AN END TO "TIL DEROS DO US PART": THE ARMY'S REGULATION OF INTERNATIONAL MARRIAGES IN KOREA

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I. Introduction

On 2 March 2007, U.S. Forces Korea (USFK) promulgated Regulation 600-240, *International Marriages in Korea*. The regulation applies to the 28,000 American servicemembers[1] stationed in the Republic of Korea (ROK) and delineates a number of procedural requirements to marry a non-U.S. citizen. The regulation's purposes go far beyond counseling young servicemembers before they make life-altering decisions. For American military personnel stationed in the ROK, micro-decisions often have macro-consequences. Prior to the regulation, marriages between U.S. servicemembers and foreign nationals[2] garnered USFK negative publicity and enervated an already fragile alliance.[3] Since its publication, the regulation has successfully reversed this trend. Nonetheless, problems with interpretation and implementation have hampered the regulation's full effectiveness. Moreover, the regulation raises a number of constitutional concerns.

This article considers several aspects of the military's decision to regulate servicemember marriages in South Korea. Section II considers the regulation in the larger context of U.S.-ROK relations, as one can

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[1] Although this regulation applies to all U.S. servicemembers on the Korean peninsula, the author's experiences pertain solely to U.S. Soldiers. Furthermore, although the regulations cited and the analysis in this article apply equally to male and female spouses, the author refers predominantly to foreign national wives as most often falling into the problematic groups of abandoned and waiting spouses. *See infra* notes 51–59 and accompanying text.

[2] Throughout the article, "foreign nationals" refers to both Koreans and non-Koreans.

[3] *See, e.g.*, U.S. FORCES KOREA, REG. 600-240: INTERNATIONAL MARRIAGES IN KOREA summary (2 Mar. 2007) [hereinafter USFK REG. 600-240] ("Insufficient regulation of international marriages involving U.S. Forces, Korea (USFK) personnel has resulted in numerous void marriages and others in which the 'spouse' is ineligible for marriage and/or immigration to the United States, creating a logistical burden and negative publicity for USFK.").

only ascertain USFK Regulation 600-240's rationale with an understanding of the U.S.- Korean partnership.

Section III traces the history of the military's regulation of marriage. The section begins with The Judge Advocate General of the U.S. Army's exhortation following the Civil War that a military directive seeking to regulate marriage would be *ultra vires* of a commander's authority. The section next reviews the changes in thinking and policy reversals witnessed as a result of World Wars I and II. A particular focus is the promulgation of Army Regulation (AR) 600-240, the 1953 regulation upon which USFK Regulation 600-240 is based. This section also evaluates two cases brought before the Court of Military Appeals in the 1950s challenging a Navy directive requiring command involvement in the marriage process. The section concludes with the public debate surrounding the controversial proposal by the Commandant of the Marine Corps to refuse to accept married recruits into the Marine Corps beginning in 1995.

Section IV reviews the regulation's constitutional ramifications, emphasizing the status of marriage as a fundamental right. The right to marry has enduring antecedents as a fundamental right in Supreme Court jurisprudence. Governmental action impinging on that right should therefore trigger the highest standard of judicial review. Nonetheless, recent Supreme Court decisions have refused to extend this standard, thereby exposing an inherent dichotomy in a declaration of the right to marry as fundamental. This section also examines the presumption that the military is a "specialized community" invoking judicial deference. As will be analyzed, both the application of a standard of review other than strict scrutiny in recent right to marry cases and the treatment of the military as a "specialized community" have far-reaching implications for a possible constitutional challenge to USFK Regulation 600-240.

Section V offers a critical analysis of USFK Regulation 600-240's purposes, procedures, policy, and applicability.[4] Particular consideration is given to two provisions that render the regulation constitutionally suspect. The article concludes in Section VI with several recommendations.

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[4] Based on the author's professional experience as Chief of Administrative Law for Second Infantry Division during USFK Regulation 600-240's promulgation.

II. The Enduring Alliance?

The U.S.-ROK alliance's strategic importance is matched only by its complexity. In the words of one Korea commentator, there has long been "[a] virulent and violent form of anti-Americanism" in South Korea.[5] Fissures in the relationship can be traced back to the Kwangju Uprising of May 1980.[6] The Kwangju Uprising, or "South Korea's Tiananmen Square," refers to the massacre of Koreans protesting the military rule of the American-backed dictator, General Chun Doo-Hwan, in the city of Kwangju.[7] Charges of American complicity in the crackdown led to violent anti-American demonstrations and have been ineffaceable as a source of tension in the relationship.[8]

Both before and since the Kwangju Uprising, an incident seems to occur every decade that further destabilizes the already frail U.S.-ROK alliance. The 7th Infantry Division withdrew in the 1970s, one of two American Army divisions that had been in Korea since the end of the Korean War.[9] The 1980s saw the Kwangju Uprising, and the 1990s brought the murder of Kum E. Yoon, a Korean prostitute, by a 2d Infantry Division (2ID) Soldier.[10] In the first decade of the twenty-first century there was the uproar over the decision to resume the importation of American beef.[11]

It is difficult to overstate the deleterious impact on the alliance brought about by the rape and murder of Kum E. Yoon by Private Kenneth Markle. At the time of the crime, Markle was assigned to 2ID and stationed at Camp Casey in Dongducheon.[12] Yoon worked as a "juicy girl"[13] in one of the camptown clubs. On 28 October 1993,

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[5] Bruce Cumings, *Anti-Americanism in Korea*, DIPLOMAT, July 1, 2007, *available at* http://www.the-diplomat.com/article.aspx?aeid=3262.
[6] For a through treatment of the Kwangju Uprising, see DON OBERDORFER, THE TWO KOREAS 124–33 (2001).
[7] Becky Branford, *Lingering Legacy of Korean Massacre*, BBC NEWS, May 18, 2005, *available at* http://news.bbc.co.uk/2/hi/asia-pacific/4557315.stm.
[8] *See, e.g.*, Edward J. Button, *Social-Cultural Changes in South Korea Since 1991: An American View*, IIX INT'L J. OF KOREAN STUD. 199, 211 (2004).
[9] KATHARINE H.S. MOON, SEX AMONG ALLIES: MILITARY PROSTITUTION IN U.S.-KOREAN RELATIONS 59 (1997).
[10] *See infra* notes 12–14.
[11] *See infra* notes 40–41.
[12] MOON, *supra* note 9, at 21.
[13] Women working in the camptown clubs are referred to as "juicy girls" or "juicies." A juicy girl is a young woman, often from the Philippines (favored because of her fluency

Markle raped Yoon and bludgeoned her to death with a soda bottle.[14] Yoon's landlord discovered her naked, blood-caked body.[15] Her legs had been spread apart, a bottle inserted into her vagina, and an umbrella inserted eleven inches into her rectum.[16] Markle had also covered the body and the entire crime scene with laundry detergent—apparently believing it would act as lye and destroy the evidence.[17] Markle was sentenced to fifteen years in prison by a Korean court.[18]

Yoon's death brought the widely acknowledged but seldom discussed topic of crimes committed against Koreans by USFK Soldiers to the forefront of the Korean psyche.[19] Per the National Campaign for the Eradication of Crime by U.S. Troops in Korea (an umbrella organization composed of forty-six Korean non-governmental organizations formed in response to Yoon's murder), American Soldiers in Korea committed 39,452 criminal offenses between the years 1967 and 1998.[20] In the year Yoon was murdered, USFK Soldiers committed 850 crimes.[21]

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in English) or a former Soviet Republic, hired by a bar owner to encourage Soldiers to spend money on watered-down alcoholic drinks for themselves and non-alcoholic fruit drinks for the "juicy girl." *See, e.g.*, Michael Hurt, *Sex Business Lives on Despite Crackdown,* KOREA HERALD, May 27, 2005.

[14] MOON, *supra* note 9, at 21.

[15] *Id.*

[16] *Id.*

[17] *Id.*; Interview with Lieutenant Colonel Kevin M. Boyle, U.S. Army Judge Advocate General's Corps, in Uijongbu, S. Korea (Dec. 7, 2007). Lieutenant Colonel Boyle served as Private Markle's defense attorney in Markle's administrative separation hearing from the Army. *Id.*

[18] ANNI P. BAKER, AMERICAN SOLDIERS OVERSEAS: THE GLOBAL MILITARY PRESENCE 161 (2004).

[19] *See, e.g.*, MOON, *supra* note 9, at 31 (quoting a letter from forty-six Korean organizations to the Commander, 2ID, as explaining, "This [crime] has been presented as an accidental homicide, committed by one individual soldier―a 'Private crime' between the victim and the perpetrator. However, we the people believe that this is an example of how American soldiers treat Korean women.").

[20] 212TH GEN. ASSEMBLY OF PRESBYTERIAN MINISTRIES, POLICY STATEMENT TO MIDDLE GOVERNING BODIES, CONGREGATIONS, PARTNER CHURCHES, AND OTHERS FOR STUDY AND CONSIDERATION OF ITS IMPACT ON THEIR RESPECTIVE MISSION MINISTRIES app. 6, at 73 (2003), *available at* http://www.pcusa.org/gac/minutes/app103.pdf.

[21] REV. K. M. KIM, ASIAN HUMAN RIGHTS COMM'N―HUMAN RIGHTS SOLIDARITY, RISING U.S. CRIMES: KOREAN PEOPLE'S STRUGGLE TO ERADICATE THE CRIMES BY U.S. ARMY TROOPS IN KOREA (1994), *available at* http://www.hrsolidarity.net/mainfile.php/1994vol01no01/1937/.

With the turn of the century, the U.S.-ROK alliance entered a further period of decline, due largely to fundamental differences with the Bush administration over how to deal with North Korea.[22] As the U.S. President was declaring North Korea a member of the Axis of Evil, the ROK was pushing ahead with its "Sunshine Policy," seeking to emphasize peaceful cooperation with the Democratic People's Republic of Korea (DPRK) as a prelude to eventual reunification.[23] Furthermore, in October 2002, the Bush administration's doctrine of preemption replaced containment and deterrence as the cornerstone of American defense policy.[24] To America's South Korean partners, this signaled a dangerous new development in which a war could be launched against the DPRK without the ROK's consent or approval.[25]

Against this background, in June 2002, two young South Korean girls were killed when a U.S. Army engineering vehicle accidentally ran them over as they were walking to a birthday party.[26] Their deaths rallied the South Korean people, many of whom viewed the American military presence as a humiliation.[27] A military court's acquittal[28] of the two Soldiers driving the vehicle further inflamed tensions, leading to

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[22] *See, e.g.*, Cumings, *supra* note 5 ("Over 35 years of closely following Korean-American relations, I can think of no time when affairs have been allowed to deteriorate so drastically, nor can I think of an administration that has struck more dissonant notes than the Bush administration.").

[23] *See generally* KONGDAN OH, THE ASIA SOC., TERRORISM ECLIPSES THE SUNSHINE POLICY: INTER-KOREAN RELATIONS AND THE UNITED STATES (2002), *available at* http://www.asiasociety.org/publications/KoreanUpdate2002. pdf.

[24] David E. Sanger, *Beating Them to the Prewar*, N.Y. TIMES, Sept. 28, 2002, at B7.

