



# MILITARY LAW REVIEW

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Spring 2010

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

Pamphlet No. 27-100-203, Spring 2010

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## **MILITARY LAW REVIEW—VOLUME 203**

Since 1958, the *Military Law Review* has been published at The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia. The *Military Law Review* provides a forum for those interested in military law to share the products of their experience and research, and it is designed for use by military attorneys in connection with their official duties. Writings offered for publication should be of direct concern and import to military legal scholarship. Preference will be given to those writings having lasting value as reference material for the military lawyer. The *Military Law Review* encourages frank discussion of relevant legislative, administrative, and judicial developments.

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**SUBSCRIPTIONS:** Interested parties may purchase private subscriptions from the Superintendent of Documents, United States Government Printing Office, Washington, D.C. 20402, at (202) 512-1800. See Individual Paid Subscriptions form and instructions to the *Military Law Review* on pages vi and vii. Annual subscriptions are \$20 each (domestic) and \$28 (foreign) per year. Publication exchange subscriptions are available to law schools and other organizations that publish legal periodicals. Editors or publishers of these periodicals should address inquiries to the Technical Editor of the *Military Law Review*. Address inquiries and address changes concerning subscriptions for Army legal offices, ARNG and USAR JAGC officers, and other federal agencies to the Technical Editor of the *Military Law Review*. Judge Advocates of other military services should request distribution

through their publication channels. This periodical's postage is paid at Charlottesville, Virginia, and additional mailing offices.

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

CITATION: This issue of the *Military Law Review* may be cited as 203 MIL. L. REV. (page number) (Spring 2010). Each issue is a complete, separately-numbered volume.

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

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# MILITARY LAW REVIEW

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Volume 203

Spring 2010

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## MILITARY COMMISSIONS AND THE LIEBER CODE: TOWARD A NEW UNDERSTANDING OF THE JURISDICTIONAL FOUNDATIONS OF MILITARY COMMISSIONS

GIDEON M. HART\*

### I. Introduction

Over the past eight years, the use of military commissions at Guantanamo Bay has thrust this rarely used military venue into the forefront of public attention.<sup>1</sup> Legal scholars have increasingly looked to the history of the commissions when addressing the debates over the proper and appropriate manner for their use.<sup>2</sup> Despite this heightened

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<sup>1</sup> For example, displaying the public interest, *Time* magazine has even compiled a brief history of military commissions, complete with a description of procedures used and a discussion of the current debate over continued use of commissions in the Obama Administration. See Randy James, *A Brief History of Military Commissions*, May 18, 2009, <http://www.time.com/time/nation/article/0,8599,1899131,00.html>.

<sup>2</sup> See, e.g., Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259 (2001–2002); Michal R. Belknap, *Putrid Pedigree: The Bush Administration's Military Tribunals in Historical Perspective*, 38 CAL. W. L. REV. 433 (2002); John M. Bickers, *Military Commissions Are Constitutionally Sound: A Response to Professors Katyal and Tribe*, 34 TEX. TECH L. REV. 899 (2003); David Glazier, *Kangaroo Court or Competent Tribunal?: Judging the 21st Century Military Commission*, 89 VA. L. REV. 2005 (2003); Scott L. Silliman, *On Military Commissions*, 36 CASE W. RES. J. INT'L L. 529 (2004); LOUIS FISHER, MILITARY

interest in the history of these tribunals, scholars and commentators have assumed the underlying jurisdiction of commissions to try violations of the laws of war, devoting little attention to this topic.<sup>3</sup> For example, in *Hamdan v. Rumsfeld*, the Supreme Court debated at length whether particular offenses fell within the laws of war, but did not ever question or seriously investigate the bases for this particular type of military commission jurisdiction.<sup>4</sup> Contrary to various assumptions, military commissions have not always had jurisdiction over violations of the laws of war. Prior to the American Civil War, military commissions had been used only by General Winfield Scott to try a small number of American Soldiers during the Mexican-American War, primarily for common law crimes committed on foreign soil.<sup>5</sup> Violations of the laws of war were tried previously only before Councils of War, a short-lived venue that was called only a handful of times in Mexico.<sup>6</sup>

In August 1861, Henry Halleck, a graduate of the U.S. Military Academy<sup>7</sup> and veteran of the Mexican-American War,<sup>8</sup> reentered the U.S. Army to fight in the Civil War.<sup>9</sup> An author of a treatise on international law,<sup>10</sup> Halleck had successfully practiced law in San

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TRIBUNALS AND PRESIDENTIAL POWER 33 (2005); Captain Brian Baldrate, *The Supreme Court's Role in Defining the Jurisdiction of Military Tribunals: A Study, Critique, & Proposal for Hamdan v. Rumsfeld*, 186 MIL. L. REV. 1 (2005); MAROUF HASIAN JR., IN THE NAME OF NECESSITY (2005); David Glazier, *Precedents Lost: The Neglected History of the Military Commission*, 46 VA. J. INT'L L. 5, 36–37 (2006); Louis Fisher, *Military Commissions: Problems of Authority and Practice*, 24 B.U. INT'L L.J. 15 (2006); Hardimos V. Thravalos, Comment, *The Military Commission in the War on Terrorism*, 51 VILL. L. REV. 737 (2006); Anthony F. Renzo, *Making a Burlesque of the Constitution: Military Trials of Civilians in the War Against Terror*, 31 VT. L. REV. 447 (2007); Detslev F. Vagts, *Agora: Military Commissions Act of 2006*, 101 AM. J. INT'L L. 35, 37 (2007); Kyandra Rotunda, *A Comparative Historical Analysis of War Time Procedural Protections and Presidential Powers: From the Civil War to the War on Terror*, 12 CHAP. L. REV. 449 (2009).

<sup>3</sup> See sources cited *infra* note 323.

<sup>4</sup> 548 U.S. 557, 590 (U.S. 2006).

<sup>5</sup> See *infra* Part II.A.

<sup>6</sup> Councils of War were established in Mexico by General Scott. The panels consisted of a trial panel of five officers and a judge advocate, whereas military commissions were more similar to courts-martial. Overall, twenty-one individuals were tried in the Councils of War, with eleven convicted. See Glazier, *Neglected History of the Military Commission*, *supra* note 2, at 36–37.

<sup>7</sup> STEPHEN AMBROSE, HALLECK: LINCOLN'S CHIEF OF STAFF 5 (1962).

<sup>8</sup> *Id.* at 7–8.

<sup>9</sup> *Id.* at 8–9.

<sup>10</sup> HENRY WAGER HALLECK, INTERNATIONAL LAW, OR, RULES REGULATING THE INTERCOURSE OF STATES IN PEACE AND WAR 783 (S.F., H.H. Bancroft & Co. 1861).

Francisco during the previous decade.<sup>11</sup> By November, the newly commissioned Major General had been assigned to command the Department of Missouri.<sup>12</sup> Upon arrival, General Halleck was faced with a dire situation: an increasingly violent guerrilla war threatened to spiral out of control as Union authorities attempted to maintain authority in this critical border state. A legal scholar, Halleck creatively combated guerillas with a legal solution, expanding the jurisdiction of military commissions to include all those offenses constituting violations of the laws of war, an innovation that allowed for the prosecution of those involved in the guerilla war before a military venue. Interestingly, Halleck's operations in Missouri are one of the earliest examples in American history of "lawfare" being used to combat insurgents.<sup>13</sup> Before 1862 had come to a close, the Lincoln Administration realized the useful role that commissions could play nationwide and began encouraging their use outside of Missouri, based not on Scott's model from Mexico, but rather, on Halleck's more versatile Missouri model.

Most important to the expansion of the commissions throughout the entire country was the promulgation of the Lieber Code in late April, 1863, by the Department of War.<sup>14</sup> The Lieber Code, building upon Halleck's innovation in Missouri, more fully delineated the laws of war<sup>15</sup> and, for the first time, definitively granted military commissions subject matter and *in personam* jurisdiction to try violations of the laws of war.<sup>16</sup> Soon after the promulgation of the Lieber Code, military commissions began appearing all over the United States.<sup>17</sup> By the end of the Civil

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<sup>11</sup> AMBROSE, *supra* note 7, at 8.

<sup>12</sup> *Id.* at 13.

<sup>13</sup> See *infra* note 99 and accompanying text.

<sup>14</sup> See Headquarters, War Dep't, Gen. Orders No. 100 (1863) [hereinafter 1863 War Dep't Gen. Orders No. 100] (on file with Library of Cong., Wash., D.C.), reprinted in RICHARD HARTIGAN, *LIEBER'S CODE AND THE LAW OF WAR* (Precedent 1983).

<sup>15</sup> *Id.* art. 13.

