Advocate (SJA), COL Dick Gordon, vigorously raised similar issues and questions, and joined us in our requests until we actually entered Iraq. Unfortunately, the answer we received was that there was a dedicated Phase 4 planning cell at CFLCC, CENTCOM, and in Washington, and that all of these matters were being addressed at "the National and Coalition level."

The Corps commander became so concerned about what was—or wasn't—being done at the Washington level, that he sent our civilian political advisor to D.C. to sit in on the meetings. Her report was that interagency planning for Phase 4 was underway, but that it would not be called an "occupation." We would not be occupiers, but "liberators" and "the O word" was not to be used at all. Of course, this was ludicrous, as occupation is a fact and the Fourth Geneva Convention and the older Hague Regulations establish the rights and obligations of an occupier as a matter of law. This fact cannot be wished away or dismissed by using the euphemism of liberator. On the topic of the Iraqi Penal Code, we did not obtain an official version until we were in Iraq, and then thanks to

CLAMO.[6] In the interim, one of our V Corps Judge Advocates, who happened to have been an Arabic linguist, checked out a copy from the Kuwait City public library and began the tedious task of translating the Code into English.

To make matters worse, the Corps's G-5, the Civil Affairs officer, had a heart attack in Grafenwoehr and could neither continue in the exercise nor deploy to Kuwait, then on to Iraq. He was never replaced by a civil affairs officer and the position of G-5 was instead filled by our G-1, a very competent officer, but a personnel specialist unschooled and inexperienced in Civil Affairs. Another deficiency existed in the Provost Marshal section. Until several months into the occupation, the senior Military Police officer on the Corps and CJTF-7 staff was a Major.

In January 2003, V Corps held a legal conference in Heidelberg to examine the ROE, targeting, detainees, and occupation and law of war issues generally. The Corps commander spoke to the assembly of Judge Advocates, including the SJAs of the Corps' subordinate wartime divisions. Also in January in Heidelberg, we hosted a conference with an Israeli Judge Advocate who had real-world experience in the administration of occupied territory. These conferences augmented research on occupation law, including the study of materials from the Army War College and the Center for Military History, on U.S. experiences after World War II.

Upon our return to Kuwait in February 2003, planning for the occupation continued, albeit in a vacuum. The SJA section gave the Corps commander a lengthy briefing on the rights and responsibilities of an occupier. At the end, we identified numerous issues concerning which we required information and decisions. The Corps commander directed the staff to coordinate with the Office of Reconstruction and Humanitarian Assistance, ORHA, which had recently established an element in Kuwait City. The ORHA was the predecessor to the CPA. We did so and were beyond sorely disappointed, we were simply stunned. They had done little analysis, had devoted few resources to the effort, and were way behind us in their thought process. In fairness, ORHA was designed for consequence management, not for the administration of occupied territory. Instead, it was their belief—really a hope—that "the interagency" (an agency, by the way that I've looked for

[6] The Center for Law and Military Operations at The Judge Advocate General's Legal Center & School, Charlottesville, Va.

in Washington, but been unable to find) would issue the clear policy decisions, *deus ex machina*-style, that we so desperately needed.

The third myth is that looting and lawlessness had not been anticipated. This probability had been addressed in the Victory Scrimmage and follow-on exercises. I had seen looting by civilians in prior military operations, even in Grenada in 1983 and in Kuwait in the first Gulf War. As an instructor at the Army JAG School, I had studied what happened in Panama, where looting by civilians took place even during military operations. It is a consequence of an authority vacuum and occurs when the lights go out and the police are off the street.

But in Iraq we did not know that Saddam had emptied the prisons and jails, except for political prisoners, and every thug in the country would be back on the block. This caused untold problems as our troops not only captured prisoners of war and what we later called insurgents, but also caught thousands of common criminals. Some were detained in the act of committing violent crimes. Some were turned in after the acts by locals, some were convicted criminals who had been granted amnesty, some were probably innocent of any wrongdoing and unjustly accused by a citizen holding a grudge, but the result was a huge influx of common law prisoners, what we would term criminal detainees, with precious few places to hold them, Soldiers to guard them, or courts to try them. The problem was compounded by Soldiers using Prisoner of War capture cards to document the capture of these persons; there were cards with "murderer" or "rapist" written on them and no more information.

In the march to Baghdad, V Corps *had* issued orders regarding procedures and warnings at checkpoints (after a terrible incident early on in which an entire family was killed as their van approached a checkpoint without slowing down, despite warning shots); cordon and search operations; curfews; weapons, explosives, and fuel possession controls; and the use of force against looters. The problem was that these were all issued as necessary at the tactical level and not as part of any cohesive plan. Efforts to try to address the problem in a comprehensive way were thwarted by a lack of fundamental policy decisions at a higher level. For example, an Occupation Proclamation and orders to civilians had been staffed, drafted, printed, and pre-positioned, but no order was ever given to release them.

Instead, actions were taken in accordance with the commander's intent using the Fourth Geneva Convention as a guide. I went on the

radio in Baghdad to order judges and court personnel to return to work. Denied the ability to convene occupation courts by CPA, Army and Marine Judge Advocates and Civil Affairs Soldiers went all over the country to meet with judges, coax them to the bench, and reestablish regular court sessions. This effort, a rudimentary rule of law program, was enthusiastically supported by commanders, who saw the reopening of the courts as an essential aspect of restoring stability, security, and public confidence. Judge Advocates routinely went to Iraqi courts, and even arranged for and executed payroll payments for judges and other Ministry of Justice personnel, and were under fire on a number of occasions as they did it. Later, Judge Advocates at the corps, division, and brigade levels created and staffed Judicial Reconstruction Assistance Teams (called JRATs) and Ministry of Justice Offices (called MOJOs) and for almost a year managed the Baghdad and Mosul court dockets.

There were few local police, no prisons, and almost no operating jails. During the intelligence preparation of the battlefield (IPB) process, our intelligence assets had an almost total focus on two things: enemy order of battle and WMD.[7] Early in the war, I became involved in the analysis of an order directing us to seize a prison in order to safeguard some political prisoners who were believed to have information about WMD. Despite the intelligence focus on the prisoners and their information, it turned out that the prison no longer existed; it had been looted and razed down to the foundation, like virtually every other prison in the country, after Saddam had issued his general amnesty in November 2002. The result was that all the criminals in a country of twenty-six million people were on the street and, until after we entered Iraq, we neither knew that nor did we know that there were almost no facilities available to hold anyone we caught.

In Baghdad, in addition to the large numbers of detainees, there was inadequate troop strength to effectively control the city. The 3d Infantry Division had reached its culminating point. It had fought all the way to Baghdad and was exhausted; it just had little energy left to detain looters or guard key infrastructure. Orders were issued to protect museums, courthouses, police stations, power and water plants, and public records holding areas, but there were simply not enough troops to go around. Even when troops were available, they frankly did not always follow through. I would often go out to key facilities to check on them, particularly courthouses and police stations. In the early days, we would

[7] Weapon of mass destruction.

go wherever we wanted to go in Baghdad, usually with just two Humvees and a small detail, almost all Judge Advocates and paralegal Noncommissioned Officers (NCOs) and Soldiers. Despite orders having been issued to secure the buildings, there were often no Soldiers there.

In the case of courthouses, we unilaterally deputized court personnel as armed court police to guard the buildings and records. In the main public records repository building in Baghdad, where property and other records were stored, we walked right in through unlocked unguarded doors and discovered that fires had been set in the document storage stacks. Courthouses, public records repositories, and police stations were prime targets for arsonists.

We were spread thin in the legal area. Our Corps SJA section was the foundation of the CJTF-7 legal section and had continuing responsibilities for legal support and services for the former V Corps area in Germany. My Deputy SJA had to remain in Heidelberg with the V Corps Rear command structure. Our request for Reserve augmentation in Germany had been denied, and the decision was not revisited until 2004. (When V Corps deployed from Germany, its higher headquarters were focused on, preoccupied by, and husbanding resources for their potential role in the "Northern Option," the invasion of Iraq from Turkey that never transpired.)

In the summer of 2003, as legal issues skyrocketed due to demands of occupation, our Reserve augmentation in Iraq actually shrank. The personnel planning assumptions that the war would be over in the summer resulted in the draw-down of legal support. It was like the stories of mobilization before World War I, only in reverse. We could see what needed to be done and the need for more people, but the system was on automatic, sending mobilized reservists home. Concurrently, the Joint Manning Document (JMD) for CJTF-7 was being developed. I was surprised that V Corps was the base, but shocked at the personnel estimate for the size of the legal section: four attorneys and two NCOs—six total personnel for the entire headquarters! The V Corps leadership, including the Corps commander, became involved to correct this and the JMD grew, but we still had to augment the JMD with V Corps assets, the V Corps Augmentation Package, in order to have minimum capability.

At the same time, the demand for Judge Advocates was going through the roof. Early on, Judge Advocates essentially did the intellectual heavy lifting for the J-5 section and did almost all the early

work on reconciliation. When a rash of kidnappings and major crimes hit Baghdad, V Corps formed Task Force Vigilant Justice with the SJA and 18th MP Brigade commander as co-leads to target organized crime in Baghdad. The Task Force ran some raids of modest success and was then given a nation-wide charter and renamed the Special Prosecutions Task Force, with a concentration on counter-smuggling efforts off the coast of Basra. It was eventually turned over to CPA as a combined and interagency Task Force. Based on cases built by the Task Force, Iraqi Judges issued orders to seize oil tankers carrying smuggled oil and Judge Advocates fast-roped from hovering helicopters to serve the orders and impound the ships. Less exciting, but important, was the fact that Judge Advocates ran the rewards program in Iraq, which paid out a great deal of money for wanted persons and information, and for specified weapons, such as MANPADS.[8]

There was much debate about whether U.S. Forces should have shot and killed civilian looters. Aside from the fact that most U.S. troopers simply would not shoot an unarmed civilian who was not threatening them, our ROE would not allow it. The ROE allowed Soldiers and Marines to use deadly force to accomplish the mission against lawful targets (combatants), to protect themselves and others, and to protect designated property—but not to shoot a fellow walking down the street with a TV set.

In fact, Judge Advocates worked hard to find innovative ways to compensate civilians who had been inadvertently injured by our troops. The Foreign Claims Act would not allow the payment of claims arising from broadly construed combat activities, such as most checkpoint shootings. Judge Advocates convinced Central Command to reverse its position prohibiting *solatia* or gratuitous payments, and helped draft the enabling language for the newly created Commanders' Emergency Response Program so as to allow payments for unintended combat damage. Judge Advocates also established a meaningful foreign claims program after advocating that the Army, not the Air Force with its limited resources in country, should have single-service claims responsibility for Iraq.