[25] *See, e.g.*, Michael Dobbs, *N. Korea Tests Bush's Policy of Preemption; Strategy Seems to Target Weaker Nations,* WASH. POST, Jan. 6, 2003, at A01.

[26] *See, e.g.*, Howard W. French with Don Kirk, *American Policies and Presence are Under Fire in South Korea, Straining an Alliance*, N.Y. TIMES, Dec. 8, 2002, at A20.

[27] *See* Interview with Major Sean Kilkenny, U.S. Army Trial Def. Serv., in N.Y., N.Y. (Apr. 22, 2009) [hereinafter Kilkenny Interview].

[28] *See* U.S. Dep't of State, Agreement Under Article IV of the Mutual Defense Treaty between the United States of America and the Republic of Korea, Regarding the Facilities and Areas and the Status of United States Armed Forces in the Republic of Korea, Pub. L. No. 89-497, 80 Stat. 271 (1966). This agreement explained that "military authorities of the United States shall have the primary right to exercise jurisdiction over members of the United States armed forces . . . in relation to: (ii) offenses arising out of any act or omission done in the performance of official duty." In response to Korean accusations that the U.S. Army convened a mock court, the trial counsel in the court-martial at the time stated the following: "The panel had all the evidence and came to their result after lengthy deliberations. It is unfortunate that the South Korean people did not view the court-martial as anything but a kangaroo court." Kilkenny Interview, *supra* note 27.

widespread demonstrations against USFK and contributing in no small measure to the 2002 election of President Roh Moo Hyun, "the first president in South Korean history with no experience with or attachments to the United States."[29] One analyst at the Brookings Institute has referred to the Roh-Bush relationship as "the 'single rockiest' of Bush's tenure."[30]

During Roh's tenure as president of the ROK, the United States accused him of being overly nationalistic and anti-American.[31] Not only did President Roh consistently criticize the American approach to North Korea as "hardline,"[32] but President Roh also made the thorny issue of restructuring the U.S.-ROK military alliance a chief objective of his administration. Although the United States abdicated peacetime troop command to South Korea in 1994, an American four-star general continues to head the Combined Forces Command (CFC).[33] This means that although the United States accounts for less than two percent of the active duty forces in the ROK, an American general officer would command ROK forces in a war with the DPRK.[34] In 2007, the United States and the ROK agreed that the CFC would be deactivated and wartime control would shift to the ROK by 17 April 2012.[35]

In December 2007, ROK voters elected Lee Myung-Bak as President Roh's successor.[36] President Lee immediately pledged to commit his administration to rebuilding the U.S.-ROK relationship.[37] As one analyst explained in June 2008, "If what troubled Roh's presidency was too much nationalism, Lee's problem is a lack of it."[38] In April 2008, President Lee decided to lift the ban on American beef imports as part of

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[29] Cumings, *supra* note 5; *see also* Cho Hyo-young, *Roh's Victory Seen to Lead Bourse to Short-Term Rally*, KOREA HERALD, Dec. 21, 2002.
[30] Posting of Matthew Yi to S.F. Chronicle's The Ross Report, http://www.sfgate.com/cgi-bin/blogs/foreigndesk/detail?blogid=16&entry_id=8930 (Sept. 15, 2006, 15:35 PST) (quoting The Brooking Institute's Michael O'Hanlon).
[31] *See, e.g.*, Choe Sang-Hun, *An Anger in Korea Over More than Beef*, N.Y. TIMES, June 12, 2008, at A1.
[32] *See, e.g.*, French with Kirk, *supra* note 26, at A20.
[33] *See, e.g.*, David H. Gurney & Jeffrey D. Smotherman, *An Interview with B.B. Bell*, 47 JOINT FORCES Q. 76, 76 (2007).
[34] *Id.* at 76–77.
[35] *Id.* at 78.
[36] Normitsu Onishi, *Conservative Wins Presidential Elections in South Korea*, N.Y. TIMES, Dec. 20, 2007, at A8.
[37] *See, e.g.*, Betsy Pisik, *Seoul's New Chief Brings Sea Change,* WASH. TIMES, Apr. 17, 2008, at A01.
[38] Sang-Hun, *supra* note 31, at A1.

a larger free-trade deal with the United States.[39] American beef imports had been banned since 2003 after a case of mad cow disease was detected in the United States.[40] Beef-loving South Koreans saw the decision as kowtowing to the Bush administration. The move sparked massive and virulent anti-American and anti-government demonstrations, paralyzing the Lee government and culminating in a mammoth 10 June 2008 demonstration that "appear[ed] to be the largest in the capital since the 1980s . . . ." [41] Following this demonstration, President Lee's entire cabinet offered to resign;[42] it was only after President Lee offered a public mea culpa, dismissed several of his presidential aides, and revised the trade deal that a tense equilibrium was restored.[43]

Like the outrage provoked by the murder of Kum E. Yoon in 1993 and the accidental killing of the two young Korean girls in 2003, the furor over beef was less about the event and more about the tenuous state of U.S.-ROK relations. Taken as isolated incidents, neither Yoon's murder nor the decision to import beef would have unleashed such a torrent of anti-Americanism. Nonetheless, in a markedly fragile relationship built upon feelings of humiliation and intense nationalism, these incidents proved to be the tipping point.

In this light, it is easy to understand why something as celebratory as a marriage could further strain the troubled U.S.-ROK partnership. One contributing factor is the rate at which Soldiers marry foreign nationals in Korea. Although Soldiers marry foreign nationals in every country in which they are stationed, certain circumstances make such marriages in Korea far more common. Policies implemented by the Defense Finance Accounting System (DFAS) in 2005 provide incentives to USFK Soldiers to marry foreign nationals. Effective 1 October 2005, DFAS approved overseas housing allowance (OHA) for Soldiers whose

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[39] Choe Sang-Hun, *South Korea Will Lift its Ban on American Beef*, N.Y. TIMES, Apr. 19, 2008, at A3.

[40] Choe Sang-Hun, *15,000 in Seoul Defy a Warning on Protests*, N.Y. TIMES, June 29, 2008, at A11.

[41] *U.S. Beef Flap Challenges South Korea's President* (Nat'l Pub. Radio Morning Edition radio broadcast June 11, 2008), *available at* http://www.npr.org/templates/story/story.php?storyId=91372079.

[42] On 7 July 2008, President Lee dismissed the minister of agriculture along with two other ministers. *See* Choe Sang-Hun, *South Korean President Fires 3 Cabinet Ministers*, N.Y. TIMES, July 8, 2008, at A1.

[43] Choe Sang-Hun, *Beef Furor Provokes a Turnover in Seoul*, N.Y. TIMES, June 21, 2008, at A10.

dependents were overseas with them on a non-command-sponsored tour.[44] While the policy was implemented to allow Soldiers who had served tours in Iraq and Afghanistan the opportunity to bring their Families to Korea and thus avoid another year of separation, the practical effect of this policy is to encourage overseas marriage. Although USFK Soldiers married foreign nationals prior to the DFAS policy change and accepted living in the barracks while their spouses lived off-post, the change has alleviated most of the economic burdens associated with overseas marriages. Thanks to the change in policy, a Soldier who marries a foreign national in Korea now gets to leave a sub-standard barracks room, get away from his First Sergeant, and live in a spacious, completely furnished apartment off-post—all at no additional cost to the Soldier.

Married servicemembers also earn more than single servicemembers, as the former receive family-separation pay[45] and higher basic allowance for housing (BAH), which varies by dependency status.[46] Since the formation of the Armed Services, servicemembers who do not live in government housing have received BAH.[47] The allowance is tax-exempt and represents the average rental cost in a particular geographic area.[48] For example, in addition to his base pay, a Private First Class (PFC) with dependents living in Washington, D.C. receives $1790 per month while a single PFC living in the same location receives $1388.[49] If the Soldier with dependents were to move to Fort Polk, Louisiana, his BAH would decrease to $820 per month, and the single PFC's to $703.[50]

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[44] U.S. Defense Finance Accounting Service, Military Pay Advisory (MPA) 40.05―Changes to Overseas Housing Allowance, Oct. 17, 2005, *available at* http://www.dkassociation.org/fourm/topic.asp?TOPIC_ID=154.

[45] Family separation pay of $250 per month is paid to servicemembers who are involuntarily separated from their families for thirty calendar days or more. *See* Family Separation Allowance (FSA), http://www.dfas.army.mil/militarypay/woundedwarriorpay /familyseparationallowancefsa.html (last visited June 15, 2009). A married servicemember serving a one year tour in Korea therefore receives an additional $3000. *See id.*

[46] U.S. DEP'T OF DEF., 1 REPORT OF THE TENTH QUADRENNIAL REVIEW OF MILITARY COMPENSATION 81 (2008) (cash compensation).

[47] *Id.* at 77.

[48] *Id.* at 88.

[49] U.S. Dep't of Defense, Per Diem, Travel, & Transp. Allowance Comm., Basic Allowance for Housing (2009), http://perdiem.hqda.pentagon.mil/perdiem/bah.html (last visited June 15, 2009).

[50] *Id.*

The foregoing is not meant to suggest that *all* Soldiers make a life-altering decision such as marriage simply to get away from their command, make more money, and enjoy better living conditions. Nonetheless, it would be naïve to believe that such considerations do not prove to be a determinative factor in a young Soldier's thought process on whether to marry in Korea.

So how is it that a personal decision such as marriage can deleteriously impact the U.S.-ROK strategic relationship? The answer is that Soldiers do not always act responsibly. Prior to USFK Regulation 600-240, many Soldiers either failed to assist their wives in obtaining visas to the United States, or the wives proved to be ineligible for immigration. Specifically, marriages prior to the regulation created two distinct, problematic groups: abandoned spouses and waiting spouses.

Abandoned spouses are spouses left behind when their Soldier-husbands return to the United States.[51] These Soldiers likely married their brides with no intention of taking them back to the United States after completing their tours. While these women and any children fathered by the Soldier are legally entitled to access the commissary and post exchange (PX), the services of the medical clinic, and legal assistance, the spouse's ration control card (granting access to the PX and commissary) expires within ninety days of the husband's departure. The same is true for the spouse's military dependent identification card (granting access to USFK installations). Furthermore, many of the abandoned spouses are third country nationals in the ROK illegally due to an expired visa, and are afraid to contact the Army or the U.S. Embassy for help.[52] Many of these women wrongly believe that if they come forward they will be deported and their children (who have American citizenship through their fathers) will be taken away from them and sent to the United States. Consequently, most abandoned spouses choose to suffer in silence and work low-wage, dangerous jobs as undocumented laborers. For this reason, it is impossible to accurately determine how many abandoned spouses are in the ROK.