<sup>16</sup> Subject matter jurisdiction refers to the authority of the tribunal to try a particular type or class of cases. In the context of military commissions, this generally refers to the ability to try particular types of offenses. See 2 WILLIAM WINTHROP, *MILITARY LAW* 70–72 (Wash., W.H. Morrison 1886). Prior to the Lieber Code, the entire U.S. military had yet to receive authorization to try offenses that constituted violations of the law of war before a military commission. *In personam* (or personal) jurisdiction refers to the authority of the tribunal to try a particular individual. *Id.* at 68–70. Again, prior to the Lieber Code, the various military departments also did not have explicit authority to try civilians and enemy combatants before commission. The enormity of the grant of jurisdiction is made clear when the two are combined—jurisdiction to try U.S. Soldiers, civilians, and enemy combatants for violations of the laws of war.

<sup>17</sup> See *infra* Part III.C.

War, over 3000 individuals were tried by commission for an enormous variety of different offenses under the jurisdictional authority of the Lieber Code.<sup>18</sup>

The Lieber Code has been enormously important in international law, serving as the foundation for similar law of war codifications in Prussia,<sup>19</sup> the Netherlands,<sup>20</sup> France,<sup>21</sup> Russia,<sup>22</sup> Spain,<sup>23</sup> and Great Britain.<sup>24</sup> It was also an important influence at the conferences of Brussels in 1874 and at The Hague in 1899 and 1907.<sup>25</sup> But, despite this great influence abroad following Civil War, the Lieber Code has generally been viewed as having had almost no effect on the conduct of the combatants during the Civil War itself.<sup>26</sup> While scholars recognized that the Code's flexible provisions on military necessity provided an ethical justification for a harder war, they generally agree that it failed to

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<sup>18</sup> It is not possible to identify the precise number of defendants tried by commission due to the record-keeping during the War and the scattering of many of the records since. The 3000 figure comes from extensive research in the General Orders Volumes at the Library of Cong., the U.S. Military Academy, Columbia University, the National Archives, the New York Historical Society, the New York Public Library, and from a large sampling of the commission files at the National Archives. In all, I found records for about 3000 defendants, with 1600 reported for the Department of Missouri. The 3000 estimate is likely lower than the actual number of commissions tried due to the often inaccurate records maintained during the Civil War. In his fine work, *The Fate of Liberty*, historian Mark Neely, stated that he found records for 4271 defendants, 1940 of which were from Missouri. See MARK NEELY, *THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES* 168 (1991). This figure may be a little large because Neely's figure includes some court-martial files. William Winthrop, writing soon after the Civil War, observed that there were "upwards of two thousand cases promulgated in the G.O. of the War Department and of the various military departments and armies." See 2 WINTHROP, *supra* note 16, at 63. In justifying this figure, Winthrop provided almost no indication of what sources he used. Based on a survey of the General Orders volumes, a sampling of the records at the National Archives, and Neely's figures, the best estimate is that there were somewhere between 3500 and 4000 defendants tried by commission, about 1900 of which were tried in the Department of Missouri.

<sup>19</sup> See L. LYNN HOGUE, *Lieber's Military Code and Its Legacy*, in FRANCIS LIEBER AND THE CULTURE OF THE MIND 51, 58 (Henry H. Lesesne & Charles R. Mack eds., 2005).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* See also James F. Childress, *Francis Lieber's Interpretation of The Laws of War: General Orders No. 100 in the Context of His Life and Thought*, 21 AM. J. JURIS. 34, 35 (1976); Jordan F. Paust, *Dr. Francis Lieber and the Lieber Code*, 95 AM. SOC'Y INT'L L. PROC. 112, 114 (2001).

<sup>26</sup> See *infra* pp. 46–48.

limit Soldiers' conduct in the field.<sup>27</sup> What has been neglected under this view is the Code's enormous impact on the use of military commissions in the same time period. Here, the Code provided the first nationwide authorization for the trial of violations of the laws of war before military commission. In context, the evolution of commissions arising from the Code provides a new and necessary view.

The value of the Lieber Code in shaping Civil War commissions also extends to the system of contemporary military commissions. The Lieber Code was the primary basis for expanding military commission jurisdiction over those individuals accused of violations of the laws of war.<sup>28</sup> Modern day commissions, including those used during World War II and those currently in use at Guantanamo Bay, can directly trace their lineage to the Lieber Code.<sup>29</sup> Although the merger of military commission jurisdiction—combining Winfield Scott's limited Mexican-American War military commissions (designed to try ordinary crimes committed on foreign soil) with his Councils of War (designed to try violations of the laws of war)—has been noted by legal historians<sup>30</sup> and the U.S. Supreme Court,<sup>31</sup> no serious explanation has been given for why or how this important transformation occurred.<sup>32</sup> As this article explains, the two prongs of this jurisdiction were set forth together for the first time by Henry Halleck in Missouri, a development that was later repeated nationwide in the Lieber Code, fundamentally linking the Lieber Code to the modern system of military commissions.<sup>33</sup>

This article provides a historical context for the evolution of military commissions following the American Civil War. With knowledge gained from archival research, it offers the first comprehensive description of the role of the Lieber Code in expanding military commission jurisdiction over violations of the laws of war. Part II explores the early experiments with commissions during the first two years of the Civil War, primarily in Missouri, and also briefly discusses connections to lawfare and modern counterinsurgency efforts. Part III addresses the jurisdictional innovations of Henry Halleck and Francis Lieber, focusing particularly on the important role of the Lieber Code in expanding

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<sup>27</sup> *Id.*

<sup>28</sup> *See infra* III.B.

<sup>29</sup> *See infra* pp. 51–54.

<sup>30</sup> *See infra* note 323.

<sup>31</sup> *Hamdan v. Rumsfeld*, 548 U.S. 557, 590 (2006).

<sup>32</sup> *See infra* Parts III.A, III.B.

<sup>33</sup> *See infra* Part III.B.

military commission jurisdiction. Part IV considers the formation of a more centralized and modern military justice system, which allowed the Lieber Code to be quickly and consistently applied in the various military departments and the transition in 1865 to the Reconstruction. This entire article provides insight into the previously unexplored expansion of commission jurisdiction over law of war violations, which laid the foundation for almost all of the post-Civil War commissions.

## II. Historical Foundations and Early Experiments

### A. Military Commissions in the Mexican-American War

The use of military commissions in the United States can be traced back to the Revolutionary War, where they were mostly used to try spies.<sup>34</sup> However, the generally accepted view is that the military commission did not assume a developed form until the Mexican-American War.<sup>35</sup> On 19 February 1847, General Winfield Scott issued General Order No. 20, providing for martial law and the ability to try a number of offenses, including “murder, poisoning, rape . . . malicious

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<sup>34</sup> These Revolutionary War hearings, despite the status of “military tribunals” in loose sense of the term, were not, at a fundamental level the same venue as the commissions utilized, first, in the Mexican-American War, and later during the Civil War. See Glazier, *Kangaroo Court or Competent Tribunal?*, *supra* note 2, at 2027:

A key difference between those trials and later use of military commissions, however, was a specific statutory grant of court-martial jurisdiction over spies enacted by Congress in 1776. The early spy trials thus do not share the “common law” basis of later tribunals that were used to extend jurisdiction to persons not otherwise subject to American military justice. The conclusion that military jurisdiction was strictly limited to persons subjected to military authority by Congress was specifically endorsed by the early commentators on American military justice.

See also Fred Borch, *The Historical Role of Military Lawyers in National Security Trials*, 50 S. TEX. L. REV. 717, 719 (2009) (“Although it is sometimes said that Andre was court-martialed or tried by military commission, this is incorrect. Rather, General George Washington appointed a Board of General Officers headed by Major General Nathaniel Greene to inquire into the facts and circumstances surrounding Andre's capture and then make recommendations to him.”).

<sup>35</sup> 2 WINTHROP, *supra* note 16, at 59–60; Glazier, *Kangaroo Court or Competent Tribunal?*, *supra* note 2, at 2027; Vagts, *supra* note 2, at 37; Erika Myers, *Conquering Peace: Military Commissions as a Lawfare Strategy in the Mexican War*, 35 AM. J. CRIM. L. 201, 206 (2008).

assault and battery . . . robbery, theft . . . whether committed by Mexicans or other civilians in Mexico . . . or against Mexicans or civilians” by military commission.<sup>36</sup> Scott was faced with a problem; the legal rules governing military justice did not provide a venue for the “trial or punishment of murder, rape, [and] theft” while American forces were in Mexico.<sup>37</sup>

Scott, in creating the military commission, was responding to a unique problem. When American soldiers were no longer on American soil, a gap appeared in the military justice system, which would allow, most problematically, American Soldiers to commit crimes against Mexican civilians and go unpunished.<sup>38</sup> Courts-martial are a statutorily created and defined military court.<sup>39</sup> They were first constituted in the United States during the American Revolution by the Articles of War of 1775,<sup>40</sup> and have existed since.<sup>41</sup> Congress has, from time to time, issued articles of war and other regulations governing the jurisdiction, procedure, and other topics related to courts-martial.<sup>42</sup> However, the Articles of War that were operative during the Mexican-American War did not include provisions for the trying of American Soldiers outside of U.S. soil before a court-martial, as, at that early date, Congress did not foresee the extensive campaigning of American armies on foreign soil.<sup>43</sup> Under the new system of commissions, designed to fill this hole, over 400 individuals were tried in Mexico, with the majority being American Soldiers.<sup>44</sup>

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<sup>36</sup> 2 WINTHROP, *supra* note 16, at 59–60.