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[8] MANPADS: Man-Portable Air Defense System. *See generally* Fed'n of Am. Scientists, *Man-Portable Air Defense System (MANPADS) Proliferation*, http://www.fas.org/programs/ssp/asmp/MANPADS.html (last visited July 15, 2008).

The fourth myth is that there should have been greater interagency involvement in Iraq. This myth is perhaps the most commonly accepted as true. In fact, it is false, in my view. There should have been less non-military presence in Iraq in the first year. There should have been more interagency planning before the war and a more responsive and cohesive interagency decision-making process before and during the war. But, in Iraq, the situation would have been drastically better if the military had simply established a military government in order to stabilize the country, restore security, reestablish infrastructure and institutions, and allow for the insertion of civilian experts and the reemergence of an Iraqi government as conditions permitted. We would have to endure the propaganda that we were occupiers, but did we really sidestep that with the CPA?

Besides, we have the obligations of an occupier regardless of what we call the situation or what instrument we use to administer the territory. By establishing the CPA, and placing CJTF-7 in direct support of the CPA, we violated the military maxims of unity of command and unity of effort. It was never clear who was in charge in Iraq, nor was it clear as to the relative roles and responsibilities of the CPA and CJTF-7. I was there, and saw General Sanchez daily and Ambassador Bremer several times per week, and never could figure it out. What was obvious was that there was a diffusion of effort and the squandering of several golden months after a decisive military victory within which time most of the Iraqi population craved firm direction and before any insurgency could meaningfully develop.

Instead, CPA concentrated on a wide range of activity, such as developing the Iraqi stock market, reestablishing symphony orchestras and arts programs, implementing Miranda-style rights warnings and building a defense bar, and promoting women's rights. All of these were nice things to do, but none of them contributed to stability and security. At best, many of the CPA's activities, even if successes, were irrelevant. Many were set-backs. CPA's efforts to rebuild the Iraqi police force and Army were total failures; CJTF-7 had to take over the programs. At worst, some of the CPA's directives were a blatant interference with the military's war-fighting mission. These included orders to release dangerous detainees because of political considerations, and extensive involvement in events in Fallujah in April 2004, including mandating peace talks and culminating in Ambassador Bremer directing General Sanchez and General Abizaid, who was then present in Baghdad, to call off the attack on the city.

Contributing to the CPA's disfunctionality was the near constant turn-over of personnel, including principals. For example, there were four senior advisors to the Iraqi Ministry of Justice during my tenure, not counting acting advisors who filled the gaps. This meant new philosophies, new approaches, and of course redevelopment of personal bonds among all involved parties, including Iraqi ministers and judges.

Also contributing was the secure video-teleconference, or SVTC. This technology allowed for personal communication between Iraq and Washington. The unfortunate reality was that it did not contribute much to common situational awareness or informed decision-making. Rather, it led to confusion as it sometimes trumped the military orders process and led to decisions that were not analyzed or thought through, and not coordinated with the military units that would have to implement them. The SVTC enabled policy from within the Beltway to be instantaneously injected into a theater of war . . . and that is normally not a good thing.

The decision to disband the Iraqi Army is one example, made without consultation with the military commanders on the ground in Iraq. The de-Ba'athification policy is another. Based on our study of de-Nazification, we concluded that there should be a conduct, not status-based, policy that addressed former Ba'ath Party members. The goal was to quickly get the cop back on the beat, the teacher back in the classroom, and the municipal worker on the street. Judge Advocates developed a conduct-based policy, implemented through a Renunciation Agreement. General Wallace discussed it with retired General Jay Garner at ORHA, and the conduct-based approach and Renunciation Agreement were approved. We printed and distributed thousands of agreements, and implemented the policy. The policy told people to sign an agreement renouncing the Ba'ath Party, and promise to obey the law and get back to work. Essentially, get to work, but we're watching you and will remove bad actors over time. Less than ten days later, CPA announced its de-Ba'athification policy that took exactly the opposite tack; it was a pure status-based policy that took thousands of people out of the work force and disenfranchised them, and was done with absolutely no coordination with the commanders on the ground and no consideration of what was being done by the military—despite the fact that this decision would have a huge impact on law and order, security and stability, and reconciliation.

On the day Ambassador Bremer arrived in country, he announced that U.S. Forces would shoot to kill all looters. This announcement was

made without any coordination with the military in Iraq and no consideration of our ROE. Of course, our ROE rightly would not allow this and we had to expend considerable time and effort to issue clarifying orders and guidance to put this genie back in the bottle.

Another example of the chaffing between CJTF-7 and the CPA was the inability to agree that CENTCOM General Order Number 1, which among other things banned alcohol use and possession in Iraq, applied to CPA. This seems like a small issue, but it is a symptom of the lack of unity of, and confusion over, the chain of command. The CPA took the consistent position that the Order was not applicable, not only to its civilian employees, but to its military personnel.

A more significant difference involved private security contractors. CJTF-7 took a conservative, if not dim, view of armed security contractors. Our concern was that the use of armed security contractors potentially blurred the distinction between combatants and noncombatants; created command, control, and communications issues; and could cause law of war violations if the contractors were to use force offensively or otherwise directly contribute to the war effort by, for example, guarding lawful military objectives. The CPA, perhaps in a position born of necessity, took a much more expansive view, although sharing some of our concerns and suffering from the absence of a coherent national policy on the use and arming of security contractors.

There were bright spots in the CPA (its legal staff was brilliant). In general, however, it was a policy- and politics-laden bureaucracy that was a drain and distraction to the war effort. In sum, the CPA was more hurtful than helpful.

Myth number five is that U.S. Forces were ill-disciplined and that the abuse of detainees was systematic or the norm. This is perhaps the most widespread myth of the war. The truth is that U.S. Forces were disciplined and detainee abuse cases were few. Abu Ghraib was an awful and aberrant exception. It demonstrated the power of pictures and the impact of the Strategic Corporal. Most detainee abuse cases occurred at point of capture, where tempers run high, frequently after an IED[9] detonation or a firefight. The thresholds for classifying and reporting cases of detainee abuse were for a significant time very low in Iraq. After the Abu Ghraib photographs were turned over to the command, and

[9] Improvised explosive device.

before they were publicly known, I went to the ICRC delegates in Baghdad and informed them of the existence of the photographs, that the circumstances would be investigated and those responsible would be prosecuted, and that the command would tell the media about the abuse and about the existence of the photographs. By the way, CJTF-7 informed the media about the abuse and the photographs in January, some three months before the media frenzy ignited by their airing on *60 Minutes*. Although ashamed by the photographs, I was proud when the ICRC delegate told me, "You must be the only Army in the world that would do that."

Detainee abuse in Iraq, including the abuse at Abu Ghraib, occurred despite, and certainly not because of, military command policies and orders. In Iraq, General Sanchez repeatedly and consistently emphasized disciplined operations and compliance with the law of war, including the humane treatment of prisoners and detainees, in numerous policy memoranda and orders. There was no lack of guidance to Soldiers and Marines. There were, however, huge problems caused by the sheer numbers of detainees and the unexpected crush of common law criminals. Judge Advocates did everything in their power to ensure that detainees were treated humanely and in accordance with the law. In many cases, Judge Advocates personally intervened to ensure that military authorities provided detainees adequate food, water, hygiene, and shelter.

Early on, one of the first organizational tasks was to separate common law criminals, prisoners of war, and persons who were attacking Coalition Forces. In May 2003, we implemented CPA Apprehension Forms that required sworn statements from Soldiers and witnesses on the circumstances of capture. This was met with some pushback from commanders and Soldiers, but it was the right thing to do and helped ameliorate the situation. Using the model of the Fourth Geneva Convention, we classified detainees into two categories: security internee and criminal detainee. The former were those who had engaged in hostilities and who would be held until the conclusion of hostilities or otherwise earlier released, perhaps through a parole or release guarantor agreement; the latter were criminals who were held for trial or other disposition by the emerging Iraqi criminal justice system. The ICRC modified its capture cards to recognize the two categories of prisoner.

For those whose status was in doubt, we conducted Article 5 tribunals. When V Corps closed on Baghdad, we soon began tribunals

under Article 5 of the Third Geneva Convention for all of the High Value Detainees (HVDs), people like Tariq Aziz. The tribunals consisted of three Judge Advocates and concluded whether the prisoners were prisoners of war, security internees, or innocent civilians. None of the HVDs were deemed innocent civilians. There were some decisions that raised eye-brows, but nobody questioned the fact that we were obligated to hold the tribunals. It was understood that we did so because the Geneva Conventions required it.

During the summer of 2003, Judge Advocates organized Operation Clean Sweep, in which we brought in attorneys from commands all over the country and, joined by a former Iraqi judge, reviewed every single detainee's file to see if they could be released outright or turned over to the emerging Iraqi court system for a hearing. Also in the summer of 2003, CJTF-7 issued an order, nicknamed "The Mother of all FRAGOs," which established review and appeal boards as required by Article 78 of the Fourth Geneva Convention. Again, the process exceeded the requirements of the Fourth Convention.

Concurrently, CJTF-7 was struggling to characterize the MeK (the Mujahadeen-e-Khalq), several thousand Iranians who had operated from Iraq as a military force against Iran. The MeK were our only large scale capitulation—and they weren't even Iraqis! Unfortunately, they were on the U.S. list of terrorist organizations and we had to determine their status. Again, the Geneva Conventions were used as the standard and, after a year of interagency wrangling and debate, it was decided that they were simply "protected persons" under the Fourth Convention.

There was also debate over the legal status of Saddam Hussein. Although there were strong arguments to the contrary, CJTF-7 believed him to be a prisoner of war, which meant, among other things, that we were obligated to report his capture to the ICRC and allow the ICRC to visit him. Ultimately, CJTF-7 prevailed in this position and Saddam's status as a prisoner of war was publicly acknowledged and the ICRC visited him on numerous occasions. Of course, his status as a prisoner of war accorded him no immunity from prosecution for his pre-capture criminal offenses.