Waiting spouses are those spouses who have remained behind in the ROK because their visas to the United States had not been approved

[51] Interview with Ms. Linda S. Rieth, IMCOM/KORO/HHC Area I, Camp Red Cloud, in Uijongbu, S. Korea (Dec. 11, 2007).
[52] *Id.*

when it came time for the husbands to return stateside.[53] As Korea is a "short tour," with most USFK Soldiers serving a single year, it is exceedingly rare that a foreign-born spouse is able to accompany her husband back to the United States, as the processing time for the visa to the United States typically takes between nine and twelve months.[54] Without the assistance of her husband, the visa process becomes even more difficult; in time, many waiting spouses become abandoned spouses. Waiting spouses face the same legal and logistical challenges accessing USFK installations as do abandoned spouses, and have the same reluctance to seek assistance. An individual working on the issue estimates there are approximately 300 waiting families in Area I[55] of the ROK.[56]

The predicament of abandoned and waiting spouses has negatively impacted U.S.-ROK relationship in two respects. First, both groups of spouses serve as a drain on the Korean economy. Although, in the author's experience, these women and their children are typically non-Korean citizens, they still receive generous benefits under the Korean social welfare system.[57] Second, the population has led Koreans to view USFK Soldiers as irresponsible or immoral and USFK leaders as ineffective. Indeed, the summary to USFK Regulation 600-240 acknowledges the "negative publicity" abandoned and waiting spouses have caused USFK.[58] Given the precarious state of U.S.-ROK affairs, USFK realized it had to counter this perception. One plausible measure would have been revision of the U.S.-ROK Status of Forces Agreement (SOFA) entered into in 1966. Unlike the U.S.-German SOFA, the U.S.-ROK SOFA does not ensure that the U.S. Army will cooperate with South Korean officials in finding fathers and ensuring that they will provide

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[53] *Id.*

[54] Interview with Ms. Elizabeth Samarripa, Army Cmty. Serv., Area I, Korea, Camp Casey, in Dongducheon, S. Korea (Dec. 3, 2007) [hereinafter Samarripa Interview].

[55] Today, Area I has approximately 7000 Soldiers in the two main garrison enclaves of Camps Casey/Hovey and Camp Red Cloud. Camps Casey/Hovey are located in the city of Dongducheon, twelve miles from the DMZ and home to both 1st Heavy Brigade Combat Team and 210th Fires Brigade. Camp Red Cloud serves as the Second Infantry Division's Headquarters located in Uijongbu. *See* U.S. Army Installation Management Command, USAG-Red Cloud, History of Area I Support Activity, http://ima.korea.army.mil/area1/sites/about/history.asp (last visited June 15, 2009).

[56] Samarripa Interview, *supra* note 54.

[57] *See, e.g.*, Young-Hwa Kim, *Productive Welfare: Korea's Third Way?*, 12 INT'L J. SOC. WELFARE 61 (2003).

[58] USFK REG. 600-240, *supra* note 3, summary.

child support to the mothers.[59] Rather, USFK chose to implement USFK Regulation 600-240, *International Marriages in Korea*, which mandates command involvement in ensuring that Soldiers assist their dependents in seeking immigration to the United States. As explored below, USFK Regulation 600-240 is just one example of the military regulating servicemembers' marriages.

III. A History of Military Regulation of Marriage

A. Precursors

Between the American Civil War and the Global War on Terror, military thinking on the permissibility of regulating servicemembers' marriages has undergone a stunning about-face. In an opinion issued on 13 April 1876, The Judge Advocate General, Brigadier General W.M. Dunn, stated:

> Nothing can be clearer, in my opinion, than that, in the absence of an express statute restraining soldiers from contracting marriage . . . no officer can be authorized to prohibit the soldiers of his command from taking wives, or to bring them to trial if they do so without his permission. While this matter is generally regulated by specific provision in the European Codes, our statute law is silent on the subject, nor have we even an Army regulation relating to the same: indeed the imposing of restrictions upon marriage would be quite beyond the proper scope of executive rules or orders . . . .[60]

Brigadier General Dunn's admonishment would guide military policy until the post-World War I era, when security and legal impediments brought about a reversal.[61] With the fight against Fascism and National Socialism, marriages to foreign nationals raised security

[59] *See, e.g.*, Gwyn Kirk et al., *Women and the U.S. Military in East Asia*, 9 FOREIGN POL'Y IN FOCUS 1, 2 (2000).

[60] A DIGEST OF OPINIONS OF THE JUDGE ADVOCATES GENERAL OF THE ARMY 450 (William Winthrop ed., 1901).

[61] *E.g.*, U.S. Dep't of State, Under Sec'y for Pub. Diplomacy & Pub. Affairs, The Immigration Act of 1924 (The Johnson-Reed Act), *available at* http://www.state.gov/r/pa/ho/time /id/87718.htm (last visited June 19, 2009).

concerns reflected in restrictive immigration laws.[62] Even when a foreign bride was allowed to immigrate to the United States, anti-miscegenation laws in thirty states meant that she might not be able to co-habit with her husband without facing criminal penalties.[63]

In 1939, the War Department took the first step in regulating marriages between Soldiers and foreign nationals by promulgating AR 600-750.[64] This regulation stipulated that the Army could refuse to re-enlist Soldiers in the grades of E1 to E3 who married without their commander's permission.[65] Three years later, the War Department requested an opinion from The Judge Advocate General of the U.S. Army regarding the permissibility of a broader regulation, which the War Department hoped to issue based upon a recommendation of the Commanding General, Caribbean Defense Command.[66] In response, Major General Myron C. Cramer, The Judge Advocate General of the U.S. Army, rendered an opinion reversing Brigadier General Dunn's 1876 guidance. General Cramer wrote:

> [I]f in the considered judgment of the Secretary of War the military efficiency of foreign commands requires the prohibition of marriages by members of those commands except with official permission, a regulation such as that proposed, would be subject to no legal objection. To the extent that prior opinions of this office express a contrary view, they are hereby overruled.[67]

With Major General Cramer's blessing, the War Department published Circular No. 179 on 8 June 1942, holding that "[n]o military personnel on duty in any foreign country or possession may marry without the approval of the commanding officer of the United States Army forces stationed in such foreign country or possession."[68]

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[62] *Id.* (citing "[t]he uncertainty over national security during World War I" as the impetus behind the legislation implementing literacy tests and excluding immigrants from certain geographic areas).
[63] Nancy K. Ota, *Flying Buttresses*, 49 DEPAUL L. REV. 693, 720 (2000).
[64] *See* U.S. DEP'T OF ARMY, REG. 600-750, RECRUITING FOR THE REGULAR ARMY AND THE REGULAR ARMY RESERVE para. 14 (10 Apr. 1939).
[65] *Id.*
[66] Richard B. Johns, *The Right To Marry: Infringement by the Armed Forces*, 10 FAM. L. Q. 357, 361 (1977).
[67] *Id.*
[68] U.S. WAR DEP'T, CIR. NO. 179 § 1 (8 June 1942).

Approval to marry was based solely upon the commanding officer's "subjective assessment of the probable success of marriage";[69] given the number of states with anti-miscegenation laws, it was relatively facile for a commander to conclude that an interracial marriage would not succeed.

Circular No. 179 failed to exempt Soldiers who had fathered foreign children. This remission resulted in a number of American Soldiers being forced to leave their Families behind.[70] Congress responded with the War Brides Act of 1945.[71] The act, rescinded in 1948, waived certain visa requirements for women who had married servicemembers during World War II. This resulted in the immigration of 92,465 foreign wives to the United States for fiscal years 1946 through 1948.[72] A year after passing the War Brides Act, Congress passed the G.I. Fiancées Act, facilitating the admission into the United States of alien fiancées of servicemembers.[73] More than 5000 individuals entered the United States between 29 June 1946 and 30 June 1948 as a result.[74]

Four years after the expiration of the G.I. Fiancées Act, Congress passed the Immigration and Nationality Act (INA) of 1952 over the veto of President Truman.[75] The INA was a landmark piece of legislation. Not only did it combine all previous immigration and naturalization statutes into one act, but it also reorganized the structure of immigration law by eliminating race-based quotas.[76] One of the three articulated goals of the INA was the reunification of families.[77] Consequently, the INA continued to give preference to U.S. servicemembers' spouses and children immigrating to the United States.[78]

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[69] Ota, *supra* note 63, at 722.

[70] One author estimated that American Soldiers had abandoned some 120,000 British and German "war babies." *See* Norman M. Lobsenz, *The Sins of the Fathers*, REDBOOK, Apr. 1956, at 109.

[71] War Brides Act of 1945, Pub. L. No. 79-271, 59 Stat. 659.

[72] S. REP. NO. 1515 ch. IID3 (1948) (Conf. Rep.).

[73] G.I. Fiancées Act of 1946, Pub. L. No. 79-471, 60 Stat. 339.

[74] S. REP. NO. 1515, *supra* note 72, pt. I., ch. IIE6.

[75] *See* McCarran-Walter Act, Pub. L. No. 82-414, 66 Stat. 163 (1952).

[76] *See, e.g.*, Adam B. Cox & Eric A. Posner, *The Second Structure Order of Immigration Law*, 59 STAN. L. REV. 809, 817 (2007).

[77] *See, e.g.*, Leah Phelps Carpenter, *The Status of the H-1B Visa in These Conflicting Times*, 10 TULSA J. COMP. & INT'L L. 553, 556 (2003); Fernando Colon-Navarro, *Familia E Inmigracion: What Happened to Family Unity?*, 19 FLA. J. INT'L L. 491, 491 (2007).

[78] *See, e.g.*, § 319, 66 Stat. at 339.

B. Army Regulation 600-240

The year after Congress passed the INA, the Departments of the Army, Navy, and Air Force issued a sweeping joint-service regulation titled *Marriage in Overseas Command.*[79] The directive applied to all Soldiers, Sailors, Airmen, and Marines stationed overseas wishing to marry a third country national, and provided explicit regulatory guidance for gaining the permission of the overseas commander. The regulation specifically authorized overseas commanders to issue ancillary regulations setting forth particular rules for that command.[80]

Army Regulation 600-240 was revised in 1957, 1959, 1965, 1977, and 1978, and rescinded on 1 January 1996.[81] Despite the flurry of paperwork created with each revision, the substance of the regulation remained intact. In setting out its purpose, AR 600-240 explained that while Soldiers have "basically the same right to enter into marriage as any other citizens of the United States,"[82] the regulation was required to protect both aliens and U.S. citizens "from the possible disastrous effects of an impetuous marriage entered into without appreciation of its implications and obligations."[83] To achieve this goal, AR 600-240 mandated that all military personnel stationed overseas seeking to marry an alien receive written authorization from their senior commander.[84] Approval was given in all cases provided that two determinations could be made. First, neither a medical examination nor an investigative background check revealed that the intended alien spouse would "certainly or probably" be denied entry to the United States for failure to meet physical,[85] mental,[86] or character[87] standards. Second, the

[79] U.S. DEP'T OF ARMY, REG. 600-240; BUPERSINT (BUREAU OF PERSONNEL INSTRUCTION) 1752.1; U.S. AIR FORCE, REG. 211-18; MARINE CORPS ORDER 1752.1C, MARRIAGE IN OVERSEAS COMMANDS (Oct. 14, 1953) [hereinafter AR 600-240].

[80] Johns, *supra* note 66, at 363.

[81] *See, e.g.*, ADMIN. & CIVIL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S SCH., JA 263, LEGAL ASSISTANCE FAMILY LAW GUIDE (1998), *available at* http://www.louisvillelaw.com/federal/ArmyPubs/JA263FamilyLawGuide.pdf.

[82] AR 600-240, *supra* note 79, para. 4a.

[83] *Id.* para. 1a.

[84] *Id.* para. 4a.