<sup>37</sup> FISHER, *supra* note 2, at 33.

<sup>38</sup> Glazier, *Kangaroo Court or Competent Tribunal?*, *supra* note 2, at 2027.

<sup>39</sup> See 1 WINTHROP, *supra* note 16, at 49–51.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*; STEPHEN VINCENT BENET, A TREATISE ON MILITARY LAW AND THE PRACTICE OF COURTS-MARTIAL 17 (N.Y., D. Van Nostrand 2d ed. 1862).

<sup>43</sup> See *id.* at 32–33; Glazier, *Kangaroo Court or Competent Tribunal?*, *supra* note 2, at 2028. 2 WINFIELD SCOTT, MEMOIRS OF LIEUT. GEN. SCOTT, 392–94, 540–43 (N.Y., Sheldon & Co. 1864). For example, when an American Soldier killed a Mexican civilian, the only remedy available was to discharge the killer and send him home. Glazier, *Kangaroo Court or Competent Tribunal?*, *supra* note 2, at 2027–28.

<sup>44</sup> Glazier, *Neglected History of the Military Commission*, *supra* note 2, at 37.

In Mexico, the commissions were used almost exclusively to regulate the conduct of American Soldiers, committing mostly common law crimes in a situation where no existing court had jurisdiction to try them.<sup>45</sup> Stephen Vincent Benet, in his 1862 treatise on military law, explained the role of commissions in the Mexican-American War, writing, “these courts [court-martial] have a very limited jurisdiction, both in regard to persons and offenses. Many classes of persons cannot be arraigned before such courts for any offence whatever, and many crimes committed, even by military officers, enlisted men or camp retainers, cannot be tried under the ‘rules and articles of war.’ Military commissions must be resorted to for such cases . . . .”<sup>46</sup> The military commissions in the Mexican-American War were borne out of necessity, as a class of offenses that threatened to undermine the discipline of American armies, which were not cognizable before any other tribunal.

In Mexico, General Scott had not defined the jurisdiction of the military commissions to include offenses against the laws of war committed by civilians.<sup>47</sup> Instead, these crimes were tried before “Councils of War,” a brief experiment that tried only twenty-one individuals (by comparison, commissions tried over 400 individuals in Mexico).<sup>48</sup> These tribunals had procedures that were distinct from the military commissions, and tried mainly guerrillas who had committed violations of the laws of war and individuals who had enticed U.S. Soldiers to desert (but who were not tried before commissions).<sup>49</sup> Although short lived and little used, these Councils of War would later be a core piece of the foundation for the Civil War commissions.<sup>50</sup>

#### B. The First Civil War Commissions: Experiments in Missouri & Virginia

The first commissions in the Civil War were held in 1861 in Missouri, which was at that time part of the Western Department (a huge pre-Civil War Department spanning all areas west of the Mississippi

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<sup>45</sup> Glazier, *Kangaroo Court or Competent Tribunal?*, *supra* note 2, at 2027 (describing the commissions as an interim common law).

<sup>46</sup> BENET, *supra* note 42, at 15. *See also* HALLECK, *supra* note 10, at 783 (describing the rationale behind the development of commissions in Mexico).

<sup>47</sup> Glazier, *Neglected History of the Military Commission*, *supra* note 2, at 33, 36.

<sup>48</sup> *Id.* at 37.

<sup>49</sup> Glazier, *Kangaroo Court or Competent Tribunal?*, *supra* note 2, at 2033.

<sup>50</sup> *See infra* Part III.A.

River),<sup>51</sup> and in Virginia.<sup>52</sup> The trials in Virginia, much like those in the Mexican-American War, were targeted at U.S. Soldiers committing common law crimes.<sup>53</sup> One of the early trials in Virginia targeted a group of Union Soldiers involved in an armed robbery of another group of Soldiers.<sup>54</sup> It is not entirely clear why a military commission, rather than a regular court-martial proceeding, was used to try these Soldiers. Unlike in Mexico, this offense was committed on American soil and would have been within the jurisdiction of a court-martial.<sup>55</sup> Regardless of the specific reasons for choosing commissions to try offenses in Virginia, all military commissions were limited in scope, and were used to try Union Soldiers.<sup>56</sup> Even though these commissions varied from those in Mexico—primarily in the absence of international jurisdictional issues in Virginia—both commissions were functionally serving identical roles: the commissions were used as a means of controlling the conduct of U.S. Soldiers who perpetrated crimes upon each other or upon civilians.<sup>57</sup>

In Missouri, where the bulk of the hearings occurred thirty-three individuals were brought before commissions in 1861.<sup>58</sup> Most of these men were either released without trial or were acquitted.<sup>59</sup> Of the thirty-three brought before commissions, only twelve were convicted, seven of whom were sentenced to hard labor for the duration of the war.<sup>60</sup> One of the earliest commissions tried Ulysses C. Vannosdoff in St. Louis,

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<sup>51</sup> RAPHAEL P. THIAN, NOTES ILLUSTRATING THE MILITARY GEOGRAPHY OF THE UNITED STATES 1813–1880, at 106 (John M. Carroll ed., Univ. of Tex. Press 1979) (1881).

<sup>52</sup> Headquarters, W. Dep't, Gen. Orders (1861) [hereinafter 1861 W. Dep't, Gen. Orders] (on file with the Library of Cong., Wash., D.C.); Headquarters, Dep't of Potomac, Gen. Orders (1861) [hereinafter 1861 Dep't of Potomac, Gen. Orders] (on file with the N.Y. Hist. Soc'y); 2 WINTHROP, *supra* note 16, at 61.

<sup>53</sup> 1861 Dep't of Potomac, Gen. Orders, *supra* note 52.

<sup>54</sup> Records of the Office of The Judge Advocate General, Nat'l Archives, Record Group 153, Case II-0766 [hereinafter case transcripts at the National Archives will be designated simply by their alpha-numeric code, for example, "Case II-0766"].

<sup>55</sup> See 1 WINTHROP, *supra* note 16, at 130–34 (describing court-martial jurisdiction over common law crimes, such as robbery).

<sup>56</sup> All of the defendants were U.S. Soldiers or were serving with the U.S. Army as teamsters in the eleven commissions in 1861 and 1862 in Virginia. See 1861 Dep't of Potomac, Gen. Orders, *supra* note 52.

<sup>57</sup> See *supra* Part II.A.

<sup>58</sup> 1861 W. Dep't, Gen. Orders, *supra* note 52.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

Missouri, on 8 September 1861.<sup>61</sup> Vannosdoff was charged with violating the 56th and 57th Articles of War—specifically, he was accused of various acts of disloyalty, including taking up arms, enlisting in a Confederate unit, and encouraging others to enlist in the Confederate Army.<sup>62</sup> Vannosdoff was captured soon after enlisting in a Confederate unit and was found guilty of all charges and sentenced to hard labor for the duration of the war.<sup>63</sup> His sentence was confirmed by General John Fremont, commander of the Western Department, on 20 September 1861.<sup>64</sup> Interestingly, it is very probable that Vannosdoff was the first individual tried by military commission in the Civil War whose sentence was upheld and actually carried into effect.<sup>65</sup>

Those tried in Missouri under General Fremont were generally charged with “Treason against the Government of the United States.”<sup>66</sup> All eleven of the individuals tried for treason were found guilty, despite their likely failure to meet the specific requirements of treason as defined in the U.S. Constitution.<sup>67</sup> The commissions in Missouri were taking on

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<sup>61</sup> Case II-0473; Headquarters, W. Dep’t, Gen. Orders No. 14 (1861) [hereinafter 1861 W. Dep’t, Gen. Orders No. 14] (on file with the Library of Cong., Wash., D.C.).

<sup>62</sup> Stat. 366 arts. 56, 57 (1806) (art. 56) (“Whosoever shall relieve the enemy with money, victuals, or ammunition, or shall knowingly harbor or protect an enemy, shall suffer death, or such other punishment as shall be ordered by the sentence of a court martial.”) (art. 57) (“Whosoever shall be convicted of holding correspondence with or giving intelligence to the enemy either directly or indirectly, shall suffer death or such other punishment as shall be ordered by the sentence of a court martial.”).

<sup>63</sup> Case II-0473; 1861 W. Dep’t, Gen. Orders No. 14, *supra* note 61.

<sup>64</sup> Case II-0473; 1861 W. Dep’t, Gen. Order Nos. 14, *supra* note 61.

<sup>65</sup> Joseph Aubuchon was likely the first individual actually tried by commission, although his sentence was remitted by General Fremont because the offense occurred prior to the declaration of martial law in Missouri. *See* Case II-0471; Headquarters, W. Dep’t, Gen. Orders No. 12 (1861) [hereinafter W. Dep’t, Gen. Orders No. 12] (on file with the Library of Cong., Wash., D.C.). Aubuchon was tried on 5 September 1861, three days before Vannosdoff.