Judge Advocates envisioned, established, and chaired the Detention Working Group in July 2003, which brought together legal, MP, military intelligence (MI), medical, engineer, and CPA assets in order to try to bring fusion and order to the chaotic situation. The first "Detainee

Summit," held in August 2003 and chaired by a Judge Advocate, identified serious shortfalls in detention operations expertise and recommended requesting additional subject matter experts and the establishment of a Detention and Interrogations Task Force, commanded by a brigadier general. This requirement was not met until the creation of TF-134 in the spring of 2004. Recognizing that the command was about to be overwhelmed by detainee operations, CJTF-7 requested additional legal support for the detention and interrogation mission in the summer of 2003, as well as changes to the headquarters structure to provide attorneys to the Joint Interrogation and Debriefing Center at Abu Ghraib. These requests were not addressed until the formation of MNF-I and MNC-I in May 2004. In the interim, we created an additional legal support cell at Abu Ghraib, using attorneys and paralegals cobbled together from various sources.

Concerned about extra-judicial indefinite detention, Judge Advocates envisioned and championed Operation Wolverine, which proposed the trial of Iraqi insurgents engaging in unlawful combat. This led to the historic trials held before the Central Criminal Court of Iraq, ongoing today, that have helped reinvigorate the rule of law in Iraq. The genesis was an incident in which two 4th Infantry Division Soldiers had been captured at a checkpoint and then executed, their bodies dumped by the side of the road.

Lieutenant General Sanchez and I went out to the scene to view the bodies, and I recalled the number of times I had been involved in the investigation of law of war violations by the enemy, but without any process that would hold the perpetrators criminally accountable. We resolved that we should try violators of the law of war and proposed convening military commissions for that purpose. The proposal went all the way to DOD and it was decided instead to use the newly-established Central Criminal Court for that purpose. Judge Advocates and detailed Department of Justice attorneys invigorated the court and we canvassed all of the detainee files for cases amenable to prosecution. As you can imagine, we were faced with many files where there was enormous difficulty in turning classified intelligence information into evidence, and where there was a paucity of prosecutable information in the first place. However, we were able to start the process, get to trial, and eventually get convictions for the murder of Coalition Soldiers and Iraqi civilians.

This is a real point of pique for me because this great demonstration of the rule of law and the law of war in a combat zone has been

misrepresented by some as failing to follow the Geneva Conventions because, they claim, we characterized those prosecuted as "enemy combatants" in the manner of the Guantanamo prisoners. Nothing could be more wrong. The CJTF-7 never classified anyone as an "enemy combatant." What we did do was hold insurgents criminally accountable for their warlike acts committed without benefit of combatant immunity. They were still "protected persons" under the Fourth Geneva Convention, but they could be prosecuted because they were not lawful or privileged combatants; they did not meet the criteria of Article 4 of the Third Geneva Convention. In other words, we prosecuted unlawful combatants, a result not only clearly contemplated by Geneva, but a result reached only by strict adherence to the Third and Fourth Geneva Conventions.

Similarly, there has been much criticism of "many confusing" interrogation policies in CJTF-7. Here are the facts: there were two. The first was developed in September 2003 to regulate the interrogation approaches and techniques flowing in from Afghanistan and Guantanamo, many of which were based on techniques used to teach interrogation resistance in SERE[10] programs, and from non-DOD forces. Three weeks later, CJTF-7 implemented a second more restrictive interrogation policy that essentially mirrored the interrogation approaches in Army Field Manual 34-52 and added additional safeguards, approvals, and oversight mechanisms that made the CJTF-7 interrogation policy much more restrictive than the Field Manual. This fact has not prevented the media from asserting otherwise and essentially blurring Iraq, Afghanistan, and Guantanamo, and merging the actions of military and non-DoD forces.

On the topic of interrogations, CJTF-7 has become, in the words of the old Iraqi saying, the coat-hanger on which all the dirty laundry is hung. For example, a *Washington Post* editorial claimed that General Sanchez issued policies authorizing interrogation techniques "violating the Geneva Conventions, including painful shackling, sleep deprivation, and nudity." This is false. The CJTF-7 policies did not violate the Geneva Conventions, when used with the safeguards and oversight required by the policies. Moreover, the CJTF-7 interrogation policies never authorized, and would not allow, the use of shackling, sleep deprivation, or nudity (or the use of dogs for that matter) as interrogation

[10] SERE: Survival, Evasion, Resistance and Escape. Higher-level military SERE training involves instruction in resistance to interrogation techniques.

techniques. In fact, as was concluded by the Army's Chief Trial Judge in her exhaustive analysis of legal support to CJTF-7, had the CJTF-7 interrogation policies been followed, there would have been no abuses at Abu Ghraib. As an aside, while the entire Abu Ghraib incident is shameful and reprehensible, a point not commonly appreciated is that the individuals depicted being abused in the Abu Ghraib photographs were not security internees; they were criminal detainees, common criminals, who were not being (and would not be) interrogated in any event.

As I reflect back on what happened in Iraq, it is ironic that CJTF-7 has been blamed for so much. In so many respects, the media and many politicians went after the good guys. We certainly could have done some things better (for example, I wish that we had never issued the September 2003 interrogation policy), but by and large my experience was that good people were struggling to do the best they could under very difficult circumstances. Of course, there were individual lapses and those folks should be—and mostly have been—prosecuted or otherwise held to account.

So what does all of this mean for the future?

1. Disregard history at your peril. Decision-makers would have benefited from a thorough study of occupation history, particularly the history of occupation in Germany and the Far East after World War II. It would have informed them greatly and potentially avoided missteps about de-Ba'athification, restoration of law and order, and resources and decisions necessary to implement an effective occupation. They would have also benefited from an analysis of past counter-insurgency and "nation-building" operations, such as the U.S. occupation of the Philippines after the Spanish-American War, British counter-insurgency operations in Malaysia, U.S. military operations generally in Central America in the last century, and British operations in Northern Ireland. Among the things they would have discovered is that patience and adaptability are essential, and that missteps and mistakes are inevitable but recoverable.

2. Recognize that the box exists for a reason. Sometimes thinking outside the box is not helpful. This is particularly the case with the law of war, which has developed over time for reasons of humanity and necessity and is grounded in pragmatism. Old law can still be good law. For example, the Geneva Conventions are neither quaint nor anachronistic. At a minimum, they can serve as guiding principles even

when not applicable as a matter of law. When they do apply as a matter of law, like in Iraq, they have demonstrated their utility and ability to be meaningfully implemented in the new millennium. In the area of special operations, "no borders, no boundaries" cannot mean "no law, no rules."

3. All who went before us were not fools. The principles of war and command, military doctrine, force ratios, troop to task ratios, and the military decision-making and orders processes all exist for a reason. Put another way, ignoring these things, either by senior military or civilian officials, is asking for trouble. In the legal arena, the long developed concept of legal technical channels is important. Use them. Every SJA needs an SJA and nobody involved in operations should be a solo practitioner. But watch out for commanders and staffs who try to push non-legal matters into legal technical channels.

4. The military is an indispensable tool for nation-building and modest rule of law activities are essential to establish security and stability. This has been demonstrated so frequently that it is amazing that the contrary view is still advanced.

5. Timely strategic policy decisions are necessary to enable and empower Soldiers and Marines on the ground. Once these are made, politicians should stay out of the fight.

6. You play as you practice. For the military, this means that exercises must not end with the defeat of the enemy's military forces and intelligence preparation of the battlefield must include an analysis of the capability of the systems of government and public administration, as well as the enemy's order of battle. We must put as much intellectual effort into planning for activities after decisive combat operations as we do into planning for fires and maneuver. This would include updating our doctrine and examining our resources and capabilities for civil administration, military government, and civil affairs in general.

7. There is a random spotlight of accountability for mistakes and misjudgments—whether real, exaggerated, or even fabricated. The fog of war in battle is nothing compared to the fog of politics on Capitol Hill. This is unfair and capricious, particularly to those of us who are political agnostics as professional Soldiers. But it is what it is and it always has been so. In the legal arena, there has developed an unforeseen dark underbelly to operational law, and that is the notion that the SJA in the field is the "Guarantor General," the one person in the command who is

somehow expected to have total awareness and perfect knowledge, to be read on to all activities, and to have the duty to identify, resolve, and report all problems. These are, of course, preposterous burdens, but consider the blocked advancement of Judge Advocates who served in Iraq and Afghanistan, despite having been selected by promotion boards, or study the case of the only officer to be court-martialed in the Haditha incident—the battalion JAG—and I think you will recognize the phenomenon.[11] Shakespeare wrote about the slings and arrows of outrageous fortune, and Teddy Roosevelt spoke of the man in the arena. I guess the point is that we need to concentrate on doing our duty and not waste time worrying about whether we'll be promoted (or whether we'll be hauled before Congress or a court-martial).

8. We cannot have different legal standards for Soldiers and non-DOD forces, or even for Soldiers operating in different operations or campaigns. It is too easy for the standards to be blurred and, as was the case with interrogation policies between Afghanistan and Iraq, to migrate (perhaps a better term is to metastasize). Concerning non-DOD forces, they may be "great Americans," but just because someone is wearing a suit or Oakley sunglasses does not mean they are smarter than you or your commander. Trust but verify and don't get "out-lawyered." There is no such agency as "the interagency" or "OGA." Get full names, insist that relationships and requirements be established in written orders from your higher military headquarters, keep good notes, and keep your higher headquarters informed—and not just through legal technical channels. Remember and remind your commanders that nothing stays a secret forever; it simply lies in ambush, waiting to emerge and attack at the worst possible time.

9. The difficult legal issues facing our operating forces, and the responsibilities placed on the shoulders of our uniformed legal advisors, merit an increase in the size and rank structure of our Judge Advocate General's Corps. Most unified command SJA offices should be substantially bigger and more capable. Despite some simply wrong assertions to the contrary, Judge Advocates are a respected and proper source for legal and policy advice at all levels, and their presence and role with the operating forces sends a powerful message about our

[11] Although charges were preferred against the battalion Judge Advocate, the convening authority dismissed the charges after an Article 32 investigation. *Charges Dropped for Two Marines in Haditha Case*, NPR.org, Aug. 9, 2007, http://www.npr.org/templates/story/story.php?storyId=12634743.

nation's commitment to the rule of law and to the law of war. At a minimum, some unified command SJAs and the Legal Advisor to the Chairman should be general or flag officers. The Judge Advocates General should be lieutenant generals at least, and it was heartening to see this recognized in recent legislation. Under no circumstances should The Judge Advocates General be subordinate to any department General Counsel.