[85] Disqualifying physical characteristics included alcoholism, infection with various sexually transmitted diseases, leprosy, or tuberculosis. *Id.* para. 5b(3)–(4).

[86] Disqualifying mental characteristics include mental retardation, insanity, psychopathy, and sexual deviation. *Id.* para. 5b(1)–(2).

[87] "Chronic alcoholics, paupers, professional beggars, [and] vagrants," as well as those having been convicted of "[a] crime involving moral turpitude," were all ineligible to meet the requisite character standards. Further disqualifying character traits included

servicemember seeking approval had to "demonstrate[] financial ability . . . to prevent the alien spouse from becoming a public charge."[88]

Applicants were encouraged, but not required, to seek the counsel of a military chaplain.[89] Later iterations of the regulation, to include USFK Regulation 600-240, mandate rather than merely encourage non-religious pre-marital counseling from a military chaplain. Army Regulation 600-240 concluded with the suggestion that in order to avoid "overwhelming adjustment problems," alien spouses should participate in English classes and other "Western cultural activities" prior to arrival in the United States.[90]

C. Early Challenges

Two years after AR 600-240 appeared, the Commander of the United States Naval Forces, Philippines, promulgated an ancillary instruction. Like AR 600-240, the instruction, U.S. Naval Forces, Philippines (NAVPHIL) 5800.1E 60, required all members of the command wishing to marry an alien obtain the written consent of the commander.[91] Unlike AR 600-240, the Navy instruction required a mandatory six-month waiting period before a commander would grant approval to marry. The rationale behind this deviation was that it would prevent young Sailors from making impetuous decisions to marry.[92]

On 16 July 1956, Navy Seaman Nation, a U.S. Sailor stationed in the Philippines, submitted an application to marry his Filipina fiancée. Seaman Nation waited the required six months but never received a response from his command. Consequently, he married on 19 January 1957 without his commander's written authorization.[93] When the command learned of Nation's marriage, he was charged with disobeying

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having engaged in prostitution, having engaged in polygamy, or having been "anarchists, opposers of organized government, advocates of forceful or violent overthrow of organized government, members of or affiliated with the Communist or any other totalitarian party or association." *Id.* para. 5b(5)–(7).

[88] *Id.* para. 4a.

[89] *Id*. para. 5b(1)–(2).

[90] *Id*. para. 15e.

[91] *See* COMMANDER, U.S. NAVAL FORCES PHILIPPINES, NAVPHIL 5800.1E 60: MARRIAGE OF UNITED STATES NAVAL PERSONNEL WITHIN THE PHILIPPINE ISLANDS para. 5 (7 Apr. 1955).

[92] *See, e.g.*, United States v. Nation, 26 C.M.R. 504, 506 (C.M.A. 1958).

[93] *Id.*

a lawful regulation[94] in violation of Article 92, Uniform Code of Military Justice.[95] A special court-martial convicted Seaman Nation; he received a bad-conduct discharge from the Navy, forfeitures, confinement, and reduction in rank.[96] A review board in the Office of the Navy's Judge Advocate General set aside the conviction on the grounds that the regulation was not a lawful order.[97] The case eventually made its way to the Court of Military Appeals (COMA).[98] The court held the six-month waiting period to be an "arbitrary and unreasonable interference with the [servicemember's] personal affairs" and affirmed the decision reached by The Judge Advocate General's office that the regulation was unlawful.[99] Of particular note, the court found the regulation so broad that it refused to "probe the question" of whether servicemembers had the right "to marry while serving overseas."[100] Such a determination would be left to a future case.

Less than three years after *Nation*, COMA again heard what was becoming an increasingly familiar story of a Sailor stationed in the Philippines who had married his Filipina fiancée without command authorization.[101] A special court-martial convicted Seaman Wheeler, who would not prove as fortunate as Seaman Nation. Shortly after the *Nation* decision, the Navy revised NAVPHIL 5800.1E 60 and omitted the six-month waiting period COMA had condemned.[102] With the offending waiting period removed, COMA turned to the issue it had sidestepped in *Nation*—the right of servicemembers to marry overseas. The decision hints of Justice Jackson's "specialized community" theory enunciated in *Orloff v. Willoughby*.[103] Nonetheless, COMA did not stop

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[94] An order or regulation is lawful provided that it relates to military duty. Military duty is an expansive term and "includes all activities reasonably necessary to accomplish a military mission, or safeguard or promote the morale, discipline, and usefulness of members of a command and directly connected with the maintenance of good order in the service." MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. IV ¶ 14c(2)(a)(iv) (2008). Provided that an order has a valid military purpose, it may "interfere with private rights or personal affairs." *Id.*
[95] *Nation*, 26 C.M.R. at 505.
[96] *Id.*
[97] *Id.*
[98] On 5 October 1994, the U.S. Court of Military Appeals (COMA) was renamed the U.S. Court of Appeals for the Armed Forces (CAAF).
[99] *Nation*, 26 C.M.R. at 507.
[100] *Id.* at 506.
[101] *See* United States v. Wheeler, 30 C.M.R. 387 (C.M.A. 1961).
[102] *Id.* at 390.
[103] 345 U.S. 83, 94 (1953) ("The military constitutes a specialized community governed by a separate discipline from that of the civilian.").

there; it further dissected the "specialized community" among Soldiers serving overseas and Soldiers serving in the continental United States.[104] The former, it declared, were subject to greater restrictions than the latter. Dismissing Judge Ferguson's dissenting argument that there was a "complete lack of connection between the order and any requirement of the military service,"[105] COMA found the regulation "a wholly reasonable limitation of the individual's freedom of action in a command located on foreign soil"[106] and affirmed Seaman Wheeler's conviction.

D. The Mundy Directive

Following the *Wheeler* decision, the issue of military regulation of servicemember marriages received scant attention for the next three decades. This changed in the summer of 1993. That August, the Commandant of the Marine Corps, General Carl E. Mundy Jr., signed a directive prohibiting the Marine Corps from accepting married recruits as of 30 September 1995.[107] The directive cited the alarming number of married Marines failing to re-enlist after completion of their initial period of enlistment, as well as the costs associated with supporting a Marine's family.[108] Despite the directive's legitimate intentions, it was never implemented. In fact, the very day President Clinton's Secretary of Defense, Les Aspin, learned of the policy, he reversed it.[109] While the Pentagon acknowledged that the Armed Services have the authority to promulgate personnel policies, it explained that Secretary Aspin viewed "family values as sufficiently important [to] require his review."[110]

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[104] *Wheeler*, 30 C.M.R. at 389. "Activities of American military personnel in foreign countries may have different consequences from the same activities performed in the United States . . . . [A] military commander may, at least in foreign areas, impose reasonable restrictions on the right of military personnel of his command to marry." *Id.*
[105] *Id.* at 390 (Ferguson, J., dissenting).
[106] *Id.* at 388.
[107] Eric S. Montalvo, *The Constitutional Right to Marry . . . Fundamental Right or Façade? A Review of the Constitutionality of Military Restrictions on the Right to Marry . . . and Even if They Could . . . Whether They Should*, 52 NAVAL L. REV. 239, 239–40 (2005).
[108] Military Families receive generous benefits to include free housing, free medical care, free child care, and free counseling services. *See*, *e.g.*, Clifford Krauss, *Marine Leader Contritely Admits He Erred on "Singles Only" Order,* N.Y. TIMES, Aug. 13, 1993, at A1.
[109] Clifford Krauss, *The Marines Want Singles Only, But They Are Quickly Overruled*, N.Y. TIMES, Aug. 12, 1992, at A1.
[110] *Id.*

In a keen post-mortem of the directive, Senator Jim Webb (D-Va.), a former Assistant Secretary of Defense, applauded General Mundy's decision to put money into the warfighters rather than their dependents.[111] Nonetheless, Senator Webb was one of the directive's few advocates. The policy was ridiculed by members of Congress[112] and civil libertarians who claimed that it raised "constitutional questions involving discrimination and privacy."[113] In a mea culpa, General Mundy was forced to concede that he "blind-sided" President Clinton and it was "not one of [his] prouder moments in history."[114] The mêlée that erupted over the Mundy directive is instructive. Although a Service may have legitimate ends in enacting personnel policy, it may prove to be so socially unpalatable and politically untenable that it becomes impossible to implement.

IV. Constitutional Considerations

A. Tiers of Scrutiny

Modern constitutional analysis relies upon a hierarchy of standards when government action is challenged as a violation of liberty under either the Due Process Clause or the Equal Protection Clause. Courts strictly scrutinize government action that impinges upon fundamental liberties[115] or involves the use of a suspect classification.[116] Strict scrutiny is the highest standard of judicial review; under this analysis a law will be struck down unless the "infringement is narrowly tailored to serve a compelling state interest."[117] For an infringement to be narrowly tailored, courts have held that it can be neither "overinclusive" (affecting more people than necessary) nor "underinclusive" (failing to affect

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[111] James Webb, *The Military Is Not a Social Program,* N.Y. TIMES, Aug. 18, 1993, at A19.
[112] See for example comments made by Rep. Pat Schroeder (D-Colo.): "If they are not allowed to be homosexuals and they're not allowed to be married . . . what are they supposed to do, take cold showers?" Krauss, *supra* note 109, at A1.
[113] *Id.*
[114] *Id.*
[115] *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 503–04 (1965).
[116] The Court has declared that race, national origin, and in certain cases, alienage, are suspect classifications subject to strict scrutiny. *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483 (1954) (race); Korematsu v. United States, 323 U.S. 214 (1944) (national origin); Graham v. Richardson, 403 U.S. 365 (1971) (alienage).
[117] Lawrence v. Texas, 539 U.S. 558, 593 (2003) (Scalia, J., dissenting).

people who should be impacted).[118] Under strict scrutiny, the means chosen by the government must also be necessary to achieve the compelling end, and there cannot be less restrictive alternatives.[119] It would be insufficient, for example, for a rational relation to exist between the means and the end, as would be permissible under the second standard of judicial review, rational basis review.[120] Due to these requirements, government action is often struck down under strict scrutiny.[121]

When government action does not infringe upon a fundamental right or involve the use of a suspect classification, the action will be upheld under rational basis review provided that it "bears a rational relation to some legitimate end."[122] Under this standard, legislation will be upheld "even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous."[123] Consequently, rational basis review is highly deferential to the government and laws are rarely overturned under such an analysis.[124]

The Burger Court formulated a third level of judicial review known as intermediate or mid-tier scrutiny.[125] Intermediate scrutiny is often invoked in gender discrimination cases.[126] Under this level of scrutiny, government conduct will be upheld provided that it is substantially related to an important government interest.[127]

B. A Fundamental Right to Marry?

As the foregoing illustrates, determining whether a right is considered fundamental is critical. The Supreme Court has traditionally

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[118] *See, e.g.*, Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993).
[119] *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989).
[120] *See, e.g.*, Heller v. Doe, 509 U.S. 312, 320 (1993).
[121] *But see Korematsu*, 323 U.S. 214 (declaring Executive Order 9066, requiring Japanese-Americans in the western part of the United States to be forcibly repatriated to relocation camps during WW II, constitutional, despite applying strict scrutiny).
[122] *E.g.*, Romer v. Evans, 517 U.S. 620, 631 (1996).
[123] *Id.* at 632.
[124] *But see id.* (declaring Colorado's Amendment 2, which prevented any laws banning discrimination against homosexuals, unconstitutional under rational basis review).
[125] *See, e.g.*, ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 529 (1997).
[126] *See, e.g.*, *id.*
[127] Craig v. Boren, 429 U.S. 190, 198 (1976).

used two methods to determine whether a right qualifies for heightened judicial protection. First, courts have looked at whether the right is "deeply rooted in th[e] nation's history and tradition."[128] While such evidence is highly persuasive, it is not dispositive.[129] Second, courts have considered a normative argument on what it means to be a free person in a free society. This concept was articulated in *Palko v. Connecticut*, where the Court argued that fundamental rights are those that are "implicit in the concept of ordered liberty."[130]

1. Antecedents: Meyer*,* Skinner*, and* Griswold

The right to marry is an unenumerated right as it appears in neither the Constitution nor the Bill of Rights.[131] Nonetheless, the right has an extensive history in Supreme Court jurisprudence. In 1923, the Court considered the case of a teacher convicted of teaching German to a student in violation of a 1919 Nebraska state statute prohibiting the teaching of foreign languages to pupils before high school.[132] That case,

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[128] *See, e.g.*, Moore v. City of East Cleveland, 431 U.S. 494 (1977); *see also* Griswold v. Connecticut, 381 U.S. 479 (1965) ("The Court stated many years ago that the Due Process Clause protects those liberties that are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934))).