<sup>66</sup> 1861 W. Dep’t, Gen. Orders No. 12, *supra* note 65; 1861 W. Dep’t, Gen. Orders No. 14; Headquarters, W. Dep’t, Gen. Orders No. 20 (1861) [hereinafter 1861 Gen. Orders No. 20] (on file with the Library of Cong., Wash., D.C.).

<sup>67</sup> Not all eleven individuals were sentenced. *See* 1861 W. Dep’t, Gen. Orders, *supra* note 52. One was released because he committed the offense before the declaration of martial law in Missouri. 1861 W. Dep’t, Gen. Orders No. 12, *supra* note 66. Two were excused due to their youth. 1861 W. Dep’t, Gen. Orders No. 20, *supra* note 66. One was excused due to the circumstances surrounding the offense. 1861 W. Dep’t, Gen. Orders No. 20, *supra* note 66. Another was excused due to his low intelligence. *Id.* The other six individuals were sentenced to hard labor for the duration of the war. 1861 W. Dep’t, Gen. Order No. 14, *supra* note 61; 1861 W. Dep’t, Gen. Orders No. 20, *supra* note 66. *See* U.S. CONST. art. III, § 2 (“No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court”). It is

a role that was wholly unique from those in Mexico and Virginia, a role that would become much more clearly defined during 1862.<sup>68</sup> Most of the Missouri commissions were directed not at U.S. Soldiers, as were those in Virginia,<sup>69</sup> but rather, were directed squarely at disloyal civilians.

On 30 August 1861, General Fremont declared martial law in the State of Missouri, which Fremont claimed allowed the trying of all persons captured bearing arms by court-martial, and if found guilty, to be shot.<sup>70</sup> Although President Abraham Lincoln soon afterwards expressed his disapproval of Fremont's proclamation (most famously for reversing the portion emancipating slaves in Missouri), Lincoln, in fact, did not voice opposition to the trying of civilians by military court.<sup>71</sup> Rather, he simply stated that no person could be shot without his consent.<sup>72</sup> The first military commissions in Missouri occurred just days after Fremont's proclamation of martial law.<sup>73</sup> Fremont indicated that the commissions were being used as a means of combating those who opposed federal authority in Missouri.<sup>74</sup> Accordingly, the commissions were focused on trying individuals who were caught bearing arms, committing sabotage against infrastructure, or engaging in the recruiting and enlistment of Confederate forces.<sup>75</sup> Unlike General Scott's commissions, or even the commissions occurring in Virginia at the same time, these commissions were used to combat a part of the Confederate war effort that could not be countered with Northern armies.<sup>76</sup>

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unlikely that the prosecution met the burden of proving treason in these cases. *See also* NEELY, *supra* note 18, at 42; *see also* 8 U.S. WAR DEP'T, THE WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES, ser. 1, at 822 (U.S. Gov't Prtg. Office, 1880–1902) [hereinafter O.R. with series number in Roman numerals, volume in Arabic, followed by page number] (Halleck explaining that treason cannot be tried before a military commission in a letter to General Pope).

<sup>68</sup> *See infra* Part II.C.

<sup>69</sup> *See supra* pp. 8–9.

<sup>70</sup> O.R., II, 1, 221–22 (“All persons who shall be taken with arms in their hands within these lines shall be tried by court-martial and if found guilty will be shot.”).

<sup>71</sup> *See* 4 COLLECTED WORKS OF LINCOLN 506 (Roy P. Basler et al. eds., 1953–55); *see also* BURRUS M. CARNAHAN, ACT OF JUSTICE: LINCOLN'S EMANCIPATION PROCLAMATION & THE LAW OF WAR 80 (2007).

<sup>72</sup> *See supra* note 71.

<sup>73</sup> *See, e.g.*, Case II-0471.

<sup>74</sup> *See supra* note 70.

<sup>75</sup> *See generally* 1861 W. Dep't, Gen. Orders, *supra* note 52.

<sup>76</sup> MICHAEL FELLMAN, INSIDE WAR: THE GUERRILLA CONFLICT IN MISSOURI DURING THE AMERICAN CIVIL WAR 81–89, 112–17 (1989) (describing the difficulties that Union

It is not actually clear why Fremont began using military commissions to try civilians.<sup>77</sup> The first reference to military commissions actually appears in the correspondence of General John Pope, in a letter written on 17 August 1861.<sup>78</sup> In this letter, Pope instructed a subordinate that commissions should be used to try snipers and marauders harassing Union forces near Palymra, Missouri.<sup>79</sup> It is not possible to tell, though, whether Fremont was influenced by, or was even aware of this order. Regardless of Pope's influence, the commissions under Fremont were, legally speaking, questionable. The actual order authorizing trials was over-broad to the point that it seemed to authorize execution of all Confederate prisoners.<sup>80</sup> Further, even though Fremont used trials called "military commissions" to try violations of martial law, the order did not actually mention commissions at all; instead, it only authorized use of courts-martial to try those captured bearing arms.<sup>81</sup> Additionally, many of the charges used in the actual commissions, such as the charge of treason, were legally defective and not appropriate for the offenses at issue.<sup>82</sup>

### C. Halleck in Missouri: The "Missouri Explosion" of 1862

The trial of civilians by commission continued until the replacement of General Fremont by General Henry Halleck, who arrived in Missouri on 19 November 1861.<sup>83</sup> Upon the promotion of Halleck to command in Missouri (a change that also saw the renaming of the Department from the Western to the Missouri), the trial of civilians by commission abruptly halted.<sup>84</sup> The author of *International Law, or, Rules Regulating the Intercourse of States in Peace and War*,<sup>85</sup> a treatise on international

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authorities faced in formulating a coherent military policy with traditional arms and the struggles that Union commanders faced in the field).

<sup>77</sup> CARNAHAN, *supra* note 71, at 72 (suggesting that Fremont may have gotten the idea from his subordinate, General John Pope, or from time spent in California during the Mexican-American War).

<sup>78</sup> O.R., II, 1, 212; CARNAHAN, *supra* note 71, at 72.

<sup>79</sup> O.R., II, 1, 212.

<sup>80</sup> *See supra* note 70.

<sup>81</sup> *Id.* Interestingly, the order had no legal effect, as the jurisdiction of courts-martial can only be expanded by statute.

<sup>82</sup> *See sources cited supra* note 67.

<sup>83</sup> AMBROSE, *supra* note 7, at 13.

<sup>84</sup> Headquarters, Dep't of Mo., Gen. Orders (1861) [hereinafter 1861 Dep't of Mo., Gen. Orders] (on file with the Library of Cong., Wash., D.C.).

<sup>85</sup> *See HALLECK, supra* note 10.

law, Halleck was more careful than Fremont about the procedural and jurisdictional formalities required to try civilians by commission, a fact that explains the brief lull. The only commissions occurring for about a month were the trials of two Union Soldiers charged with murder.<sup>86</sup> Although both Soldiers were found guilty, General Halleck, Commander of the Department of Missouri, overturned one sentence because the defendant should have been tried by a court-martial,<sup>87</sup> while upholding another sentence because a commission was an appropriate venue.<sup>88</sup> It was not until after an exchange of letters and telegraphs between General George McClellan, President Lincoln, Halleck, and Secretary of State William Seward, that, on 2 December 1861, Seward authorized Halleck to suspend habeas corpus and declare martial law to the extent that Halleck found it necessary “to secure public safety and authority of the United States.”<sup>89</sup> This grant of authority was critical to the expansion of commissions in Missouri starting at the end of 1861. The military commissions in Missouri earlier in 1861 could be viewed as an anomaly caused by the overzealous General Fremont, if the story ended there. However, when viewed through the lens of the remainder of the war, it seems more accurate to view Fremont’s commissions in Missouri as a rough and legally suspect experiment that foreshadowed the manner by which commissions would be used later in the war, especially in Missouri.<sup>90</sup>

On 4 December 1861, just three days after Halleck was granted authority to declare martial law, General Order No. 13 was issued by his headquarters.<sup>91</sup> This order authorized the trial of civilians by military commission, reading, “[c]ommissions will be ordered from these headquarters for the trial of persons charged with aiding and assisting the enemy, the destruction of bridges, roads, and buildings, and the taking of

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<sup>86</sup> Headquarters, Dep’t of Mo., Gen. Orders No. 16 (1861) [hereinafter 1861 Dep’t of Mo., Gen. Orders No. 16] (on file with the Library of Cong., Wash., D.C.); Headquarters, Dep’t of Mo. Gen Orders No. 18 (1861) [hereinafter 1861 Dep’t of Mo., Gen. Orders No. 18] (on file with the Library of Cong., Wash., D.C.).

<sup>87</sup> 1861 Dep’t of Mo., Gen. Orders No. 16, *supra* note 86.