10. Goldwater-Nichols[12] is a work in progress. There remains a significant lack of understanding of the relative roles and responsibilities of unified commands and task forces, and services and service components, particularly in the areas of discipline, investigations and reports, oversight, and responsibility for corrective action. This leads to inefficiencies, but also affords opportunities to obfuscate or shun responsibilities, with the typical result in this war being that the Army is left holding the bag for an act or omission over which it had no control and to which its only relation was that somebody involved in the matter at issue wore an Army uniform. With regard to investigations and oversight in general, I wish that we had devoted a small fraction of the resources we spent on investigating ourselves on addressing and resolving the problems in the first place.

Thank you very much for your attention and for your interest and scholarship. Thanks most of all to you and your families for your service.

[12] Goldwater-Nichols Department of Defense Reorganization Act of 1986, Pub. L. No. 99-433, 100 Stat. 992 (reworking the command structure of the U.S. military; among other changes, streamlined the chain of command between the President, Secretary of Defense, and combatant commanders).

SECOND GEORGE S. PRUGH LECTURE IN MILITARYLEGAL HISTORY[1]

HITLER'S COURTS: BETRAYAL OF THE RULE OF LAW IN NAZI GERMANY

JOSHUA M. GREENE[*]

Thank you for this honor of giving the second Major General George S. Prugh Lecture on Military Legal History. Given my lack of formal training in military legal history, it is an honor I do not deserve. But as George Burns once said, "I have arthritis and I don't deserve that either."

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[1] This is an edited transcript of a lecture delivered on 23 April 2008 by Mr. Joshua M. Greene to the members of the staff and faculty, distinguished guests, and officers attending the 56th Graduate Course at The Judge Advocate General's Legal Center and School, U.S. Army, Charlottesville, Va. The chair is named in honor of Major General (MG) George S. Prugh (1920–2006). This lecture included a screening of the lecturer's film "Hitler's Courts: Betrayal of the Rule of Law in Nazi Germany."

[*] After returning from thirteen years in Hindu monasteries, Mr. Joshua M. Greene became an author, filmmaker, and communications consultant specializing in religion and the peace process. Currently, he teaches in the Religion Department of Hofstra University and at the Jivamukti Yoga School in New York.

In 2000, his book *Witness: Voices from the Holocaust* (Simon & Schuster 2000) was made into a feature film for PBS and voted one of the best Holocaust films of all time by Facets Educational Media. His one-hour family special on cultural diversity "People" debuted at the United Nations, received an Emmy nomination, and has been incorporated into elementary and high school classes nationwide. He is a six-time recipient of TV Guide's Best Program of the Year award.

Mr. Greene's book *Justice at Dachau* (Random House 2003) traces the largest yet least known series of Nazi trials in history. The book was called "masterful" by *Publishers Weekly* and adapted to film by Discovery. His editorials on war crimes tribunals appear in newspapers and magazines internationally including the *Los Angeles Times,* the *International Herald Tribune*, and the London *Economist*. His biography *Here Comes the Sun: The Spiritual and Musical Journey of George Harrison* (John Wiley 2006) made the bestseller list. His most recent film for PBS was "Hitler's Courts," which explores the complicity of the German judiciary during the Nazi era.

Mr. Greene is a frequent lecturer. Keynotes have included the World Economic Forum, Microsoft, Harvard University Law School, the New York Public Library's Distinguished Authors series, and the Washington Holocaust Memorial Museum. He served as Director of Programming for Cablevision, the nation's sixth largest cable provider, and was Senior Vice President for Global Affairs at Ruder Finn, an international communications firm. In 2000 he was appointed Director of Strategic Planning for the United Nations World Peace Summit of Religious and Spiritual Leaders. He sits on the boards of the American Jewish Committee, the Holocaust Memorial and Educational Center of Nassau County, and the Coalition for Quality Children's Media. He lives with his family on Long Island.

The invitation to be here today prompted me to think about parallels between your career in the military and the calling I followed into Hindu monastic life. We're both up at 5:30 for PT—that's "prayer time" for me. Both paths involve interpreting laws which have far-reaching implications for others. And we both report to superior officers who think they are divinely inspired. There is an upside to our respective callings. We are, I believe, both motivated by selfless service—the term in the Sanskrit language of India is *bhakti*, literally, devotional service—and we derive a satisfaction, perhaps even a joy in that selfless service which is hard for people outside that experience to understand.

But we also share two downsides to our callings. One is a tendency to become so absorbed in our mission that we can sometimes forget to slow down and smell the roses. At the risk of sounding presumptuous, I'd like to encourage you to take the opportunity of being here at the JAG Legal Center and School not to overlook occasions to catch up with family and friends—and with yourselves as well. We humans seem to make our most meaningful contributions when we are stimulated by new experiences, and that means going outside the parameters of daily routines. My students at Hofstra, for example, are not allowed to quote Wikipedia as a source in their papers. I do that not only because it is poor scholarship but because I want them to get away from their computers and go to a place where serendipity can occur. When you peruse the shelves of a library, you come upon books and sources you never expected to find, and these can inspire very different ways of looking at a problem. That kind of serendipity doesn't happen as frequently online.

The other downside to our respective callings is that we can become tainted by the satisfaction of our mission, lured into believing that our way is the only right way. And that brings me to the subject of the film we are about to see.

Forty years ago this week, when I was seventeen and a freshman at the University of Wisconsin in Madison, I went to work as a reporter for the student paper. UW was a good school, but in those days students spent more time in the streets protesting the Vietnam War than they did in class studying. The Madison police force was using mace to disperse demonstrators, a chemical spray that had put a number of people in the hospital, and one of my first assignments was to write about it.

One day the editor-in-chief called me over and showed me the front page, and there was the lead article citing one Joshua Greene as writer. That was it for me, and apart from that thirteen-year detour through monastic life, I've been writing and making films about justice and injustice in one form or another ever since.

The Madison police were not bad people. They were church-goers, some had sons or daughters who were attending the university, and back then I could not understand their extreme reaction to student protestors. The reason became clear to me years later, and it was reinforced more recently by producing the film we are about to screen. The police, like many of the student protestors, simply were unwilling to see past their own priorities. They were fiercely loyal to their community, to their families and friends and those who saw things as they did—in other words, fiercely loyal to their own kind. They adhered to a narrow definition of the rule of law as anything which supported their sense of what is right, and anything different needed to be put down.

Let me be clear up front that I am no longer a romantic. My bellbottoms and love beads are safely stowed away in a closet, my wife keeps the only key, and she comes from a family of diehard Republicans. Her vigilance aside, I have done some writing and filmmaking about the Holocaust period and see now what I could not see as an idealistic college student: that there is nothing romantic about transgressing the law however convinced we are of possessing the Truth. Nor is there anything romantic about a government that suspends or subverts the rule of law under a pretext of emergency measures. Not only is it hypocritical to claim we compromise the law in order to defend the law, but it also doesn't work.

Why doesn't it work? We might look at the current recession as a parallel. To no small degree the current fiscal crisis owes its genesis to the corporate catastrophes of a few years ago. Those debacles led to a series of new laws called Sarbanes-Oxley[2] whose purpose, in theory, was tighter control of corporate behavior. In practice, however, the added laws did nothing to curtail malicious business habits. What they did was make white collar criminals more cunning in circumventing regulations. Laws by themselves do little to change people's hearts and a whole lot to make lawyers richer.

[2] The Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745.

"Hitler's Courts: Betrayal of the Rule of Law in Nazi Germany"[3] was produced at the behest of the good folk at Touro Law School on Long Island. Their purpose was to document the connection between the success of tyrants and the failure of lawyers and judges to defend the rule of law. The bottom line in this film is that our personal philosophies infiltrate and shape our professional behavior. Tell me who your heroes are, and I'll tell you something about how you practice law. Rule of law alone is insufficient. It must be coupled with men and women of impeccable character who can implement the law with integrity of purpose. Briefly, here is the story presented in the film.

In 1933, less than a month after being elected Chancellor, Adolf Hitler used the pretext of a fire in the Reichstag building to suspend constitutional law and place unlimited judicial authority in the hands of the government. The German legal system in the 1930s was quite sophisticated, but after the burning of the Reichstag—which was more than a symbolic destruction of Germany's Parliament—the vast majority of Germany's judiciary, more than 10,000 lawyers and judges, took an oath of personal loyalty to the Fuhrer. This set in motion the *Fuhrer prinzip*, the notion that Hitler now had absolute discretion to make any ruling whatsoever in the interests of the state, and that lesser fuhrers under him had similar discretion limited only by what the fuhrer above had told them to do.

Over the next twelve years, the Nazi party continued its subversion of constitutional safeguards until Germany's courts amounted to nothing more than tools for the implementation of National Socialism. Early in their subversion of law, Nazi officials established Special Courts to deal with anyone the party deemed an enemy of the Reich. In these courts there was no pretrial investigation, judges determined arbitrarily what evidence to consider, and there was no right of appeal. In retrospect, this would have been the time—while there was indeed still time—for men and women of good faith to stand up and say, "Wait a moment, we have a Constitution in this country, we have rules and laws that we will not see ignored." Why that did not happen may be a question more aptly addressed by psychologists than historians, but one explanation lies in the response Hitler offered to detractors. "This is," the Fuhrer promised, "only temporary. We are under attack by terrorists and need to suspend constitutional law." If any of this begins to sound familiar, it is.

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[3] HITLER'S COURTS: BETRAYAL OF THE RULE OF LAW IN NAZI GERMANY (Stories To Remember 2007).

"In this hour I am responsible for the fate of the German nation. Hence, I am the supreme Law Lord of the German people."
–Adolf Hitler, July 13, 1934

Once he succeeded in concentrating legal authority into his own hands, Hitler then had the tools for eliminating all those whom he deemed to be enemies of the Reich, most prominently Jews but also other minorities. On April 7, 1933, the German government enacted a law forbidding attorneys of non-Aryan descent from representing Aryan clients. If anyone dared to do so, their names were published in the press and their businesses boycotted. This decree was followed by others that incrementally deprived civil rights to these "enemies of the Reich."

In 1934, the government established the People's Court to try persons accused of political offenses. Eventually, the court came under the presidency of Roland Freisler, a Nazi of such extreme sentiments that he shocked even his fellow Nazi judges. Freisler was one of an echelon of senior German jurists who paved the way for the subversion of law in the 1930s. Others included Carl Schmitt, Hitler's legal theorist, a wealthy and ambitious conservative who described the Fuhrer as "Germany's Guardian of Justice," and Erwin Bumke, the man who drafted Hitler's emergency laws. These and other senior officials of Hitler's courts empowered police to disband organizations, seize assets, make arrests, and determine on their own initiative what constituted a threat to the State.