[129] For example, referring to the Virginia anti-miscegenation law that *Loving v. Virginia* struck down, Justice Stevens asserted in his *Bowers v. Hardwick* dissent, "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack." 478 U.S. 186, 216 (1986) (Stevens, J., dissenting). Similarly, writing for the majority in the case that would overturn *Bowers*, Justice Kennedy explained:

> Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.

Lawrence v. Texas, 539 U.S. 558, 578–79 (2003).

[130] 302 U.S. 319, 325–26 (1937).

[131] *See, e.g.*, Howard Gillman, *The Future of Unenumerated Rights: Regime Politics, Jurisprudential Regimes, and Unenumerated Rights*, 9 U. PA. J. CONST. L. 107, 118 (2006).

[132] Meyer v. Nebraska, 262 U.S. 390, 396 (1923).

Meyer v. Nebraska, was a benchmark in the creation of substantive due process. Writing for the majority, Justice McReynolds held that liberty, under the Due Process Clause, encompassed the right "to marry, establish a home and bring up children."[133] In 1942, in *Skinner v. Oklahoma*,[134] the Court commented on the essential nature of marriage in society when it declared that marriage is "fundamental to the very existence and survival of the race."[135] In *Skinner*, the Court considered the constitutionality of an Oklahoma law that required the sterilization of "habitual criminals."[136] The Court struck down the law as unconstitutional.

Finally, in the landmark case of *Griswold v. Connecticut*,[137] the Court again referred to the fundamental nature of marriage in invalidating a Connecticut statute that prohibited the use of contraceptives among married couples. In *Griswold*, the Court ruled that the Constitution protected a right to privacy and Justice Douglas's majority opinion placed special emphasis on the burden the Connecticut statute placed on the marital relationship.[138] Justice Douglas concluded his opinion with the following language:

> We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.[139]

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[133] *Id.* at 399.
[134] 316 U.S. 535 (1942).
[135] *Id*. at 541.
[136] *Id.* at 536 (defining an "'habitual criminal' as a person who, having been convicted two or more times for crimes 'amounting to felonies involving moral turpitude,' either in an Oklahoma court or in a court of any other State, is thereafter convicted of such a felony in Oklahoma . . . .").
[137] 381 U.S. 479 (1965).
[138] *Id.* at 485 ("The marriage relationship lies within the zone of privacy created by several fundamental constitutional guarantees. [The Connecticut statute], in forbidding the use of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship.").
[139] *Id.* at 486.

Although *Meyer*, *Skinner*, and *Griswold* all asserted the fundamental importance of marriage to the traditional family and society, none of these cases dealt with the explicit right to enter into marriage. Rather, each case involved, in the words of one legal scholar, an "interference with marriage," [140] meaning the marital relationship had already been established and the plaintiff alleged that the state had wrongly interfered with a constitutional aspect of the marriage partnership. In contrast, marriage cases considered post-*Griswold* fall into the "failure to recognize" [141] category, meaning the marital relationship had yet to be consummated and the plaintiff alleged that the state had refused to recognize the actual marital relationship.

2. Regulating the Right to Marry: Loving

In June 1958, Richard Perry Loving, a white man, and Mildred Delores Jeter, an African-American and Cherokee woman, married in Washington, D.C.[142] Five weeks later, while residing in Caroline County, Virginia, Richard and Mildred were arrested for violating Virginia's anti-miscegenation law.[143] After the Lovings pleaded guilty and received a sentence of a year in jail, the trial judge agreed to suspend the sentence provided the couple leave Virginia and not return for a period of twenty-five years.[144] The Lovings moved to Washington, D.C.; five years after their banishment, they filed a motion asking a Virginia court to vacate their sentence, arguing that the statute was unconstitutional under the Fourteenth Amendment.[145] The state court denied the motion, and the Lovings appealed. The Supreme Court of Appeals of Virginia affirmed the convictions and upheld the anti-miscegenation law as constitutional, a decision ultimately reversed by the U.S. Supreme Court. [146]

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[140] *See* Carlos A. Ball, *The Positive in the Fundamental Right to Marry: Same-Sex Marriage in the Aftermath of* Lawrence v. Texas, 88 MINN. L. REV. 1184, 1192 (2004); *see also* Lynn D. Wardle, Loving v. Virginia *and the Constitutional Right to Marry, 1790–1990*, 41 HOW. L.J. 289, 302 (1998).
[141] Ball, *supra* note 140, at 1192.
[142] Robert A. Pratt, *Crossing the Color Line: A Historical Assessment and Personal Narrative of* Loving v. Virginia, 41 HOW. L.J. 229 (1998).
[143] Loving v. Virginia, 388 U.S. 1, 3 (1967).
[144] *Id.*
[145] *Id.*
[146] *Id.*

In a unanimous opinion written by Chief Justice Warren, the Court concluded "that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause."[147] The Court's opinion could have rested solely on this equal protection analysis, but in the final two paragraphs of the opinion the Court made a substantive due process argument. Chief Justice Warren explained:

> Marriage is one of the "basic civil rights of man," fundamental to our very existence and survival. To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law.[148]

3. Tensions with the Right to Marry: Zablocki *and* Turner

The marriage cases following *Loving* expose what one scholar has referred to as "the substantial difficulties with the concept of a right to marry."[149] Although *Loving* cemented the fundamental status of the right to marry, in post-*Loving* "failure to recognize" marriage cases the Court has been unwilling to extend the strict scrutiny normally applied to laws infringing upon fundamental rights. *Zablocki v. Redhail*[150] is one such example.

In *Zablocki*, the Court considered the constitutionality of a Wisconsin statute requiring that non-custodial parents ordered to make child support payments receive court counseling and permission prior to being granted a marriage license.[151] The statute specified that such permission would only be forthcoming if two conditions could be met. First, the individual seeking the license had to provide the court with proof that he or she was in current compliance with his or her

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[147] *Id.* at 12.
[148] *Id.* (internal citations omitted).
[149] Earl M. Maltz, *Constitutional Protection for the Right to Marry: A Dissenting View*, 60 GEO. WASH. L. REV. 949, 950 (1992).
[150] 434 U.S. 374 (1978).
[151] *Id*. at 375.

obligations.[152] Second, the individual had to demonstrate that the child covered by the support order would not become a public charge.[153]

The facts behind *Zablocki* stem from a high school tryst. In 1972, an acquaintance of Roger Redhail brought a paternity action against the high school senior in Milwaukee County, Wisconsin.[154] Mr. Redhail acknowledged that the baby girl was his, and the county court ordered him to pay $109 per month until she reached the age of eighteen.[155] Mr. Redhail never made a single payment. In September 1974, Mr. Redhail filed an application for a marriage license to a second woman who was also pregnant with his child. The license was denied on the grounds that Mr. Redhail was several thousand dollars in arrears on his support obligations, and his daughter had received benefits under the Aid to Families with Dependent Children program since her birth.[156] Mr. Redhail brought a class-action suit against the country clerk, Thomas Zablocki, and prevailed in the U.S. District Court for the Eastern District of Wisconsin, which concluded that strict scrutiny was the appropriate standard[157] and held the statute unconstitutional.[158] Appellant then appealed directly to the U.S. Supreme Court.

While eight Justices agreed with the Federal District Court that the statute was unconstitutional, the Court could not agree upon a rationale, evidenced by four concurring opinions. Justice Marshall's confusing majority opinion undermines strict scrutiny[159] and at times equates equal protection with a substantive due process analysis.[160]

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[152] *Id.*
[153] *Id.*
[154] *Id.* at 378.
[155] *Id.*
[156] *Id.*
[157] In applying strict scrutiny, the U.S. District Court for the Eastern District of Wisconsin relied upon both a substantive due process argument ("there is a constitutionally protected right to marry which occupies the status of being a fundamental right") and an equal protection argument ("[t]he wealth discrimination inherent in the statute thus provides an additional justification for applying the strict scrutiny test"). Zablocki v. Redhail, 418 F. Supp. 1061, 1069–70 (1976).
[158] *Zablocki*, 434 U.S. at 376.
[159] Justice Marshall consistently expressed concern with the tiered system of judicial review. *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 98 (1973) (Marshall, J., dissenting).

> To begin, I must once more voice my disagreement with the Court's rigidified approach to equal protection analysis. The Court apparently seeks to establish today that . . . cases fall into one of two

The Court cited *Loving* as the leading case on the right to marry and quoted it, *Meyer*, *Skinner*, and *Griswold* in asserting "the fundamental character of the right to marry."[161] Nonetheless, rather than automatically apply strict scrutiny, the Court held that the determinative question was not whether government action had impinged upon a fundamental liberty, but whether it "interfered directly and substantially with the right to marry."[162] Taking special pains to explain that traditional strict scrutiny did not apply in the present case, Justice Marshall explained:

> By reaffirming the fundamental character of the right to marry, we do not mean to suggest that every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny. To the contrary, reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed.[163]

The selection of the term "rigorous" rather than "strict" is noteworthy. Equally illuminating is the pronouncement that "[w]hen a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests."[164] Here, Justice Marshall jettisons the strict scrutiny "compelling" state interest requirement in favor of an intermediate scrutiny "important" interest element. Justice Marshall was reluctant to apply a traditional

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> neat categories which dictate the appropriate standard of review . . . . But this Court's decisions . . . defy such easy categorization.

Id. (internal citations omitted); *see also* Jeffrey M. Shaman, *Cracks in the Structure: The Coming Breakdown of the Levels of Scrutiny*, 45 OHIO ST. L.J. 161 (1984) (explaining that "Justice Marshall believes that the multi-tier approach is an oversimplification . . . . He claims that a principled reading of the Court's decisions reveals a spectrum, or 'sliding scale,' of scrutiny that is calibrated by degrees rather than by two or three tiers.").