<sup>88</sup> 1861 Dep’t of Mo., Gen. Orders No. 18, *supra* note 86. Due to the specific circumstances surrounding the commission of each crime, the appropriateness of a military commission differed based upon a very legalistic interpretation of the Articles of War.

<sup>89</sup> NEELY, *supra* note 18, at 37.

<sup>90</sup> See *infra* Part III.C.

<sup>91</sup> Headquarters Dep’t of Mo., Gen. Orders No. 13 (1861) [hereinafter 1861 Dep’t of Mo., Gen. Orders No. 13] (on file with the Library of Cong., Wash., D.C.).

public or private property for hostile purposes. . . .”<sup>92</sup> Overall, in 1862, there were at least 237 defendants tried by commission in the Missouri area.<sup>93</sup> The “Missouri explosion,” a term used to signify the sudden increase in the number of commissions in the Department, began almost immediately after Halleck authorized the use of commissions to try guerrillas, saboteurs, and other insurgents.<sup>94</sup> In General Order No. 1, promulgated by Halleck’s headquarters on 1 January 1862, the grant of authority in General Order No. 13 was repeated, and more specific information regarding jurisdiction, procedure, and the role of the commissions was described at some length.<sup>95</sup> The commissions commenced in Missouri within days of the granting of authority by the Department headquarters, and ultimately, did not relent in Missouri until mid-1865 at the end of the war.<sup>96</sup>

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<sup>92</sup> *Id.*

<sup>93</sup> This figure includes one hundred defendants tried by commission in the Department of the Mississippi, 135 defendants in the Department of Missouri, and two defendants from the District of Western Tennessee tried soon after the dissolution of the Department of the Mississippi. The Department of the Mississippi existed from 11 March 1862 to 19 September 1862, and was comprised of almost the entire United States west of Knoxville, Tennessee. See THIAN, *supra* note 51, at 72–74. The Department of the Missouri existed independently until 11 March, when it was subsumed into the Mississippi, and then was reconstituted on 19 September 1862, upon dissolution of the Mississippi. *Id.* at 74–75. All of the commissions sampled from the Department of the Mississippi occurred in the state of Missouri or in Memphis, Tennessee. The commissions held in Memphis seem most related to the trends occurring in Missouri due to the close proximity to Missouri and the command of General Halleck over the area. Rather than counting these as an independent group of files, they are more accurately included in the Missouri totals. See Headquarters, Dep’t of Mo., Gen. Orders, Series 1 (1862) [hereinafter 1 1862 Dep’t of Mo., Gen. Orders] (on file with Library of Cong., Wash., D.C.); Headquarters, Dep’t of Mo., Gen. Orders, Series 2 (1862) [hereinafter 2 1862 Dep’t of Mo., Gen. Orders] (on file with Library of Cong., Wash., D.C.); Headquarters, Dep’t of the Miss., Gen. Orders (1862) [hereinafter 1862 Dep’t of the Miss., Gen. Orders] (on file with Library of Cong., Wash., D.C.); Headquarters, War Dep’t, Gen. Orders (1862) [hereinafter 1862 War Dep’t, Gen. Orders] (on file with Library of Cong., Wash., D.C.); Headquarters, War Dep’t, Gen. Orders (1863) [hereinafter 1863 War Dep’t, Gen. Orders]; Headquarters, Dist. of Mo., Gen. Orders (1862) [hereinafter 1862 Dist. of Mo., Gen. Orders] (on file with N.Y. Hist. Soc’y); Headquarters, Army of the Southwest, Gen. Orders (1862) [hereinafter 1862 Army of the Southwest, Gen. Orders] (on file with Columbia Univ. Rare Book Room, New York, N.Y.).

<sup>94</sup> See generally 1 1862 Dep’t of Mo., Gen. Orders, *supra* note 93.

<sup>95</sup> Headquarters, Dep’t of Mo., Gen. Orders No. 1, Series 1 (1862) [hereinafter 1 1862 Dep’t of Mo., Gen. Orders No. 1] (on file with Library of Cong., Wash., D.C.); O.R., I, 8, 476. See *infra* Part III.A for analysis of General Orders No. 1.

<sup>96</sup> Headquarters, Dep’t of Mo., Gen. Orders No. 160 (1865) (on file with Library of Cong., Wash., D.C.).

These trials by commission present a picture of military authorities struggling to maintain order in an area rapidly devolving into chaos. The trials were focused on retaining authority and combating guerrillas, and accordingly, they targeted bridge-burners, saboteurs, guerrillas, and other individuals who were responsible for the spreading violence west of the Mississippi.<sup>97</sup> Indeed, the trials appear to be a legal arm of the war effort and were being used to wage a counterinsurgency effort. As such, these commissions in Missouri are actually one of the first instances in American history where “lawfare”<sup>98</sup> was actively applied in the field.<sup>99</sup>

Halleck, of course, did not describe his legal solution to the guerilla insurgency as “lawfare”; Halleck did recognize, however, that he was fighting guerillas with legal processes. For example, on 1 January 1862, Halleck wrote to General Ewing that he was “satisfied that nothing but the severest punishment can prevent the burning of railroad bridges and the great destruction of human life . . . I have determined to put down these insurgents and bridge-burners with a strong hand.”<sup>100</sup> On the same day that Halleck made this pledge to punish the guerillas, his headquarters promulgated General Order No. 1, which specifically

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<sup>97</sup> For example, the offenses in just a single general order include “destroying railroad property,” “destroying telegraph lines,” “inciting insurrection,” and “inciting unlawful war.” Headquarters, 1862 Dep’t of Miss., Gen. Orders No. 15 (1862) (on file with Library of Cong., Wash., D.C.).

<sup>98</sup> A simple definition of “lawfare” is “[a] strategy of using or misusing law as a substitute for traditional military means to achieve military objectives.” See Lawfare, the Latest in Asymmetrics, Council on Foreign Relations, Mar. 18, 2003, <http://www.cfr.org/publication.html?id=5772>; see also Major General Charles J. Dunlap, Jr., *Lawfare Today: A Perspective*, 3 YALE J. INT’L. AFF. 146, 146 (2008) (also defining lawfare as “the strategy of using—or misusing—law as a substitute for traditional military means to achieve an operational objective.”).

<sup>99</sup> See generally Meyers, *supra* note 35. In her article, Meyers discusses how General Scott’s military commissions and councils of war in the Mexican-American War were a form of lawfare. This significant finding refutes the view that lawfare is a modern invention. See, e.g., Glenn Sulmasy & John Yoo, *Challenges to Civilian Control of the Military: A Rational Choice Approach to the War on Terror*, 54 UCLA L. REV. 1815, 1836, 1841 (2007); Major General Charles J. Dunlap, Jr., *Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts* (Nov. 29, 2001) (Carr Center for Human Rights, John F. Kennedy Sch. of Gov’t, Harvard Univ., Working Paper), available at <http://www.hks.harvard.edu/cchrp/Web%20Working%20Papers/Use%20of%20Force/Dunlap2001.pdf>. The activities of Halleck in Missouri also support the conclusion that lawfare has a lengthier tradition in American warfare. The commissions used in Missouri (and elsewhere during the Civil War) were used not only to punish misconduct, but also to strategically reach military objectives via legal processes.

<sup>100</sup> O.R., I, 8, 475–76.

authorized Union armies in Missouri to begin trying civilians for violations of the laws of war.<sup>101</sup>

Consistent with Halleck's goal of using commissions to counter guerillas and other irregular combatants, the commissions were almost exclusively directed at individuals who were actively at arms against the U.S. Government.<sup>102</sup> The commissions provided Union authorities a means of targeting guerillas and other insurgents, who could not be easily countered with traditional armies.<sup>103</sup> In these trials, the charge "Violation of the Laws of War" was liberally used to capture a wide variety of violent offenses.<sup>104</sup> This was especially true toward the end of the year. Although the commissions in Missouri were disorganized, and are themselves a reflection of the confused state of affairs in 1862 Missouri, their function was unmistakable. Of the 237 individuals tried in the Departments of Missouri and Mississippi, only twenty-seven were U.S. Soldiers (and fourteen of those were tried in the same commission

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<sup>101</sup> 1 1862 Dep't of Mo., Gen. Orders No. 1, *supra* note 95. Less than a month after Halleck took command in Missouri, he wrote in General Orders No. 13 (which was the first order issued in Missouri authorizing the trial of insurgents) that "the mild and indulgent course heretofore pursued toward this class of men has utterly failed . . . . The safety of the country and the protection of the lives and property of loyal citizens justify and require the enforcement of a more severe policy . . . . They have forfeited their civil rights as citizens by making war against the Government, and upon their own heads must fall the consequences." See 1861 Dep't of Mo., Gen. Orders No. 13, *supra* note 91.