The Nuremberg Laws of 1935 allowed Hitler's courts the further liberty of condemning enemies of the State not for anything they had done but on the sole grounds of racial, ethnic, and religious type. These laws reflected Nazi preoccupation with "racial purity," an idea concocted from vague elements of religion, citizenship, and heredity. Since the laws defined Jews as racially impure, marriage between Jews and non-Jews would defile the race and was now prohibited. Resourceful judges found other applications for the Nuremberg Laws, by arguing for example that because Jews were no longer considered full human beings they did not qualify for legal rights. In effect, Jews and other minorities underwent a civil death long before millions met their physical death in the camps.

With the official declaration of war in 1939, Nazi lawmakers moved into high gear as thousands of so-called enemies of the Reich were arrested and tried. By 1939, roughly sixty percent of all law school

professors were Nazi appointees engaged in training a new generation of lawmakers: young zealots raised and educated under Nazi rule. And if some of this new generation harbored misgivings, hardly any ever dared question the Nazi distortion of the rule of law.

Among the few who dared was Dr. Lothar Kreyssig, a judge on the Court of Guardianship in Brandenberg. In 1934, Kreyssig objected to Hitler's euthanasia program and even attempted to prosecute Nazi officers for sending hospital patients to their death. Because he had been a respected citizen, the courts encouraged him to retire ahead of schedule. Kreyssig was left to live out the rest his life in peace. Such leniency was extremely rare. Dr. Johann von Dohnanyi, at thirty-six the youngest member of the German Supreme Court, also spoke out against the Nazi betrayal of justice. He was arrested and later executed at concentration camp Sachsenhausen. The overwhelming majority of Germany's legal community cooperated with the Nazi regime. Postwar statistics estimate that by 1940 the number of death sentences handed down by Germany's various courts had exceeded 50,000 annually, of which more than eighty percent were carried out.

Yet another blow to the rule of law took place in September 1942, when the Reich Ministry of Justice empowered the SS[4] to change any court decision it deemed overly lenient. Thousands of prisoners were delivered to the SS at that time for summary execution.

> *"For the enemy of the state, there is only one course in prosecution and sentencing—unflinching severity and, if necessary, total annihilation."*
>
> –Roland Freisler, President, The People's Court (1942)

On 20 January 1942 a meeting took place in Wannsee outside Berlin. Among those present were Reinhard Heydrich, Head of the Reich Security Main Office; Adolf Eichmann, Heydrich's expert for deportations; and thirteen other high-ranking representatives of the Nazi party. Minutes from the meeting, known as the Wannsee Protocol, spelled out in clear terms plans for the deportation and murder of all European Jews and the active participation of Germany's public

[4] *Schutzstaffel*, meaning "protective squadron"; a major Nazi military organization.

administration in the genocide. More than half the participants at Wannsee were legally trained. Heydrich made mention of the fact that he was particularly surprised at how easily the lawyers and judges sitting around the table went along with the others.

In March 1947, the Justice Trial took place at Nuremberg, one of eleven subsequent trials that followed the main Nuremberg trial of December 1945. The Justice Trial included sixteen defendants who had been members of the Reich Ministry of Justice or of the People's and Special Courts. The trial raised the issue of what responsibility judges have for enforcing grossly unjust but arguably binding laws. The charge was: "judicial murder and other atrocities committed by destroying law and justice in Germany, and by then utilizing the empty forms of legal process for persecution, enslavement, and extermination on a vast scale."

In their own defense, the accused claimed they had stayed to prevent the worst from happening. But after hearing 138 witnesses and introducing more than 2,000 pieces of evidence, the Nuremberg court concluded that the defendants had consciously participated in "a nationwide government-organized system of cruelty and injustice, in violation of the laws of war and of humanity." The court ruled that during the Nazi era "the dagger of the assassin was concealed beneath the robe of the jurist." Nonetheless, only a handful were convicted and of these only a portion had their sentences carried out.

And therein lies the beauty of the Nuremberg trials: as painful as it may have been to see people who clearly supported "history's darkest hour" go free, due process won out over the desire for revenge. When we succumb to impulses to "get the bad guy" by any means, we betray the very value for which we go to war in the first place. In the final analysis, America's greatness is not superior military might but the ability to check that might when it threatens to interfere with due process of law. Arguing that we must compromise human rights in order to defend human rights is not only hypocritical, it also does not work. Whenever the government has crossed that line—whether it be through the Sedition Act of long ago, or the internment of Japanese Americans during World War II, or the detainment of accused terrorist without access to counsel—we have always lived to regret it.

Looking back on that dark time in Germany's history, we would do well to remember that when the rule of law is compromised in the name of democracy, it is democracy itself which suffers. To work effectively, the rule of law required implementation by men and women of impeccable character and noble motive. It strikes me that this is the image you carry forward as representatives of the Army's Judge Advocates, and it is an honor for me to have shared this time with you today.

ANDREW JACKSON AND THE POLITICS OF MARTIAL LAW: NATIONALISM, CIVIL LIBERTIES AND PARTISANSHIP[1]

REVIEWED BY MAJOR PAUL E. GOLDEN[2]

Inter arma silent leges [*In the midst of arms laws are silent*].[3]

In 1814, while the War of 1812 was in full rage, Louisiana Governor William C.C. Claiborne and others within the City of New Orleans implored General Andrew Jackson to "take military control of the unsettled and significantly foreign population [of New Orleans]" to save the city from the anticipated threat of invading British forces.[4] General Jackson complied, and in so doing suspended the civil liberties of the citizenry of New Orleans and instituted martial law.[5] Jackson repelled and virtually annihilated the attacking British.[6] He also dealt harshly with those that ran afoul of his martial code, which included members of the judiciary, the press, foreign nationals, and ordinary citizens.[7] Many would agree that Jackson's decisive action contributed to the salvation of New Orleans, but most would undoubtedly be left to question the propriety of his imposition of martial law, as did many of his defenders and detractors throughout the nineteenth century.[8]

In *Andrew Jackson and the Politics of Martial Law: Nationalism, Civil Liberties and Partisanship*, author Matthew Warshauer provides a judicious analysis of Andrew Jackson's role in the evolution of the concept of martial law in America and the politicization of civil liberties.[9] Warshauer focuses painstakingly on the congressional refund

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[1] MATTHEW WARSHAUER, ANDREW JACKSON AND THE POLITICS OF MARTIAL LAW: NATIONALISM, CIVIL LIBERTIES AND PARTISANSHIP (2006).

[2] U.S. Army. Written while assigned as a student, 56th Judge Advocate Officer Graduate Course, The Judge Advocate General's Legal Ctr. & School, U.S. Army, Charlottesville, Va.

[3] WARSHAUER, *supra* note 1, at 70–72 (quoting MAJOR HENRY LEE, A VINDICATION OF THE CHARACTER AND PUBLIC SERVICES OF ANDREW JACKSON; IN REPLY TO THE RICHMOND ADDRESS, SIGNED BY CHAPMAN JOHNSON, AND TO OTHER ELECTIONEERING CALUMNIES (1828)).

[4] *Id*. at 20.

[5] *Id*. at 24.

[6] *Id*. at 27.

[7] *Id*. at 29–38.

[8] *See generally id.* (providing numerous examples of the loyalty and animosity engendered by Andrew Jackson and his imposition of martial law in New Orleans).

[9] *Id.*

debates of 1842 to 1844, incited by Jackson's request for refund of a court-ordered fine arising from his enforcement of martial law in New Orleans, but expands his context to include insightful anecdotes, analogies, and political contradictions related to President Lincoln's later imposition of martial law during the Civil War.[10] In the end, Warshauer produces a significant historical piece relevant to our times.

The timeliness of Warshauer's account cannot be overlooked. As debates abound in the United States concerning the radicalism of the Patriot Act[11] and the recent expansion of presidential powers related to the domestic use of the military outlined in the John Warner National Defense Act for Fiscal Year 2007,[12] Warshauer provides a germane historical perspective of the significant role of political partisanship and personal passion in the formation of our national policies.[13]

Warshauer focuses his discussion around a peculiar event arising from Jackson's governance of New Orleans during the winter of 1814 to 1815.[14] Jackson's concept of martial law was absolute and severe.[15] He stifled the press and suppressed public dissension.[16] State Senator Louis Louaillier, writing under the pseudonym of "A Citizen of Louisiana of French Origin," was arrested and jailed for condemning Jackson's continued imposition of martial law after the battle for New Orleans had been decided.[17] Jackson was well aware of the maturing distaste for military rule in the city and issued orders to the field that "should any person attempt serving a writ of Habeas Corpus to arrest the prisoner Louaillier from confinement immediately confine the person making such attempt."[18] Federal district judge Dominick Hall issued such a writ for Louaillier's release.[19] He was jailed and eventually ordered banished

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[10] *See generally id.* at 197–235.
[11] *See* Donald Gutierrez, *Universal Jurisdiction and the Bush Administration*, HUMANIST, Mar. 1, 2007, at 6.
[12] *See* Pub. L. No. 109-364, § 1076, 120 Stat. 2083 (2007) (amending § 333 of Title 10, United States Code, and, in part, granting authority to the President to employ the armed forces, including the National Guard, to any state or possession, in times of defined emergencies to restore public order and enforce the laws of the United States, including the constitutional rights of the citizens of such states or possessions).
[13] WARSHAUER, *supra* at note 1, at 239.
[14] *See generally id.* at 19–45.
[15] *Id.* at 23–28.
[16] *Id.*
[17] *Id.* at 35.
[18] *Id.*
[19] *Id.* at 36.

from the city by Jackson.[20] Following Jackson's cessation of martial law, he was tried by Judge Hall for contempt, in part, for his "interference with judicial authority" in seizing and disregarding the writ, and for his detention of Hall.[21] The sentence was a $1000 fine which Jackson dutifully paid.[22] In January 1842, motivated by what Warshauer ultimately concludes was Jackson's desire for vindication and removal of the taint on his legacy,[23] Jackson wrote to his former aide and Judge Advocate, Major Auguste Davezac, then a member of the New York legislature, requesting a refund of the fine.[24]