[160] *See, e.g.*, *Zablocki*, 434 U.S. at 391 (Stewart, J., concurring) ("To hold, as the Court does, that the Wisconsin statute violates the Equal Protection Clause seems to me to misconceive the meaning of that constitutional guarantee. The Equal Protection Clause deals not with substantive rights or freedoms but with invidiously discriminatory classifications.").

[161] *Id.* at 386.

[162] *Id.*

[163] *Id.* at 388.

[164] *Id.*

strict scrutiny analysis to the right to marry, even though his opinion asserts its fundamental character.

The key to understanding this reluctance is found in the concurring opinions. Justice Stewart emphatically disagrees that "there is a 'right to marry' in the constitutional sense."[165] He explains that the "privilege" to marry is "one to be defined and limited by state law."[166] Indeed, the state, he argues, may entirely prohibit it.[167] Herein lies the problem. As one scholar explains:

> [B]road state power to regulate marriage clashes with the idea of marriage as a fundamental right. If a state can define the boundaries of marriage, then it can manage its citizens' access to marriage through those boundaries. But, if marriage is a fundamental constitutional right, such state attempts to restrict access to it should be viewed with great suspicion by the courts.[168]

Nine years after the muddled *Zablocki* holding, the Court again considered the right to marry. While both *Loving* and *Zablocki* were decided primarily on equal protection grounds, the Court based its 1987 decision in *Turner v. Safley*[169] exclusively on a substantive due process analysis, making it, in the words of one scholar, the "most important" failure to recognize marriage case.[170] In *Turner*, prison inmates argued that two regulations implemented by a Missouri correctional institution were unconstitutional and brought a class action suit against prison officials.[171] The first regulation limited correspondence between unrelated inmates housed in different prisons. The second regulation prohibited inmates from marrying except in extenuating circumstances of pregnancy or the birth of a child. The U.S. Court of Appeals for the Eighth Circuit invalidated both regulations. The court applied strict

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[165] *Id.* at 392 (Stewart, J., concurring).
[166] *Id.*
[167] *Id.* While not going as far as Justice Stewart, Justice Powell also expressed concerns with the majority's rationale, noting that it "sweeps too broadly in an area which traditionally has been subject to pervasive state regulation." *Id.* at 396 (Powell, J., concurring).
[168] Joseph A. Pull, *Questioning the Fundamental Right to Marry*, 90 MARQ. L. REV. 21, 34 (2006).
[169] 482 U.S. 78 (1987).
[170] Ball, *supra* note 140, at 1200.
[171] Turner v. Safley, 482 U.S. 78, 82 (1987).

scrutiny, as the regulation implicated two fundamental rights—speech and marriage.[172]

While Justice O'Connor's opinion acknowledged that "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution,"[173] the Court also noted that "the right to marry, like many other rights, is subject to substantial restrictions as a result of incarceration."[174] Consequently, the Court concluded that rational basis review was the proper standard to evaluate the regulations.[175] By a vote of 5-4, the Court reversed the Eighth Circuit's invalidation of the correspondence regulation, holding that it *reasonably* related to security interests. With regard to the marriage regulation, the four dissenters joined Justice O'Connor's opinion and the Court unanimously affirmed the lower court's decision to strike down the marriage regulation, as it did not "satisfy the reasonable relationship standard."[176] Once again, despite acknowledging the fundamental character of the right to marry, the Court applied a less exacting standard than strict scrutiny.

Turner is an important case in considering the constitutionality of marriage regulations promulgated by the military. The *Turner* Court's use of rational basis review, rather than strict scrutiny, can be analogized to cases involving marriage rights of Soldiers. Soldiers, like prison inmates, belong to a "specialized community,"[177] and any regulation that infringes upon the fundamental rights of individuals belonging to either of these groups should undergo a similar standard of review.

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[172] Safley v. Turner, 777 F.2d 1307, 1313 (8th Cir. 1985).
[173] *Turner*, 482 U.S. at 84.
[174] *Id.* at 95.
[175] *Id.* at 89.

> [W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests. In our view, such a standard is necessary if "prison administrators . . . , and not the courts, [are] to make the difficult judgments concerning institutional operations."

Id. (internal citations omitted).
[176] The Court concluded that the marriage regulation was neither reasonably related to the penological interest of security nor to the goal of rehabilitation. *Id.* at 97–98.
[177] *See infra* note 179 and accompanying text.

A. The Military as a "Specialized Community"

While the Supreme Court has acknowledged that Soldiers are entitled to the same rights as all U.S. citizens,[178] it has consistently held that "the military constitutes a specialized community governed by a separate discipline from that of the civilian",[179] and the need for discipline and obedience "may render permissible within the military that which would be constitutionally impermissible outside it."[180] Such a presumption is as old as the Constitution. In the Fifth Amendment, for example, the framers distinguished cases arising in the military services from those arising in civilian life.[181]

Hand in hand with the supposition that military members' individual rights must often be curtailed to accomplish the military mission has been a judicial deference to military matters.[182] Indeed, as Justice Jackson famously noted in *Orloff v. Willoughby*, "judges are not given the task of running the Army."[183] At times, however, such judicial deference runs the risk of amounting to judicial abdication. In the most shameful example of the judiciary deferring to the military—*Korematsu v. United States*—the Court upheld Executive Order 9066, requiring Japanese-Americans in the western United States to be forcibly repatriated to internment camps during World War II.[184]

Justice Jackson first penned the widely quoted aphorism "specialized community" in the 1953 case of *Orloff v. Willoughby*.[185] In what the Court described as "a novel case," Orloff was inducted into the Army but

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[178] Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 188 (1962) ("[O]ur citizens in uniform may not be stripped of basic rights simply because they doffed their civilian clothes.").
[179] Orloff v. Willoughby, 345 U.S. 83, 94 (1953).
[180] Parker v. Levy, 417 U.S. 733, 758 (1974).
[181] *See* U.S. CONST. amend. V (providing in part that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of Grand Jury, *except in cases arising in the land or naval forces*, or in the Militia, when in actual service in time of War or public danger" (emphasis added)).
[182] *See, e.g.*, Goldman v. Weinberger, 475 U.S. 503, 507 (1986) (holding that "our review of military regulations . . . is far more deferential than constitutional review of similar laws or regulations designed for civilian society"); *see also* Rostker v. Goldberg, 453 U.S. 57, 64 (1981) ("The case arises in the context of Congress' authority over national defense and military affairs, and perhaps in no other area has the Court accorded Congress greater deference.").
[183] *Orloff*, 345 U.S. at 93.
[184] 323 U.S. 214, 216 (1944).
[185] *Orloff*, 345 U.S. at 94.

denied a commission due to his refusal to state whether he had been a member of the Communist Party.[186] Orloff then sought a writ of habeas corpus to discharge him from the Army.[187] The district court denied the writ and the U.S. Court of Appeals for the Ninth Circuit affirmed.[188] In affirming the Ninth Circuit's judgment, the Court held that "[t]he military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters."[189]

The effect of judicial deference to the military's "specialized community" has been the consistent application by courts of less stringent standards than strict scrutiny to constitutional challenges of military regulations and rules implicating fundamental rights and suspect classifications. As the case law demonstrates, even when military regulations and rules implicate fundamental rights, such as speech[190] or the Free Exercise Clause,[191] or suspect classifications such as gender,[192] courts apply rational basis review rather than strict scrutiny, and uphold the military regulation or rule provided that it is reasonable.

V. The Devil is in the Details: USFK Regulation 600-240

A. Purposes

In an e-mail to commanders and senior USFK leaders on 1 March 2007, the USFK Commander specifically cited USFK Regulation 600-240's purpose as "eliminat[ing] the problem of [servicemembers] leaving

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[186] *Id.* at 84.
[187] *Id.* at 85.
[188] *Id.* at 87.
[189] *Id.* at 94.
[190] *See, e.g.*, Parker v. Levy, 417 U.S. 733, 737 (1974) (denying an Army physician's habeas corpus review of his general court-martial conviction). Captain Levy had referred to special forces personnel as "liars, thieves, killers of peasants, and murderers of women and children" and had urged African-American enlisted men not to go to Vietnam. *Id.*
[191] *See, e.g.*, Goldman v. Weinberger, 475 U.S. 503 (1986) (holding that an Air Force regulation prohibiting the wearing of a yarmulke did not violate the First Amendment free exercise rights of a Jewish Air Force captain).
[192] *See, e.g.*, Rostker v. Goldberg, 453 U.S. 57 (1981) (holding that the Military Selective Service Act did not violate the Fifth Amendment in authorizing the President to require a male-only registration for the draft.).

spouses behind when they [transfer] out of Korea."[193] The emphasis of invigorating the U.S.-ROK strategic relationship by confronting the issue of abandoned and waiting spouses is further reflected in the regulation's *Commander's Intent*. Of the two articulated interests, the first explains that the regulation fills a necessary information gap and that "[m]arriages entered into in the absence of this information may result in spouses and children who are left behind in Korea when the servicemember leaves, creating undue hardship."[194]

United States Forces Korea Regulation 600-240 is a short document of thirteen pages with an additional eighteen pages in appendixes and copies of required forms. The regulation is structurally confusing and often difficult to follow, particularly for Soldiers. The crux of the regulation is meant to be paragraph 4 (responsibilities), delineating the myriad tasks both the Soldier and members of the chain of command must complete. Nevertheless, this paragraph fails to lay out comprehensively all required steps. Very confusingly, that paragraph is supplemented by paragraph 6 (pre-marital procedures); paragraph 7 (marriage in the ROK); and paragraph 8 (immigration procedures), all of which contain their own laundry list of requisite steps.

The 2ID Office of the Staff Judge Advocate (OSJA) further promulgated both a *Commander's Guide to USFK Regulation 600-240* and a *Soldier's Guide to International Marriages in Korea*. Both documents include a user-friendly flow chart laying out all required steps in a single PowerPoint slide.[195] Because commanders often were as confused as their Soldiers, particularly with regard to the information they needed to convey in two separate counseling sessions, the *Commander's Guide* is also supplemented by model templates of the Department of the Army Form 4856, Developmental Counseling.[196] The

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[193] E-mail from General Burwell B. Bell, UNC/CFC/CDR, to Lieutenant General James P. Valcourt, USFK Chief of Staff et al. (1 Mar. 2007, 17:74:12 KST (UTC + 9)) (on file with author). Eight days after sending the email to senior USFK leaders, General Bell followed up with an article to all USFK Soldiers. *See* General B.B. Bell, *International Marriages in South Korea*, WOLF PACK WARRIOR, Mar. 9, 2007, at 2, *available at* http://www.kunsan.af.mil/shared/media/document/AFD-070314-054.pdf.

[194] USFK REG. 600-240, *supra* note 3, para. 3a(1).

[195] Second Infantry Div. Chief, Admin. Law, Marriages in the Republic of Korea Briefing (Apr. 3, 2007) (unpublished PowerPoint Presentation, on file with author).