<sup>102</sup> In the Missouri and Mississippi Departments, only twenty-three of the civilian defendants were charged with a non-insurrection related crime in 1862 (out of a total of 237). See, e.g., Headquarters, Dep't of Mo., Gen. Orders No. 19, Series 1 (1862) (on file with Library of Cong., Wash., D.C.); Headquarters, Dep't of the Miss., Gen. Orders No. 11 (1862) [hereinafter 1862 Dep't of Miss., Gen. Orders No. 11] (on file with Library of Cong., Wash., D.C.). See also Headquarters, Dep't of Mo., Gen. Orders No. 31 (1861) (on file with Library of Cong., Wash., D.C.) (stating the goal of the commissions and describing treatment of insurgents and bridge burners, reading, "these men are guilty of the highest crime known to the code of war and the punishment is death. Anyone caught in the act will be immediately shot, and any one accused of this crime will be arrested and . . . examined by a military commission, and, if found guilty, he also will suffer death.").

<sup>103</sup> See FELLMAN *supra* note 76.

<sup>104</sup> For example, in a commission which convened in Westville, Missouri, on 7 February 1862, John H. Bently was convicted for violating the laws of war following capture while in arms against the U.S. Government. The trial itself was extremely brief: only one witness testified on behalf on the prosecution—a man who was also a member of "Meyer's Company" of guerrillas. After a brief deliberation, the commission found the defendant guilty and sentenced him to hard labor for the duration of the war. The sentence was later mitigated to imprisonment for the duration of the war by General Halleck. See Case KK-0823.

stemming from a single incident of burglary).<sup>105</sup> The remainder was nominally civilians, who more accurately could be classified as guerrillas, bushwhackers, or other irregular soldiers.<sup>106</sup> They were almost exclusively tried for committing acts of overt, and, at times, extreme violence or subterfuge against Union Soldiers, northern loyalists, or important infrastructure.<sup>107</sup> No longer directed at common law crimes and offenses committed by American Soldiers as in the Mexican-American War, the commissions had transformed into a tool by which Union authorities counteracted the activities of guerrillas.<sup>108</sup>

Often the sentences were harsh—death sentences were not uncommon<sup>109</sup>—but so too were many of the offenses.<sup>110</sup> In a particularly gruesome case, two guerrillas tricked a Union lieutenant into following them into the woods where they disarmed and stripped him.<sup>111</sup> The guerrillas forced the officer to kneel and then one of them brutally executed him at point blank range.<sup>112</sup> One of the guerrillas escaped, but the other, Smith Crim, was convicted in August 1862, on charges of murder and violation of the laws of war.<sup>113</sup> Crim was sentenced to death, while the other guerrilla's identity remained unknown throughout the trial.<sup>114</sup>

The harsh punishments reflected the goal of the commissions: removing and disabling troublesome individuals who were involved in the guerrilla war to stabilize Missouri. For example, on 18 February 1862, William Lisk was tried for violating the laws of war and for aiding and abetting the rebellion by arming guerrillas.<sup>115</sup> The commission

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<sup>105</sup> See Headquarters, Dep't of Mo., Gen. Orders No. 42, Series 1 (1862) (on file with Library of Cong., Wash., D.C.).

<sup>106</sup> See sources cited *supra* note 93.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> There were close to fifty death sentences imposed in Missouri in 1862. Of these, about half were upheld. See sources cited *supra* note 93. For the post-trial review process of the commissions, see *infra* Part IV.A.

<sup>110</sup> For example, many common offenses were violent crimes, such as murder, arson, or robbery charged as violations of the laws of war. See sources cited *supra* note 93.

<sup>111</sup> Case MM-0136; Headquarters, War Dep't, Gen. Orders No. 151 (1863) (on file with Library of Cong., Wash., D.C.).

<sup>112</sup> See sources cited *supra* note 111.

<sup>113</sup> *Id.*

<sup>114</sup> The death sentence was ultimately upheld by President Lincoln. See sources cited *supra* note 111.

<sup>115</sup> Case KK-0825.

focused on an incident where a group of guerrillas fired on a boxcar.<sup>116</sup> Even though Lisk's connection to the actual assault was apparently limited to allowing one of the shooters to borrow his gun, he was found guilty on all charges and sentenced to hard labor for the duration of the war—a sentence later approved by General Halleck and which lasted for approximately four years.<sup>117</sup>

Although 1862 was the year in which military commissions were the roughest in terms of procedure,<sup>118</sup> the conviction rate was comparable to other years, and was actually lower than in 1863.<sup>119</sup> Of 237 defendants brought before a commission in the Departments of Mississippi and Missouri, forty-eight<sup>120</sup> were acquitted or ultimately not charged, a conviction rate of about eighty percent (not counting uncharged individuals, the conviction rate increases to about eighty-five percent<sup>121</sup>). Of the 189 individuals convicted by the commission, fifty-one of those convictions were reversed by either General Halleck, General Samuel Curtis, or by the War Department (a total of twenty-seven percent), and another thirteen individuals had their convictions upheld but had the sentence mitigated to a much less severe punishment.<sup>122</sup> Overall, a little

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<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> See Appendix B.

<sup>119</sup> Compare these statistics with Department of Missouri conviction rate in 1863 (around eighty-five percent), *infra* note 265.

<sup>120</sup> See *supra* note 93.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* In an interesting case, and likely the first reviewed by President Lincoln, Sely Lewis was convicted for spying and smuggling and sentenced to death. Lincoln reversed the spying conviction because the offense was outside of the jurisdiction of military commissions and reduced the punishment to six months imprisonment. Lewis was tried on 21 Aug 21, 1862, in Memphis, in the District of Western Tennessee. Upon reversal, Lewis was released. See case KK-0825; Headquarters, War Dep't, Gen. Orders No. 170 (1862) (on file with Library of Cong., Wash., D.C.). At that time the District was part of the Department of the Mississippi. THIAN, *supra* note 51, at 72–73. The convictions of another seventeen defendants tried in or near Missouri were reversed by the War Department. See Headquarters, War Dep't, Gen. Orders No. 91 (1863) (on file with Library of Cong., Wash., D.C.), Headquarters, War Dep't, Gen. Orders No. 95 (1863) (on file with Library of Cong., Wash., D.C.), Headquarters, War Dep't, Gen. Orders No. 135 (1863) (on file with Library of Cong., Wash., D.C.), Headquarters, War Dep't, Gen. Orders No. 151 (1863) (on file with Library of Cong., Wash., D.C.), Headquarters, War Dep't, Gen. Orders No. 162 (1863) (on file with Library of Cong., Wash., D.C.), Headquarters, War Dep't, Gen. Orders No. 239 (1863) (on file with Library of Cong., Wash., D.C.), Headquarters, War Dep't, Gen. Orders No. 255 (1863) (on file with Library of Cong., Wash., D.C.), Headquarters, War Dep't, Gen. Orders No. 267 (1863) (on file with Library of Cong., Wash., D.C.).

over half of the defendants tried in 1862 were convicted and had their sentence executed in full.<sup>123</sup>

In the opening month of 1862, the broad charge of “treason” was again used, but Halleck, unlike Fremont, reversed all of these convictions because the specific offense of treason could not be tried before military commission.<sup>124</sup> Offenses that could constitute treason could be tried before military commission as military offenses themselves, but the charge of treason itself could not be brought before a commission.<sup>125</sup> Removal of the commissions reviewed during the period in which judge advocates and generals were confused about the charge of treason reveals the true acquittal and reversal rates for approximately the last eleven months of the year.<sup>126</sup> Of the commissions tried from roughly late-January onwards (about 193), the conviction rate increases slightly to about eighty-two percent, and of the approximately 160 convictions, forty-two were reversed (about twenty-six percent).<sup>127</sup> About sixty-one percent of the individuals tried from that point were found guilty and had their sentence upheld in full, a figure noticeably higher than the fifty percent figure created when including the first confused trials for the year.<sup>128</sup> Although the number of acquittals and reversals suggests that these commissions were not kangaroo courts,<sup>129</sup> the fact that over sixty

<sup>123</sup> See *supra* note 93.

<sup>124</sup> Headquarters, Dep’t of Mo., Gen. Orders No. 20, Series 1 (1862) (on file with Library of Cong., Wash., D.C.).

<sup>125</sup> 1 1862 Dep’t of Mo., Gen. Orders No. 1, *supra* note 95 (Halleck writing “Treason, as a distinct offense, is defined by the Constitution, and must be tried by courts duly constituted by law; but certain acts of a treasonable character, such as conveying information to the enemy, acting as spies, &c., are military offenses, triable by military tribunals, and punishable by military authority). See also O.R., I, 8, 822 (General Halleck, writing to General Pope, explained the proper use of the treason charge: “[T]reason is an offense technically defined by the Constitution, and is not triable by a military commission.”).

<sup>126</sup> 1 1862 Dep’t of Mo., Gen. Orders, *supra* note 93 (removing Gen. Orders Nos. 1–38); 2 1862 Dep’t of Mo., Gen. Orders, *supra* note 93; 1862 Dep’t of the Miss., Gen. Orders, *supra* note 93; 1862 War Dep’t, Gen. Orders 1862, *supra* note 93; 1862 Dist. of Mo., Gen. Orders, *supra* note 93; 1862 Army of the Southwest, Gen. Orders, *supra* note 93.