Jackson's request and the conditions he attached to what he deemed adequate refund legislation sparked congressional debates that endured for the better part of two years and three congressional sessions.[25] Warshauer details the intense back and forth that ensued between Jackson's loyal Democrats and the antagonistic Whigs led in body and spirit by none other than John Quincy Adams, former President and Jackson's nemesis in the presidential election of 1824.[26] The result is a collection of congressional debates rich in substance, hyperbole, contradiction, and personal affection and animosity for Andrew Jackson.[27] Jackson received his vindication in February 1844 when Congress and the President approved refund of the fine with interest.[28] The significance of the refund extended beyond vindication for Jackson. Instead, as Warshauer contends, the refund ratified Jackson's imposition of martial law and symbolized a shocking disregard for civil liberties in the interest of political partisanship.[29]

The strength of Warshauer's work is in the details.[30] He provides strong and ample support for his conclusion that the refund was not merely an attempt at vindication for Jackson's imposition of martial law, but rather a political referendum during the "Age of Party" where civil liberties were exploited as a partisan tool.[31] The depth of Warshauer's

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[20] *Id.*
[21] *Id.* at 38–39.
[22] *Id.*
[23] *Id.* at 78.
[24] *Id.* at 2–3, 241 n.1.
[25] *See generally id.* at 77–112.
[26] *Id.* at 56, 77–112.
[27] *See generally id.* at 77–175.
[28] *Id.* at 111.
[29] *See generally id.* at 77–175, 240.
[30] WARSHAUER, *supra* note 1.
[31] *Id.* at 240.

research is impressive. He brings the debates to life by highlighting the various speeches and correspondence of many Democrats and Whigs in their fight over the propriety of the refund.[32] By using Andrew Jackson's correspondence with those both loyal and opposed to his cause, the author vividly recounts Andrew Jackson's public affairs campaign to rescind the fine.[33] Warshauer also builds an impressive congressional record concerning the constitutionality of martial law, natural law and the concept of necessity as justification for martial law, and judicial autonomy and powers during periods of military rule, flushing out in the end an interesting, but somewhat questionable, concept of the evolution and legality of martial law in America.[34]

Warshauer provides significant anecdotal support for his position that lawmakers on both sides were committed to partisanship rather than any heartfelt devotion to the law or precedent.[35] He reveals a striking example of the partisan nature of the debates and the hypocrisy of both parties in Congress by detailing their respective reactions to the Rhode Island legislature's declaration of martial law during the Dorr War scandal of 1842.[36] "[A]t the outset of the refund debates, in June 1842, the Whig-controlled government of Rhode Island . . . declared martial law in order to stop a revolt by Thomas Wilson Dorr."[37] Ironically, many Democrats in Congress who vehemently supported Andrew Jackson's unprecedented form of martial law chose to condemn Rhode Island. The Whigs proved equally committed to partisanship. Those who stood in opposition to Jackson's imposition of martial law chose to remain silent.[38]

Warshauer underscores the depth and endurance of his theme by recounting the opposition of many Democrats, including surviving Democrats from the refund debates, to Abraham Lincoln's impositions of martial law during the Civil War, and the support of many former Whigs who rallied behind their former Whig President.[39] Two great illustrations play out in Warshauer's accounts of Robert Cumming Schenk and Chief Justice Roger Taney. Schenck, a former Whig congressman, made his

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[32] *See generally id.* at 77–175.
[33] *Id.*
[34] *Id.* at 195.
[35] *Id.* at 151.
[36] *Id.* at 145–48.
[37] *Id.* at 145.
[38] *Id.* at 46–48.
[39] *Id.* at 225–34.

maiden speech on the House floor in opposition to martial law during the 1844 refund debates. Later, while serving as a major general and commander of the Union's middle department during the Civil War, Schenk declared martial law in Maryland and managed it with the same ferocity as Andrew Jackson in New Orleans.[40] Taney was appointed Chief Justice by Jackson in 1836[41] and was a documented, but private supporter of Jackson's imposition of martial law in New Orleans during the refund debates.[42] In his writings to Jackson during the debates, "[h]e concluded that Whig opposition was nothing more than blatant partisanship, remarking, 'unfortunately the bitter feelings engendered by party conflicts too often render men blind to the principles of justice.'"[43] His contradictory ruling in *Ex Parte Merryman*, the Civil War era case dealing directly with President Lincoln's imposition of martial law, "discounted the authority of military rule upon any pretext or under any circumstances."[44] In the end, Warshauer brings the reader confidently to the "conclusion . . . that martial law was only beautiful, or at least justified, when in the eyes of the beholder."[45]

One significant weakness of Warshauer's work is the lack of depth in his analysis of the root and cause of the political partisanship that guided the refund debates. Warshauer contends that the political partisanship was incited by the "Age of Party" and Andrew Jackson's return to the national consciousness in the 1840s.[46] However, he truncates his analysis of the formative period for this partisanship that began with the "corrupt bargain" struck during the presidential election of 1824 and endured throughout Jackson's later two terms as President.[47] By doing

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[40] *Id.* at 211–13.
[41] *Id.* at 210.
[42] *Id.*
[43] *Id.* (quoting Letter from Roger Taney to Andrew Jackson (Apr. 28, 1943), *in* CORRESPONDENCE OF ANDREW JACKSON 6:217).
[44] *Id.* (internal quotes omitted); *see also Ex Parte* Merryman, 17 F. CAS. 144, 152 (1861).
[45] WARSHAUER, *supra* note 1, at 148.
[46] *Id.* at 240.
[47] *See generally* 2 ROBERT V. REMINI, ANDREW JACKSON AND THE COURSE OF AMERICAN FREEDOM 83–115 (1981) (discussing the presidential election of 1824 and the allegation that Jackson lost the presidency due to Speaker of the House Henry Clay's bartering of the electoral vote to John Quincy Adams in exchange for appointment as Secretary of State, and detailing the formation of the Democratic Party by Jackson loyalists in the wake of the 1824 election for the "advancement of Jackson"). *Id.* at 10 (discussing generally the competing party views of Jackson that developed during the 1820s and 1830s). The Democrats viewed Jackson as a "hero and patriot," while the Whigs viewed Jackson as a "despot" and "the greatest threat to the nation." *Id.*

so, he forces the interested reader to look elsewhere to confidently conclude, as he does, that "[o]pposition to [Jackson] was the raison d'être of the Whig Party, the very reason they came into being."[48] Warshauer's superficial treatment of this period deprives the isolated reader of worthwhile context and the opportunity for a comprehensive understanding of the evolution of the partisanship that existed between Whigs and Democrats in the 1840s and the loyalty and animosity incited by the reemergence of Andrew Jackson to the political scene in 1842.

Another significant shortcoming of Warshauer's analysis is his failure to reconcile the historical significance of early nineteenth century legal authority that dealt directly with emergency powers and the authority of military commanders to curtail civil liberties with his conclusion that Jackson's experience in New Orleans and the refund debates defined America's concept of martial law.[49] Interestingly, Andrew Jackson's imposition of martial law in New Orleans was not the first attempt to place that city under military rule.[50] General James Wilkinson's attempt to place the city under martial law and his defiance of the writ of habeus corpus in 1807 prompted the Supreme Court's decision in *Ex parte Bollman and Swartwout*, "which declared that only the legislature could suspend the writ."[51] Unmentioned by Warshauer is the Insurrection Act of 1807, which vested power in the President to deploy troops within the United States and, in effect, impose military rule.[52] Neither authority "define[d] or authorized the use of martial law as implemented by Jackson. Indeed, American law had no such precedent for such action."[53] Logically, Jackson's suspension of the writ and imposition of military rule without congressional or presidential oversight added a third layer to the historical and legal framework of martial law in America. However, in American legal and historical context, the significance of Jackson's experience does not square with Warshauer's conclusion regarding its precedential value in the formation of the concept of martial law.[54] Indeed, the historical and legal record of

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[48] WARSHAUER, *supra* note 1, at 239.
[49] *Id.* at 21, 195.
[50] *Id.* at 21.
[51] *Id.*; *see also Ex Parte* Bollman and Swartwout, 8 U.S. 75 (1807).
[52] James Bovard, *Working for the Clampdown*, AM. CONSERVATIVE, Apr. 27, 2007, at 26.
[53] WARSHAUER, *supra* note 1, at 23.
[54] *Id.* at 200 (concerning suspension of the writ and imposition of martial law by the Union and Confederacy during the Civil War);230 (discussing congressional approval of President Lincoln's habeus corpus bill during the Civil War); *see also Ex Parte* Merryman, 17 F. CAS. 144, 149 (1861) (holding that Lincoln's suspension of the writ was an improper assumption of legislative power).

America's experience with martial law during the Civil War leads the reader to conclude that the principles, if not substance, of *Bollman* and the Insurrection Act endured, while the Jackson precedent provided merely anecdotal support for later impositions of martial law.[55] It is certainly beyond arguable that a legal framework existed outlining the authority, means, and methods for imposing martial law long before Andrew Jackson impounded New Orleans. Considering this authority and America's experience with martial law after 1815, the reader is forced to question Warshauer's position regarding the value of Jackson's contribution to our common understanding of martial law.

Despite its shortcomings, Warshauer's work provides a worthwhile historical perspective on matters at the forefront of political and legal debate in this country. Commentators have railed against the actual and perceived curtailments of civil liberties embodied by the Patriot Act since its inception.[56] Likewise, recent amendments to the Insurrection Act that broaden presidential authority to deploy the military within the United States have prompted some critics to conclude that "[t]here is nothing more to prevent a president from declaring martial law . . . ."[57] Congress has broadened presidential powers, no doubt, but whether this power includes legal justification for the imposition of martial law is both debatable and yet to be seen. Warshauer's analysis of the concept and reality of martial law in America provides meaningful context for this debate and primes the interested reader with both a better historical understanding of the inherent clash between military rule and civil liberties and the partisanship, passion, and vitriol incited by the very idea of martial law and the assumption of unlimited power.

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[55] WARSHAUER, *supra* note 1, at 15–16, 200 (highlighting Lincoln's citing of the Jackson precedent as justification for his own curtailment of civil liberties during the Civil War).
[56] *See, e.g.*, Gutierrez, *supra* note 11, at 6.
[57] Bovard, *supra* note 52, at 26; *see also* Pub. L. No. 109-364, § 1076, 120 Stat. 2083 (2007).

A.J. LIEBLING'S WORLD WAR II WRITINGS[1]

REVIEWED BY MITCHELL MCNAYLOR[2]

On 9 July 1944, A.J. Liebling, reporter for *The New Yorker* attached to the Allied Expeditionary Force in Normandy, received word that troops of the VIII Corps would soon go into battle near La Haye.[3] Having just settled down to dinner with a few of his fellow correspondents, Liebling decided that, "it would be callous to tell the G-2 we were cutting his battle in order to eat *sole bonne femme* and *tournedos Choron*. We decided, therefore, to attend the battle, but not until after lunch, when we would be in a better frame of mind for it."[4] Liebling's articles provide a look at how an articulate, esoterically educated man covered the European war for what was arguably the most sophisticated weekly publication in America during the early 1940s. Throughout his wartime writings an inimitable style emerged, as he used gastronomic references, literary allusions, and humor to describe the war against Nazi Germany.