[196] U.S. Dep't of Def., DD Form 4856, Developmental Counseling Form (Pre-Marital Counseling with Couple) (May 2006); U.S. Dep't of Def., DD Form 4856, Developmental Counseling Form (Pre-Marital Counseling with Soldier) (May 2006); U.S. Dep't of Def., DD Form 4856, Developmental Counseling Form (Final Checklist

Soldier's Guide places special emphasis on those steps required to marry in Korea once the procedural requirements of USFK Regulation 600-240 have been met.[197]

B. Procedures

The process begins with a Soldier informing his chain of command that he wishes to marry a non-U.S. citizen in the ROK.[198] Immediately thereafter, the Soldier is responsible for scheduling the first of two counseling interviews with his battalion commander.[199] During the initial counseling the battalion commander is expected to advise the prospective couple on "understanding and accepting cultural differences."[200] It is peculiar that this is a required topic, as most commanders are not counselors and cross-cultural sensitivity is a topic covered in the mandatory counseling with the chaplain. Even more bizarre, the commander is required to counsel the Soldier on "what constitutes visa fraud and the penalties for marriage with a foreign national solely to circumvent U.S. immigration law"[201]—a topic most battalion commanders are unqualified to discuss with, much less counsel, a young Soldier.

At least forty-eight hours after the initial counseling session, the Soldier, without his fiancée, is required to meet with his battalion commander for a second counseling interview. The minimum forty-eight hour period is meant to let the Soldier "reflect on the subjects discussed" and cannot be waived.[202] During this second counseling, the commander

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Prior to Forwarding to Verification Authority) (May 2006) (on file with author).

[197] *See, e.g.*, Camp Casey Legal Office, *Soldier's Guide to International Marriages in Korea* 5–7, Mar. 2007, *available at* http://www.2id.korea.army.mil/documents/soldiers_guide_usfk_marriage_reg20070319.pdf [hereinafter *Soldier's Guide to International Marriages in Korea*].

[198] USFK REG. 600-240, *supra* note 3, para. 6a.

[199] When the 2ID OSJA learned that some Soldiers were waiting up to two months to get on the battalion commander's calendar, it drafted a memorandum for record signed by the 2ID Chief of Staff directing all commanders to "make reasonable efforts to meet with [their] Soldiers within 14 days of the Soldier notifying the chain of command." Memorandum from Colonel Robert P. Pricone, Second Infantry Div. Chief of Staff, to Second Infantry Div. Commanders, subject: Implementation Guidance for USFK Reg. 600-240 (International Marriages in Korea) (1 Apr. 2007) (on file with author).

[200] USFK REG. 600-240, *supra* note 3, app. I(2).

[201] *Id.* para. 6b.

[202] *Id.*

will inform the Soldier that he may be involuntarily extended in Korea to complete the regulation's requirements.[203] The Soldier will also swear to and sign USFK Form 166, an affidavit of acknowledgement that he has been counseled on visa fraud.[204]

The Soldier must next notify his security (intelligence) manager of his decision to marry a foreign national.[205] Such vigilance is well-founded, as many of the women our Soldiers are marrying could present a significant intelligence threat. One Russian woman confided to the author that she and other "juicy girls" could earn extra money by acquiring operational information from Soldiers and selling it to Russian mafia handlers who would offer it to the Russian government.[206]

The security manager will caution Soldiers with security clearances that marriage to certain foreign nationals may result in reduction or loss of the clearance as well as possible ineligibility to continue a career in the intelligence field.[207] Per paragraph 4e(7)(d) of the regulation, prospective spouses of Soldiers with access to Sensitive Compartmented Information may be required to undergo a National Agency Check equivalent.[208] In fact, in the ROK, *all* prospective spouses, whether Korean, Filipina, Russian, or another nationality, must provide the Korean ward office (town hall) with background checks prior to marriage.[209] If the Soldier's fiancée is Korean, she must receive a Korean National Police Certificate (KNPC) by providing a local Korean police station with her Korean identity card.[210] The KNPC will indicate whether the subject has committed a felony in the ROK.[211] Processing the KNPC costs roughly 10,000 won (about ten U.S. dollars) and takes fewer than twenty-four hours.[212] If the Soldier's fiancée is a nationality other than Korean, but she has lived in the ROK for more than six months after her sixteenth birthday, she must provide the local ward office with both a police certificate from her country of nationality and a

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[203] *Id.* para. 6c.
[204] *See id.* app. E.
[205] *Id.* para. 6(d).
[206] Interview with Natasha Ivanova, Mojo's American Bar, in Dongducheon, S. Korea (Nov. 24, 2007).
[207] USFK REG. 600-240, *supra* note 3, para. 4e(7).
[208] *Id.* para. 4e(7)(d).
[209] Interview with Sung Lee, Uijongbu Immigration Office, in Uijongbu, S. Korea (Dec. 21, 2007).
[210] *Id.*
[211] *Id.*
[212] *Id.*

KNPC, which will be processed upon presentation of her Korean alien registration card or passport.[213] If the Soldier's fiancée is a nationality other than Korean, but she has lived in the ROK for less than six months, she need only provide the ward office with a certificate from her country of nationality indicating that she has no criminal record.[214]

The Soldier and his fiancée must next schedule a counseling session with a military chaplain. The chaplain will provide the couple with pre-marital and cross-cultural marriage counseling. The counseling will not be religious in nature unless requested by the Soldier.[215] The issue of mandatory counseling by a chaplain was briefly raised in *United States v. Wheeler* with the defendant claiming the counseling constituted "an intrusion into religious practices."[216] The Court of Military Appeals squashed this argument, asserting that "[h]owever high or thick the wall of separation between church and state, the interview provision does not breach that wall. It does not force, influence, or encourage the applicant to profess any religious belief or disbelief."[217]

The couple must next attend a legal counseling session. The legal officer will provide the couple with an overview of the Immigration and Nationality Act and the prospective spouse's status under immigration laws of the United States.[218] This counseling does not create a confidential attorney-client privilege.[219] At the termination of this session, the Soldier is required to sign USFK Form 41, Immigration Counseling Certificate.[220]

Both the Soldier and his intended spouse must next obtain a medical examination. The Soldier may have his medical examination conducted at a military medical facility at no charge. The Soldier's examination consists of serology testing for HIV, syphilis, and hepatitis B, as well as a tuberculin skin test.[221] The intended spouse's medical examination serves as both the pre-marital examination as well as the visa medical examination. The couple is responsible for scheduling the examination

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[213] *Id.*
[214] *Id.*
[215] USFK REG. 600-240, *supra* note 3, para. 4d(4).
[216] United States v. Wheeler, 30 C.M.R. 389 (C.M.A. 1961).
[217] *Id.*
[218] USFK REG. 600-240, *supra* note 3, para. 4g(2).
[219] *Id.* para. 4g(1).
[220] *See id*. app. B.
[221] *See id*. app. F(a).

at an approved medical facility sanctioned by the U.S. Embassy.[222] The fee for the medical exam at all approved facilities is $150.[223]

Provided that the Soldier and his intended spouse have complied with the requirements above, they may submit their application to marry to the battalion commander.[224] A completed application will contain a number of USFK forms[225] as well as paperwork, to include: the Soldier's and intended spouse's birth certificates;[226] birth certificates of any additional dependents to be acquired by marriage;[227] evidence of termination of any previous marriages by either party;[228] parental consent if either party is under twenty years of age (the legal age to marry in the ROK);[229] the Soldier's medical examination report signed by a U.S. forces medical officer;[230] the medical examination of the intended spouse signed by a U.S. forces medical officer;[231] and all required background checks for the intended spouse. This paperwork is required for the spouse to receive a U.S. visa, and gathering the documents at this stage will facilitate that process.

Once the battalion commander has ensured that all the necessary documents are included, and has verified that the Soldier is single by consulting the Soldier's Official Military Personnel File (OMPF), he will sign USFK form Section V.[232] At this time the complete application will be forwarded to the supporting legal office for sufficiency review.[233] Once the legal officer has determined that the application is legally

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[222] Currently, the U.S. Embassy has approved five Korean medical facilities, with three located in Seoul, one in Suwon, and one in the port-city of Pusan. *See* Embassy of the United States, Seoul, Korea, Immigration Visa Medical Examination, *available at* http://seoul.usembassy.gov/uploads/images/aeBE4_eiK8ao951ClV9EMQ/ME_dec08.pdf (last visited July 1, 2009).

[223] Interview with Ang-Suk Kim, Saint Mary's Hospital, in Seoul, S. Korea (Jan. 2, 2008).

[224] USFK REG. 600-240, *supra* note 3, para.6h.

[225] These forms include: U.S. Forces Korea, USFK Form 41, Immigration Counseling Certificate (2 Mar. 2007); U.S. Forces Korea, USFK Form 163, Pre-Marital Certification Application (2 Mar. 2007); and U.S. Forces Korea, USFK Form 166, Affidavit of Acknowledgement (Visa Fraud) (2 Mar. 2007).

[226] USFK REG. 600-240, *supra* note 3, para. 6h(3).

[227] *Id.* para. 6h(4).

[228] *Id.* para. 6h(6).

[229] *Id.* para. 6h(5).

[230] *Id.* para. 6h(8).

[231] *Id.* para. 6h(9).

[232] *Id.* para. 6l.

[233] *Id.* para. 4c(2).

sufficient, the Soldier's chain of command will forward it to the verification authority.[234] The verification authority will ultimately determine whether the Soldier has properly complied with the regulation.[235]

United States Forces Korea Regulation 600-240 outlines five verification authorities.[236] Additionally, the regulation permits the verification authority to "be delegated in writing to the brigade, area, or wing, or appropriate O-6 level commander."[237] Second Infantry Division promptly delegated verification authority for acknowledging Soldier compliance with USFK Regulation 600-240 to the three brigade commanders.[238] Once the verification authority has verified that the Soldier has satisfied all the pre-marital requirements, he will sign USFK Form 163, Section VIII. While this act concludes the regulation's procedural requirements, the couple still must comply with Korean marriage laws.[239] After marriage, the Soldier can immediately begin filing for the spouse's immigration visa.[240] The Soldier will keep his battalion commander informed of the date the immigrant petition is filed, the date the petition is approved, and the date the immigration visa is approved.[241]

C. Policy

The regulation's paragraph 5 (Policy) holds that verification of a Soldier's application to marry will be granted in all cases where the Soldier has met the regulation's procedural provisions, *provided that* the verification authority determines the following four circumstances exist:

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[234] *Id.* para 5(b).
[235] *Id.* para. 4c(1).
[236] The verification authorities include Commander, 8th U.S. Army; Commander, 7th Air Force; Commander, U.S. Naval Forces Korea; Commander, U.S. Marine Corps Forces, Korea, and Commander Special Operations Command Korea. *See id.* para. 4b(1)–(5).
[237] *Id.* para. 4b(6).
[238] *See* Memorandum from Brigadier General John D. Johnson, Second Infantry Div. Assistant Div. Commander, to Second Infantry Div. Commanders, subject: Delegation of Verification Authority for Acknowledging Soldier Compliance with USFK Regulation 600-240, International Marriages in Korea (15 Mar. 2007).
[239] *See Soldier's Guide to International Marriages in Korea, supra* note 197, at 4–5.
[240] USFK REG. 600-240, *supra* note 3, para. 8.
[241] *Id.*

> (1) There is no evidence that the servicemember and intended spouse are currently married; (2) There are no indications that the intended spouse would be barred entry to the U.S. through inability to meet required physical, mental, or character standards; (3) The servicemember has shown financial ability, not limited to any particular form of financial security, to prevent the intended non-U.S. citizen spouse from becoming a public charge; (4) The marriage is not solely for securing a visa for the intended spouse with no intention of living together as husband and wife.[242]

If the verification authority makes a determination contrary to any of these circumstances, the Soldier's application will be denied.[243] While the first requirement is understandable—although unnecessary, as the battalion commander has already verified this—the second, third, and fourth requirements permit a subjective, rather than objective, determination. All three of these requirements are tied to a federal statute[244] and should be made by an immigration official. Nonetheless, the regulation empowers military officers with little to no familiarity with the law to apply it without consulting a subject-matter expert. This decision can have far-reaching consequences for the Soldier, as USFK Regulation 600-240 does not provide for an appeal from such a judgment.