<sup>127</sup> See sources cited *supra* note 126.

<sup>128</sup> *Id.* See also NEELY, *supra* note 18, at 43 (noticing the same trend and removing these commissions from his analysis).

<sup>129</sup> The surge of interest over the past several years has given many some legal historians a skewed conception of the Civil War commissions. Many researchers have focused their attention on the famous trials of the era, such as that of Clement Vallandigham, Henry Wirz (the commander of Andersonville), or those implicated in the assassination of President Lincoln. Those trials have received the most academic attention. See Vagts, *supra* note 2, at 35 (describing this trend). However, like many “show trials,” these cases

percent of the individuals tried were convicted and had their sentences fully upheld<sup>130</sup>—often to imprisonment until the end of the war—reflects how serious the Union authorities were about removing dangerous individuals from Missouri as a core component of the war effort.

Notably, the aggressive use of military commissions in Missouri as an offensive weapon to counter guerillas is a lesson that can be applied to modern counterinsurgency efforts, particularly in the context of the war on terror. Many of the recent articles on lawfare focus on how law limits the ability of the United States to wage effective wars and how increased reliance on the law in the military has hampered combat operations.<sup>131</sup>

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are also very atypical and have led to conclusions about the Civil War commissions that are not entirely fair. A criticism among some of these articles is that the Civil War commissions were little more than kangaroo courts. For example, Professor Belknap, basing his conclusions almost entirely on high profile cases, wrote that “abuses and injustice pockmark the domestic record of these tribunals” and that

[f]ar too often, the principal reason for employing [military commissions] has been political . . . they have been utilized because they could be counted on not only to impose harsher penalties than the civilian courts but also to return convictions more easily and on the basis of less evidence . . . their proceedings have been marred by gross procedural irregularities, perjury, and corruption.

Belknap, *supra* note 2, at 452, 480; *see also e.g.*, Renzo, *supra* note 2, at 476–85 (assessing the fairness of the trial of civilians using *Vallandigham*, the Lincoln Conspirators, and *Milligan* as examples); Rotunda, *supra* note 2, at 451–62 (assessing procedural protections given during the Civil War by considering the trial of Clement Vallandigham and the Lincoln Conspirators). Many of the conclusions reached in these articles would be accurate if they were discussing only the specific trials that were researched, but they are not accurate when they discuss the commissions at large. Although the goal of this article is not to prove that the Civil War commissions were fair, a close study of typical commission trials and their review process does show that these trials were not kangaroo courts. *See infra* Part IV.A and Appendix A for discussions of the commission review process; *see also* Glazier, *Kangaroo Court or Competent Tribunal?*, *supra* note 2, at 2037–38, 2092 (describing the similarity in procedure and review to courts-martial in Civil War commissions).

<sup>130</sup> *See supra* note 126.

<sup>131</sup> *See, e.g.*, Sulmasy & Yoo, *supra* note 99, at 1836, 1844 (“Our adherence to law and process within warfare has risen to a level that some now assert interferes with the efforts of military commanders to achieve victory on the battlefield. One area in which we can see these developments at work is the military lawyer’s newfound involvement in combat operations.”); Scott Sullivan, *International Law and Domestic Legitimacy: Remarks Prepared for Lincoln’s Constitutionalism in Time of War: Lessons for the Current War on Terror?*, 12 CHAP. L. REV. 489, 496 (2009); William G. Hyland Jr., *Law v. National Security: When Lawyers Make Terrorism Policy*, 7 RICH. J. GLOBAL L. & BUS. 247, 249–50 (2008); Dunlap, *supra* note 99 (describing the view that hyper-legalism in the Kosovo

Yet, Halleck's use of commissions in Missouri is an example of legal processes being used by the more organized party against one of the most violent insurgencies in American history.<sup>132</sup> For example, in Missouri, guerillas were destroying bridges and telegraph lines, assaulting Union Soldiers, burning towns, and otherwise terrorizing towns and civilians.<sup>133</sup> Similar to modern insurgents, the guerillas in Missouri were difficult to control because they often used friendly towns as bases and were difficult to distinguish from the rest of the population.<sup>134</sup> However, the use of legal processes allowed guerillas to be quickly tried and detained, often for the duration of the war, without the collateral damage that would have been caused by more traditional violent reprisals and counter-raids.<sup>135</sup> Moreover, Halleck's commissions—which held legal formalities in high regard<sup>136</sup>—were actually more effective than those of General Fremont, which did not.<sup>137</sup>

Today, it is not difficult to imagine the Obama Administration facing similar concerns as General Halleck faced in Missouri. These concerns could arise, for example, in the current counterinsurgency operations in Iraq and Afghanistan or in response to a theoretical increase in terrorist activity and cells within the United States. Rather than limiting the military's counterinsurgency efforts, the law can actually assist the armed forces.<sup>138</sup> Although some commentators suggest that lawyers and

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campaign seriously constrained combat operations) (citing Richard K. Betts, *Compromise Command*, FOREIGN AFF., July/Aug. 2001, at 126).

<sup>132</sup> See also Meyers, *supra* note 35 (describing similar use by Winfield Scott in Mexico).

<sup>133</sup> See *supra* notes 97, 100.

<sup>134</sup> See FELLMAN, *supra* note 76, at 23–29 (describing the variety of tactics used by guerillas which made operations against them particularly difficult).

<sup>135</sup> See Ganesh Sitaraman, *Counterinsurgency, The War on Terror, and the Laws of War*, 95 VA. L. REV. 1745, 1747 (2009) (describing similar goals in modern war, which is dominated by counterinsurgency efforts:

Instead, counterinsurgents follow a win-the-population strategy that is directed at building a stable and legitimate political order. Winning the population involves securing the population, providing essential services, building political and legal institutions, and fostering economic development. Killing and capturing the insurgents is not the primary goal, and it may often be counterproductive, causing destruction that creates backlash among the population and fuels their support for the insurgency.).

<sup>136</sup> See *supra* pp. 12–14.

<sup>137</sup> See *supra* pp. 11–12.

<sup>138</sup> See, e.g., Dunlap, *supra* note 98, at 147 (describing the use of lawfare as part of a successful counterinsurgency strategy in Iraq); see also Michael Kramer & Michael

legal advisors may handicap the military,<sup>139</sup> the historic example of Missouri shows that legal tools can significantly expand the arsenal of potential weapons available.<sup>140</sup> If it had not been for Halleck's legal expertise, he likely would not have been able to devise such a creative legal solution to irregular warfare in Missouri in 1862.<sup>141</sup> His legal oversight also demonstrates the central role of attorneys in devising global and ground strategy in wars during the 21st century if American armies are to fight at maximum capacity.

#### D. Commissions Outside of Missouri in 1862

In other military departments, the approximately forty commissions that rounded out the total of at least 280 commissions in 1862 were largely similar to those seen in 1861 in Virginia.<sup>142</sup> At least ten of the defendants were Union Soldiers, and most of the remaining Soldiers were either tried for committing common law offenses or for some type of disloyal conduct.<sup>143</sup> Rather than being used as an organized legal component of the war effort, such as the Missouri commissions, the commissions elsewhere were more closely related to those in Mexico.

In general, the commissions used in 1862 display confusion about the role of military commissions and many of the defendants tried could

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Schmitt, *Lawyers on Horseback? Thoughts on Judge Advocates and Civil-Military Relations*, 55 UCLA L. REV. 1407, 1432–33 (2008).

<sup>139</sup> See *supra* note 131.

<sup>140</sup> See Colonel Kelly Wheaton, *Strategic Lawyering: Realizing the Potential of Military at the Strategic Level*, ARMY LAW., Sept. 2006, at 1, 6–7 (instructing military attorneys to not “cede to the enemy the use of law as a weapon of war” and that “military attorneys must embrace the concept of lawfare”).

<sup>141</sup> See *infra* Part III.A (describing the expansion of military commission jurisdiction over violations of the laws of war in Gen. Orders No. 1).

<sup>142</sup> I located records of thirty-nine non-Missouri defendants tried by commission in 1862; however, there were surely more. I estimate that in total there were between fifty and seventy-five individuals tried. See 1862 War Dep't, Gen. Orders, *supra* note 93; 1863 War Dep't, Gen. Orders, *supra* note 93; Headquarters, Dep't of the S., Gen. Orders (1862) [hereinafter 1862 Dep't of the S., Gen. Orders] (on file with Library of Cong., Wash., D.C.); Headquarters, Mountain Dep't, Gen. Orders (1862) [hereinafter 1862 Mountain Dep't, Gen. Orders] (on file with N.Y. Hist. Soc'y.); Headquarters, Dep't of the Gulf, Gen. Orders (1862) [hereinafter 1862 Dep't of the Gulf, Gen. Orders] (on file with Library of Cong., Wash., D.C.); Headquarters, Dep't of the Cumberland, Gen. Orders (1862) (on file with Library of Cong., Wash., D.C.); Headquarters, Dep't of the Potomac, Gen. Orders (1862) [hereinafter 1862 Dep't of Potomac, Gen. Orders] (on file with N.Y. Hist. Soc'y); O.R., II, 3, 616 & 645; O.R. II, 4, 63.