Liebling's World War II journalism is now available in a handsome volume published by the Library of America. This edition contains three books: *The Road Back to Paris*, *Mollie and Other War Pieces*, and *Normandy Revisited*. Also included are some of Liebling's previously uncollected pieces, along with selections from his work on the French Resistance, *The Republic of Silence*. Anyone interested in military history, or in seeing how journalists covered the military in years past, will find much of interest in this volume.

Reading Liebling, one should keep in mind that he wrote not for a daily paper, but that he wrote feature articles for *The New Yorker*, a fact which helps to explain the character of much of his writing. Working as a feature writer, rather than as a news reporter, gave Liebling the

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[1] A.J. LIEBLING, WORLD WAR II WRITINGS (Pete Hamill ed., The Library of America 2008).

[2] J.D., 2007, University of Florida Levin College of Law; M.A., 1998, The Ohio State University; B.A., 1996, Louisiana State University. Parts of this review were presented as a paper at the 2002 Society for Military History Annual Conference. The author would like to thank Professor John F. Guilmartin, Jr. and Lieutenant Colonel Robert L. Bateman for their encouragement with this project.

[3] LIEBLING, *supra* note 1, at 896.

[4] *Id.* at 897.

freedom to indulge in writing more discursive examinations of wartime scenes. With the exception of his letters from France that usually appeared weekly, Liebling had no regular deadline. Freed from the need to cover breaking news, he focused on scenes from life in Paris during the *drôle de guerre*, from soldierly life and, after the Normandy landings, on scenes of French life. Liebling was under far less pressure for speed and could indulge his own interests more than many other correspondents. Hints of this contrast appear in his work. During the North Africa campaign, Liebling shared a hotel room in Algiers with Dave Brown, then covering the war for Reuters. Liebling commented: "Living with a spot-news man during a big news period is a great luxury for a magazine correspondent, because the spot-news fellow has to keep up with the hour-to-hour situation and file frequent news bulletins. The magazine writer keeps posted without any exertion."[5]

Born in 1904, Liebling spent most of his early life, with occasional trips to Europe, in New York City.[6] Expelled from Dartmouth for cutting chapel too often, he eventually took a degree from Columbia in 1925.[7] Fired from the *New York Times* for comically altering sports stories, Liebling then took a year off to visit Paris, ostensibly to take classes at the Sorbonne.[8] He introduced himself to French cuisine, French women, and French medieval literature.[9]

After working on a number of newspapers, Liebling started writing for *The New Yorker* in 1935.[10] He had a penchant for local color pieces of New York low life, an interest he would later adapt to his wartime reporting. In the foreword to *Mollie and Other War Pieces* Liebling commented that "the wars were the central theme of my life from October 1939, until the end of 1944, and sometimes I feel a deplorable nostalgia for them."[11] One would not expect an overweight New York journalist, plagued by recurring attacks of gout, to be an effective war

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[5] *Id.* at 229.
[6] *Id.* at 995–97.
[7] *Id.* at 996.
[8] *Id.* at 996–97.
[9] See also A.J. LIEBLING, BETWEEN MEALS: AN APPETITE FOR PARIS (Simon & Schuster, 1962), in which Liebling discusses his affinity for all three.
[10] LIEBLING, *supra* note 1, at 997. Boasting a staff of writers such as Janet Flanner, Robert Benchley, and James Thurber, throughout the war *The New Yorker* would carry articles by such talented authors as Mollie Panter-Downes, Walter Bernstein, Rebecca West, and John Hersey. Indeed, in 1946 editor Harold Ross would devote an entire issue to Hersey's *Hiroshima*.
[11] *Id.* at 313.

correspondent, although he did adopt an exercise regime in advance of the Normandy campaign.[12] Yet Liebling managed to cover the war up front; one of only a very few journalists to cover the earliest landings on D-Day,[13] he went on to accompany General Jacques Philippe LeClerc's Deuxième Division Blindée into Paris.[14] After the war, he published two other works dealing with his wartime experiences: *The Republic of Silence*[15] and *Normandy Revisited.*[16] The former combined some of Liebling's articles on the French Resistance with a large selection of writings by members of the Resistance; in the latter, Liebling wrote of a return trip to Normandy and of his memories of 1944 and other visits there.

Throughout his career, Liebling excelled at using descriptions of food to evoke a mood. The following passage is particularly notable for the way Liebling uses a meal to describe the mood of the incomprehensible French defeat in 1940:

> We had Mediterranean rouget burned in brandy over twigs of fennel. Although all three of us knew the war was lost, we could not believe it. The rouget tasted too much as good rouget always had; the black–browed proprietor was too normally solicitous; even in the full bosom and strong legs of the waitress there was the assurance that this life in Paris would never end. Faith in France was now purely a *mystique*; a good dinner was our profane communion.[17]

Similarly, Liebling would, in *The Road Back to Paris*, use a dinner as a means for tracing how Americans adjusted to life in peacetime America after fleeing the fall of France. Describing lunch, and the ogling of a young woman ice skating, in New York with his fellow correspondent Dick Boyer, shortly after Boyer's return from wartime Europe, Liebling offered, in microcosm, the process of readjustment to civilian life that

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[12] GARDNER BOTSFORD, A LIFE OF PRIVILEGE, MOSTLY 199 (2003).
[13] LIEBLING, *supra* note 1, at 457–96.
[14] *Id.* at 522–27.
[15] *Id.* at 1000.
[16] *Id.* at 1002.
[17] *Id.* at 84. These passages offer just a hint of how much Liebling loved to eat; fellow *The New Yorker* writer Brendan Gill noted that "the pleasure he took in gormandizing was obviously identical to the pleasure other people took in listening to a Chopin nocturne." BRENDAN GILL, HERE AT THE NEW YORKER 322 (1975).

takes place in such circumstances. With the oysters, Boyer railed at how Americans took no serious interest in the war; by the time the lobster Thermidor arrived, Boyer took more interest in the ice skater than in the war.[18] World affairs fade from the mind when they seem an ocean away and when pleasant distractions appear far more immediate.

The introduction of a well-timed literary or historical allusion also helped to shape Liebling's style. An excerpt from *The Road Back to Paris* set in the North African campaign helps to illustrate this facet of Liebling's writing. For much of the campaign, Liebling attached himself to forward airbases; while he did not see infantry combat, he did talk to infantry veterans. He quoted these words of an infantry captain from Virginia: "'People down in my part of the country talk about battles as if they were some kind of fine antique, like old lace,' he said. 'I always used to daydream about them as a kid. But my God, if I'd known a battle was like this—.'" The next line shows the Liebling touch, using a literary allusion to reinforce the sentiments expressed by the Soldier and to introduce a note of wistful irony: "It reminded me of Stendhal writing in his diary: 'All my life I have longed to be loved by a woman who was melancholy, thin and an actress. Now I have been, and I am not happy.'"[19]

Sent to Paris in the fall of 1939 to cover the war,[20] his reports from Paris during the *drôle de guerre* often featured non-military events in France, including descriptions of horse racing[21] and of two pimps sitting in a whorehouse discussing the war.[22] Liebling remained in Paris until forced to flee in the face of the German invasion. Liebling hitched a ride out of Paris with Waverley Root, who "had an old Citroën with a motor that made a noise like anti-aircraft fire and was responsible for a few minor panics during our journey, but it stood up through the constant starting and stopping on the one vehicle-chocked road the military authorities permitted civilians to travel south on."[23] Root wrote for the Paris edition of the *Chicago Tribune* and later became famous for his book *The Food of France*.[24] Oddly enough, the two authors who would become America's leading gastronomy writers fled Paris in the same car.

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[18] *Id.* at 117–19.
[19] *Id.* at 288.
[20] *Id.* at 20.
[21] *Id.* at 584.
[22] *Id.* at 40.
[23] *Id.* at 98–99.
[24] WAVERLEY ROOT, THE FOOD OF FRANCE (1958).

Three days after arriving in Tours, Liebling, Root, and the French government fled to Bordeaux.[25] From there Liebling proceeded on to Lisbon, then back to America.[26]

Until his return to Europe in July 1941, Liebling's writing suffered; he felt uncomfortable in isolationist America, and wrote little.[27] By mid-1941 he had returned to England expecting to cover a German invasion. After Hitler invaded the Soviet Union, Liebling decided to return to America.[28] In late November 1941, Liebling boarded a Norwegian tanker destined for Baton Rouge, Louisiana to return to America and to have a chance to cover the Battle of the Atlantic.[29] Near the end of his voyage Liebling wisely disembarked at New Orleans, home of such temples of gastronomy as Antoine's, and then headed back to New York.[30] He described this trip in one of his more famous pieces, "Westbound Tanker," first published in *The New Yorker*, then as a chapter in *The Road Back to Paris*. Much of the article tells of Liebling's gradually drawing closer to the crew, a group of men full worthy of one of his New York City local color pieces. About halfway across the Atlantic the British escort vessels left to join an eastbound convoy and the tanker remained unescorted until a force of Canadian destroyers arrived the next morning. One of the crew members sought to reassure Liebling: "There were never enough vessels for convoy duty, Bull said, but luckily there never seemed to be enough submarines, either. The Battle of the Atlantic sounded imposing, but it was rather like a football game with five men on a side."[31] In this particular instance, luck and timing saved Liebling from a more awful encounter with the Battle of the Atlantic. The German Navy responded to the war with America by sending more U-Boats to sea to prey on American shipping, at that time still unorganized into convoys, but the decision to deploy more U-Boats and it took some time for them to sail into areas of

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[25] LIEBLING, *supra* note 1, at 104–05.
[26] *Id.* at 110–13.
[27] According to biographer Raymond Sokolov, "Faced with such unreasoning apathy, Liebling didn't know what to do. His work record for the year following his return from France shows this concretely. He wrote only eight articles, a career low." RAYMOND SOKOLOV, WAYWARD REPORTER: THE LIFE OF A.J. LIEBLING 141 (1980).
[28] LIEBLING, *supra* note 1, at 124.
[29] *Id.* at 170–208.
[30] *Id.* at 206–08. Despite suffering damage during Hurricane Katrina, Antoine's is still open for business at 713 Saint Louis St., New Orleans, Louisiana. *See also* www.antoines.com (last visited July 15, 2008).
[31] LIEBLING, *supra* note 1, at 201.