The possible denial of permission to marry at the discretion of the verification authority based upon the absence of one of the four circumstances above also raises a second concern. It is directly contradicted by the Supreme Court's holding in *Zablocki v. Redhail,* the 1978 case concerning the Wisconsin statute that prevented residents from marrying if they were behind in their child support obligations.[245] In his majority opinion, Justice Marshall considered the legislative history of the Wisconsin statute. He explained:

> There is evidence that the challenged statute, as originally introduced in the Wisconsin Legislature, was intended merely to establish a mechanism whereby

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[242] *Soldier's Guide to International Marriages in Korea, supra* note 197, at 4–5.
[243] USFK REG. 600-240, *supra* note 3, para. 5a.
[244] *See* 8 U.S.C. § 1182 (2006).
[245] Zablocki v. Redhail, 434 U.S. 374 (1978).

> persons with support obligations to children from prior marriages could be counseled before they entered into new marital relationships and incurred further support obligations. Court permission to marry was to be required, but apparently permission was automatically to be granted after counseling was completed. The statute actually enacted, however, does not expressly require or provide for any counseling whatsoever, nor for any automatic granting of permission to marry by the court and thus it can hardly be justified as a means for ensuring counseling of the persons within its coverage. Even assuming that counseling does take place . . . this interest obviously cannot support the withholding of court permission to marry once counseling is completed.[246]

According to Justice Marshall, had the Wisconsin legislature passed the original statute, setting as its goal counseling and providing for automatic approval, it would have been upheld. Instead, the legislature impermissibly broadened the purpose of the regulation and implemented a scheme by which members of a certain class would automatically be denied a marriage license. In this aspect, the unconstitutional Wisconsin statute is remarkably similar to USFK Regulation 600-240. Like the original Wisconsin statute, USFK Regulation 600-240's paramount purpose is counseling.[247] Moreover, since the regulation's promulgation, in not a single instance has the verification authority denied permission to marry based upon one of the four articulated circumstances in paragraph 5a of the regulation. As such, allowing verification authorities to deny a request to marry based upon the second, third, or fourth requirement above is entirely unnecessary to achieving USFK's goals.

D. Applicability

USFK issued *International Marriages in Korea* on 2 March 2007 with compliance set to begin on 16 March 2007. Problems of

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[246] *Id.* at 388–89.

[247] *See, e.g.*, USFK REG. 600-240, *supra* note 3, para. 1a ("The provisions of this regulation are intended to– a. Ensure that servicemembers have the necessary information to make an informed decision before entering into an international marriage."); *see also id*. para. 1c ("Ensure that servicemembers and intended spouses are aware of applicable U.S. immigration laws.").

interpretation arose immediately. On 3 March 2007, the OSJA received a phone call from a Soldier who had plans to travel to the Philippines to marry his fiancée at the end of the month. The Soldier asked whether the new regulation would apply to him. The author replied that this depended upon what the meaning of the word "in" is. An expansive view would hold that "*in Korea*" refers to any Soldier assigned to USFK, regardless of whether he was physically in the ROK when he wished to marry. A narrow view would only apply the regulation to USFK Soldiers physically in Korea at the time of the intended marriage.[248]

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[248] The 2ID Staff Judge Advocate (SJA) believed that the narrow interpretation was correct. This view was subsequently endorsed by the SJA for USFK. Nevertheless, not all decision-makers agreed with this analysis. In particular, one of the three brigade commanders, dual-hatted as a 2ID verification authority, believed the expansive interpretation was proper. As such, he stated that he would deny leave for any of the several thousand Soldiers under his command who intended to marry outside the ROK without complying with the regulation. Similarly, if one of his Soldiers managed to travel overseas by not declaring his motive for doing so, and married without compliance, the Soldier would be subject to disciplinary action.

The OSJA argued that while leave was always subject to the commander's discretion, approval "could not be used to impermissibly broaden the scope of the regulation." *See* Memorandum from Captain Dana M. Hollywood, Second Infantry Div. Chief, Admin. Law, to Colonel Robert P. Pricone, Second Infantry Div. Chief of Staff, subject: Travel to Philippines (3 Apr. 2007) (on file with author). Similarly, the OSJA argued that making a Soldier comply with the regulation when his intended spouse was in another country was procedurally unfair, as it would require the spouse to travel to the ROK. As of this writing, no 2ID Soldier has ever received disciplinary action as a result of marrying a third country national outside the ROK. The author is aware, however, of a handful of Soldiers denied leave because they intended to marry while on leave.

In time, the 2ID Commander himself came to favor the expansive applicability interpretation. In a memorandum to the USFK Commander, the 2ID Commander requested an unambiguous revision of the applicability paragraph supporting the expansive interpretation. A section of the memo submitted by the 2ID Commander to the USFK Commander reads:

> Several servicemembers have attempted to bypass the requirements of this regulation by traveling to countries outside of Korea to marry non-US citizens. This makes it impossible for the purposes of the regulation to be met. Additionally, often after marriages outside of Korea, servicemembers bring their new spouse to Korea, some of whom may not be qualified to travel with the servicemember to the US upon PCS. This runs counter to the intent of the regulation.

See Memorandum from Major General James A. Coggin, Second Infantry Div. Commander, to Mr. Peter Mann, USFK J1, subject: USFK Regulation 600-240 (5 Sept. 2007) (on file with author).

Of the two scenarios raised by the 2ID Commander above, there is little evidence to support either. The first scenario predicts that young Soldiers and their "juicy girl"

The regulation's applicability paragraph provides little assistance to this quandary. It nebulously declares that "[t]his regulation applies to all United States (U.S.) military personnel assigned in the Republic of Korea (ROK) [and] does not apply to marriages between U.S. citizens," without further clarification.[249] Nevertheless, the spirit of the regulation—eliminating the problem of abandoned/waiting spouses—clearly supports the narrow interpretation. After all, the expansive view would mean that a Soldier who goes on leave from Korea to his home in Texas and chooses to marry his Mexican girlfriend while there would have to comply with the regulation, requiring his fiancée to travel to Korea for several months. Yet, making the couple comply with the regulation would not further its purpose as the intended spouse would never become an abandoned or waiting spouse in the ROK.

This issue has not yet been resolved. If the command adopts the expansive view, it would raise further constitutional concerns. In *Turner v. Safley*, the Court applied a rational basis review to the regulation and *still* found it invalid.[250] Justice O'Connor explained:

> It is undisputed that Missouri prison officials may regulate the time and circumstances under which the marriage ceremony itself takes place. . . . On this record, however, the almost complete ban on the decision to marry is not reasonably related to legitimate penological objectives. We conclude, therefore, that the Missouri marriage regulation is facially invalid.[251]

Turner therefore stands for the legal proposition that when a regulation results in a complete prohibition to marriage, a court will find the regulation unconstitutional. Viewed in this light, USFK's current policy of regulating the "time and circumstances" under which Soldiers may marry is likely valid (barring the broad discretion granted to verification authorities). Nonetheless, if USFK were to broaden the scope of the regulation to apply to marriages outside the ROK, it would wrongfully be foreclosing marriage to a class of Soldiers. In light of

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fiancées will abscond from the ROK so as to not have to "comply" with the regulation. This is unlikely to occur. The majority of "juicy girls" are in Korea on expired work visas and would not risk leaving, as they would not be allowed to return. With regard to the second scenario, there is simply no data to support this scenario.

[249] *See, e.g.*, USFK REG. 600-240, *supra* note 3, para. 2.

[250] *See supra* notes 172–78 and accompanying text.

[251] Turner v. Safley, 482 U.S. 78, 100 (1987).

Turner, USFK cannot deny a Soldier permission to marry his fiancée in the Philippines while at the same time declaring that an intended spouse living in the Philippines is unable to comply with the regulation's myriad regulatory procedures. While a Soldier in such a position could apply for a K-1 fiancée visa, [252] this contingency does not diminish the "complete ban" on the decision to marry that the proposed revision would create.

VI. Conclusions & Recommendations

USFK Regulation 600-240 is far more than a directive counseling young Soldiers against impetuous marriages. The likelihood of an ever-growing number of abandoned or waiting spouses further imperiled the already attenuated U.S.-ROK alliance. It is for this reason that USFK implemented the regulation. A little more than two years after the regulation's promulgation, even the most ardent critics of military regulation of Soldiers' personal affairs would be hard-pressed to controvert the evidence that USFK Regulation 600-240 has proven a success. While precise data on abandoned or waiting spouses was always indeterminate, there is no denying that the regulation has significantly curbed further swelling of this lamentable population. Command involvement now ensures that Soldiers act responsibly in assisting their dependents in seeking immigration to the United States. In fact, many commanders involuntarily extend their Soldiers and prevent them from leaving Korea until the spouse's immigration visa has been submitted and received.

The regulation does, however, raise constitutional concerns. A constitutional challenge to USFK Regulation 600-240 would be reviewed under the deferential standard of a rational basis review. While it is true that courts pay lip-service to the axiom that marriage is a fundamental right, they simultaneously acknowledge the reality that extensive state powers regulating marriage conflict with this assertion.[253] This has led courts to uphold substantial restrictions to marriage provided they are *reasonably* related to a legitimate end. Moreover, the presumption that the military is a "specialized community" has ensured judicial deference on a wide range of military matters. A constitutional challenge to USFK Regulation 600-240 will therefore focus on whether the ends are legitimate and the means are reasonably related to those ends. On both

[252] *See, e.g.*, 8 U.S.C. § 1184 (2006).
[253] *See supra* notes 167–68 and accompanying text.

these points USFK would prevail. Nevertheless, particular aspects of the regulation could still render it unlawful.

Taken together, *U.S. v. Nation* and *U.S. v. Wheeler*, the two cases to reach COMA on the question of military regulation of overseas marriages, stand for the proposition that regulation is reasonable and lawful provided that it is not arbitrary. Regulation 600-240's allowance that verification authorities can deny a Soldier's marriage on nothing more than a subjective analysis is an arbitrary grant of discretion. Not only does this provision jeopardize the legality of the regulation, but it is also wholly unnecessary to achieving USFK's goals. For that reason, the regulation should be revised so that approval to marry in the ROK is automatic once a Soldier has complied with all the requisite procedures. USFK Regulation 600-240's applicability provision should also be revised to unambiguously clarify that the regulation applies to USFK Soldiers physically in the ROK at the time of the intended marriage—thereby codifying the narrow interpretation of the regulation's applicability. Were USFK to implement these two recommendations, the U.S. and ROK would, at long last, have a partnership truly worthy of both our Soldiers and the South Korean people.