the Atlantic where they might attack American ships. Liebling had returned safely to the United States before the full onslaught of U-Boats began to impact American shipping. An observer more familiar with the overall course of the war and writing from the perspective of history, Winston Churchill, termed the end of 1941 and the first half of 1942 "The U-Boats Paradise."[32]

After spending several months covering the U.S. Army in the North African campaign, Liebling sought a way to cover the Allied invasion of France. Finding a way to go ashore as an Army correspondent on D-Day proved beyond Liebling's reach.[33] He did, however, manage to attach himself to a landing craft and went into Normandy with the Navy.[34] His three part series "Cross-Channel Trip" told of his experiences during the invasion.[35] On an LCIL (Landing Craft, Infantry, Large) on D-Day Liebling was in a position to appreciate the intensity of the combat. Two striking images emerge from his articles; he spoke of going forward while the ship was under fire, to "the well deck, which was sticky with a mixture of blood and condensed milk. Soldiers had left cases of rations lying all about the ship, and a fragment of the shell that hit the boys had torn into a carton of cans of milk."[36] Later, discussing the evacuation of the wounded, he described "a Coastguardsman [who] reached up for the bottom of one basket so that he could steady it on its way up. At least a quart of blood ran down on him, covering his tin hat, his upturned face, and his blue overalls. He stood motionless for an instant, as if he didn't know what happened, seeing the world through a film of red because he wore eyeglasses and blood had covered the lenses."[37] Years later, in *Mollie and Other War Pieces*, he noted of the last quotation that "this was me. It seemed more reserved at the time to do it this way—a news story in which the writer said *he* was bathed in blood would have made me distrust it, if I had been a reader."[38] He remained aboard ship and did not visit the beach until D-Day plus three.[39] After a brief stay ashore he returned to the LCIL and thence to England, to write his story and wire it to *The New Yorker*.[40]

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[32] WINSTON S. CHURCHILL, THE HINGE OF FATE 108–32 (1950).
[33] LIEBLING, *supra* note 1, at 825.
[34] *Id.* at 827.
[35] *Id.* at 457–96.
[36] *Id.* at 476.
[37] *Id.* at 477.
[38] *Id.*
[39] *Id.* at 487.
[40] *Id.* at 493–95.

Soon Liebling managed to catch up with the Allied army in Normandy.[41] While most of his articles deal with French rural life during the Allied invasion of Normandy, Liebling did witness combat, although he did not often directly describe it in print. In the final days of the drive on Paris, Liebling attached himself to General Leclerc's Free French troops and followed them into Paris.[42] Unfortunately, Liebling did not publish his account of the Liberation of Paris until years after the war, in his book *Normandy Revisited*, ostensibly a chronicle of a postwar trip through the region. This was the closest that Liebling came to writing war memoirs. In many ways, the work tells little about combat or military experience and the structure of the work appears artificial and convoluted, for it follows no linear path through Liebling's wartime experiences, but wanders back and forth between the war and Liebling's visit to Normandy ten years later. That artifice greatly adds to the charm of *Normandy Revisited*.[43] For instance, in the span of six pages, Liebling discusses the condition of a pack of basset hounds that he encountered in 1944, depressed from the occupation when their masters could not secure ammunition for a hunt, and their reaction to U.S. Army food: "They scorned K rations. They might be down, but they weren't as flat as all that."[44] Recounting his attempts to visit the "Chateau of the Mournful Hounds" years later, Liebling turns to a long digression about the town of Vire, which he visited in his youth.[45] Discoursing on Vire stirs a recollection of a meal that he enjoyed there, which included, among other things, *rillettes*, *jambon cru de pays*, *andouilles*, salt herring, *tripes à la mode de Caen*, steaks, soufflée potatoes, cheese, a whole pheasant,

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[41] *Id.* at 497.

[42] *Id.* at 936–37, 960–71.

[43] Raymond Sokolov, after seeing a first edition of the work, noted a subtitle that appeared only on the dust jacket of that edition: "A Sentimental Journey." Unsure of whether that was a late addition by the publisher or an invention of Liebling's, Sokolov rightly points to a correlation between Liebling's work and *A Sentimental Journey Through France and Italy* by Laurence Sterne:

> The perversely digressionary pace was, in any case, a tribute to Sterne's manner and, more generally, it reproduced the feel of all the early books of reportage Liebling admired, books in which the difficulty of travel and its slowness created a leisurely setting and as justification for extended authorial observation on the passing scene.

SOKOLOV, *supra* note 27, at 293. This edition of *Normandy Revisited* does not reproduce the Sentimental Journey subtitle that so intrigued Sokolov.

[44] LIEBLING, *supra* note 1, at 907.

[45] *Id.* at 908.

and an Armagnac chaser.[46] All of this makes for delightful and amusing reading, but those seeking action along the lines of Ernst Jünger's *Storm of Steel* should look elsewhere.[47]

After the Liberation, Liebling "remained in Paris, to report on political things, while my young friend David Lardner, who had come over for the purpose, relieved me as correspondent of the *New Yorker* with the armies."[48] Shortly afterward, Lardner was killed at Aachen when his jeep ran over a land mine. Liebling stayed to write one more article, on German atrocities at Comblanchien in November 1944.[49] After completing the article he left for New York; he later commented, "I never came back to the war. Before I could feel sufficiently ashamed for that, it was over."[50]

An obvious affection for and admiration of the French Resistance emerged in an edited volume of Resistance literature that Liebling compiled just after the war, entitled *The Republic of Silence*. That work, of which only the "Argument" and "In Lieu of an Epilogue" are reproduced in the current volume, presents a number of pieces by Resistance writers, introduced and with comments by Liebling interspersed throughout the text. In the early pages of the book, Liebling made clear that he was not working on an academic volume: "I am not a student of Resistance literature; candidates for the degree of doctor of philosophy will have their crack at it later."[51] The book that emerges offers an interesting introduction to the literature. This volume represents a rare instance of Liebling writing about events not observed firsthand, although much of the work is an attempt to get primary sources in front of the English-speaking reader. Liebling claimed that "men seldom write as ingenuously ten years after the event as when they are in its grip . . . so I have a high esteem for history that may be picked out of accounts as contemporary as these, like the sweet meat from the claws of the lobster."[52] This interest in Resistance literature had developed during the war. In April 1944, Liebling published "Notes from the Kidnap House," a short article on underground newspapers published in

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[46] *Id.* at 912–13.
[47] ERNST JÜNGER, STORM OF STEEL (Michael Hoffman trans., Penguin Books 2004) (1922).
[48] LIEBLING, *supra* note 1, at 541.
[49] *Id.*
[50] *Id.*
[51] *Id.* at 737.
[52] *Id.* at 739.

France.[53] After commenting on the bewildering political spectrum covered by such journals, Liebling shifted to a topic he found more interesting: food. When discussing French farmers who worked to deliver food to the Resistance, Liebling addressed attempts to circumvent official inspectors sent to supervise the harvests: "Some of the inspectors, of course, are 'reasonable,' shutting their eyes to all discrepancies, since they are at heart as anti-Boche as anybody else. Others, not 'reasonable,' are mobbed or ambushed and beaten up with farm implements."[54]

One last article on the European war, surprisingly absent from the present anthology, deserves attention as it combines both Liebling's interest in the war and his press criticism. In the spring of 1945, Liebling began to write the "Wayward Press" column for *The New Yorker*, resurrecting it as the column had not been written since Robert Benchley abandoned it several years before.[55] Liebling praised Edward Kennedy for breaking the story of the German surrender at Reims before SHAEF (Supreme Headquarters Allied Expeditionary Force) press agents had wanted it released, and railed against the fact that only three journalists had been admitted to the ceremony. It disgusted Liebling that

> correspondents may send no news, even though it is verified and vital to an American understanding of what is happening, unless it is "authorized" by some army political officer . . . or rather, in the last analysis, the censors' Army superiors—will decide what is true and accurate or false and misleading, and what is calculated to injure the morale of Allied forces."[56]

Unfortunately, for his reputation since the war, Liebling never achieved the popularity of another great World War II correspondent, Ernie Pyle.[57] Since Pyle wrote a weekly column, like Liebling he did not have to report breaking news and chose to focus on scenes from daily

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[53] *Id.* at 653–71.
[54] A.J. Liebling, *Notes From the Kidnap House - II*, THE NEW YORKER, Apr. 22, 1944, at 50. The Library of America anthology reproduces only parts I and III of this originally three-part article.
[55] LIEBLING, *supra* note 1, at 999. For more on Benchley, see ROBERT BENCHLEY, MY TEN YEARS IN A QUANDARY AND HOW THEY GREW (1936).
[56] A.J. Liebling, *The A.P. Surrender*, THE NEW YORKER, May 19, 1945, at 60.
[57] For more about Pyle, see also JAMES TOBIN, ERNIE PYLE'S WAR (1997).

life.[58] Both men wrote of the experience of the common Soldier and vividly captured the boredom of daily life, along with moments of extreme violence and terror. Pyle, however, staked out the infantry as his special preserve and became especially adept at empathetically describing the experiences of combat infantrymen without becoming too brutal for audiences in America. Liebling lacked that focus and drifted from merchant seamen to combat infantrymen to French civilians. He retained, however, an essential, idiosyncratic style no matter what his subject. The two men wrote in radically different styles; Liebling's ironic, allusive writing had little in common with Pyle's touching, although painfully homespun, prose.

Liebling's journalism stands out for an eclectic literary sensibility, more reminiscent of Laurence Sterne than of Ernest Hemingway. Much of what Liebling wrote, however, remains a very individualistic contribution to journalism. That contribution is, thanks to the Library of America, once again readily available for interested readers. The rare talent for combining gastronomic references, literary allusions, and acute military observations, and expressing them in an inimitable style, remains Liebling's trademark. His writing style, with its great humor and panache, remains his most significant contribution to the journalism of the Second World War and makes his writing a treat to read.

[58] LIEBLING, *supra* note 1, at 752. See also Liebling's own thoughts on Pyle, recorded in a book review reproduced in the present volume, at 751–58.

By Order of the Secretary of the Army:

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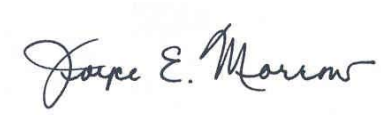

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