<sup>143</sup> See *supra* note 142.

actually have been tried before a court-martial. For example, in the Department of the Gulf, Private K.M. Kostarbater was tried before a commission for insubordination.<sup>144</sup> Major General Benjamin Butler, commander of the Department of the Gulf, approved the conviction and sentence of forfeiture of two months wages.<sup>145</sup> However, the offense fell squarely within the jurisdiction of a court-martial and trial before a military commission was inappropriate.<sup>146</sup> Another case that displays the confusion is the trial of Jose Maria Rivas, convicted for spying in Santa Fe, New Mexico, on 18 July 1862.<sup>147</sup> Rivas was a Mexican from Chihuahua who had acted as a scout for several Confederate commanders during the winter of 1861–62, and was captured in civilian clothes near Union lines.<sup>148</sup> Rivas was sentenced to death, and his file was forwarded to President Lincoln for approval.<sup>149</sup> Although Lincoln did not address the jurisdictional problem in the case, he disapproved the sentence due to the hearsay evidence admitted and because Rivas's admission to spying seemed to be the result of confusion, rather than an actual confession.<sup>150</sup> Lincoln reversed the sentence and ordered that Rivas be treated as a Prisoner of War.<sup>151</sup> However, a problem not addressed by Lincoln was that the offense of spying could not be brought before a military commission at that point, and instead, properly belonged before a court-martial under the 101st Article of War.<sup>152</sup>

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<sup>144</sup> Headquarters, Dep't of the Gulf, Gen. Orders No. 103 (1862) (on file with Library of Cong., Wash., D.C.).

<sup>145</sup> *Id.*

<sup>146</sup> 2 Stat. 367 (1806) (art. 99) ("All crimes not capital, and all disorders and neglects which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not mentioned in the foregoing articles of war, are to be taken cognizance of by a general or regimental court martial, according to the nature and degree of the offence, and be punished at their discretion."). The conduct could also have fallen within a number of other specific provisions of the Articles of War depending upon its exact character.

<sup>147</sup> Case KK-0829; Headquarters, War Dep't, Gen. Orders No. 174 (1862) (on file with Library of Cong., Wash., D.C.).

<sup>148</sup> See sources cited *supra* note 147.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* It is likely that Lincoln did not reach the jurisdictional problem because on the same day he addressed the issue of spies tried by commission in the case of Sely Lewis. See *supra* note 147. See also 2 Stat. 371 (1806) (art. 101, § 2) ("That in time of war, all persons not citizens of, or owing allegiance to the U.S. of America, who shall be found lurking as spies, in or about the fortifications or encampments of the armies of the United States, or any of them, shall suffer death, according to the law and usage of nations, by sentence of a general court martial.").

### III. Legal Innovations and the National Explosion

#### A. Halleck's Innovation: The Legal Theory behind the Commissions

Although Halleck, upon his appointment to command of the Department of the Missouri, immediately ended the legally suspect trials used by Fremont to target disloyal civilians, it was ultimately under Halleck's guidance that the commissions were first utilized in an organized manner for trying guerillas and other insurgents.<sup>153</sup> In Halleck's work on international law, published in 1861, Halleck set forth his views on martial law and the authority of the military to try individuals for violations of the laws of war. He wrote in his treatise:

[M]artial law is quite a distinct thing. It exists only in times of war, and originates in military necessity. It derives no authority from the civil law, nor assistance from the civil tribunals, for it overrules, suspends, and replaces both. It is, from its very nature, an arbitrary power and extends to all inhabitants (whether civil or military) of the district where it is in force . . . The right to declare, apply and enforce martial law . . . resides in the governing authority of the state.<sup>154</sup>

Halleck's actions in Missouri were, not surprisingly, consistent with the views espoused in his work.<sup>155</sup> Halleck did not try individuals by commission until, unlike Fremont, he had the authority to do so from Washington, which was granted on 2 December 1861.<sup>156</sup> Soon

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An interesting case, which is more in line with Scott's Mexican commissions, was the commission that tried Henry Kuhl, Conrad Kuhl, and Hamilton Winder for the murder of a Union soldier (whose name remained unknown throughout the trial). In a trial marked by admission of questionable evidence, all three men were convicted. Both Conrad and Henry Kuhl pled guilty; Henry was sentenced to death, while Conrad was sentenced to hard labor for the duration of the war. *See* Case II-0832; Headquarters, Mountain Dep't, Gen. Orders No. 17 (1862) (on file with N.Y. Hist. Soc'y). Quite interestingly, the main prosecution witness at Conrad's trial was Winder, who testified that Conrad and Henry killed the young Union soldier. The third defendant, Winder, pled not guilty, but was convicted on the testimony of none other than Conrad, who testified that Henry and Winder committed the murder (creating a strange triangle of blame). Winder, upon conviction, was sentenced to death. The convictions and sentences were approved and carried into effect. Of the three, only Conrad survived. *Id.*

<sup>153</sup> *See* Part II.C.

<sup>154</sup> HALLECK, *supra* note 10, at 373 (parenthetical in original) (internal citations omitted).

<sup>155</sup> *Id.*

<sup>156</sup> *See supra* note 89 and accompanying text.

afterwards, trials of civilian insurgents commenced.<sup>157</sup> Halleck's views on martial law explain how he could, with a firm theoretical basis, extend the use of military commissions to target civilian insurgents whose offenses were outside of the jurisdiction of courts-martial, in a way likely not imagined in Mexico when commissions were first used. Halleck, through a grant of authority from the executive, had the authority to replace civil law with martial law and, accordingly, could try individuals violating the laws of war.<sup>158</sup>

The text of General Order No. 1 is a revealing window into Halleck's rationale and justification for using commissions.<sup>159</sup> Halleck, in his correspondence with other commanders, defined the jurisdiction of the commissions as that outside of the jurisdiction of courts-martial and of civil courts, which was the same definition used in Mexico by General Scott.<sup>160</sup> However, unlike in Mexico, where the commissions were used primarily to try American Soldiers committing crimes outside of the jurisdiction of courts-martial, these commissions were focused on trying crimes by civilians. Most of these civilian crimes involved offenses, such as arson, robbery, or assault, which, unlike in Mexico, could have been tried by civil courts as the crimes were committed on American soil by American civilians.<sup>161</sup>

Halleck provided some insight into this apparent problem in the order where he made two critical moves to provide a basis for the jurisdiction of these commissions. First, the order reads, "[c]ivil offenses cognizable by civil courts, whenever such *loyal* courts exist, will not be tried by a military commission."<sup>162</sup> Here, in distinguishing between loyal and non-loyal civil courts, Halleck carved out a jurisdictional hole similar to that existing in Mexico, necessitating the use of military commissions.<sup>163</sup> Additionally, and quite importantly, the determination

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<sup>157</sup> Stephen Bontwell is an example of the type of individual tried soon after the proclamation of martial law. He was tried on 14 January 1862 in Cape Girardeau, Missouri. See Case KK-0821. Bontwell was charged with robbery and violating the laws of war because he was a member of a band of guerrillas called "Jeff Thompson's Men," which had held a civilian hostage and violently robbed him in August, 1861. *Id.*

<sup>158</sup> See *supra* note 154.

<sup>159</sup> 1 1862 Dep't of Mo., Gen. Orders No. 1, *supra* note 95.

<sup>160</sup> O.R., I, 8, 476; O.R. I, 8, 822 (writing that "military commissions should, as a general rule, be resorted to only for cases which cannot be tried by a court-martial or by a proper civil tribunal.").

<sup>161</sup> See *supra* Part II.C.

<sup>162</sup> 1 1862 Dep't of Mo., Gen. Orders No. 1, *supra* note 95 (emphasis added).

<sup>163</sup> *Id.*

of what constituted a “loyal” civil court would likely fall upon either Union officers in the field or upon Halleck himself. Under this system, any court that did not operate as Union authorities liked could be deemed disloyal, providing an easy way to sidestep the court system entirely. Halleck wrote at about the same time regarding the situation in Missouri: “The civil courts can give us no assistance, as they are very generally unreliable. There is no alternative but to enforce martial law. Our army here is almost as much in hostile territory as it was in Mexico.”<sup>164</sup> Under this logic, the lack of loyal courts prevented trial by civilian courts in most parts of Missouri, necessitating the use commissions to try a wide variety of offenses like in Mexico. This first move provided a foundation for using commissions based on the solid precedent of Scott in Mexico, with a slight adjustment for the unique situation in Missouri.<sup>165</sup>

Just sentences later, Halleck makes another important move in establishing a legal basis for the commissions: “It must be observed, however, that many offenses which in time of peace are civil offenses become in time of war military offenses, and are to be tried by a military tribunal, even in places where civil tribunals exist.”<sup>166</sup> Halleck here states, consistent with his own earlier stated views on martial law, that martial law could largely subsume much civil authority if the need arose.<sup>167</sup> This rationale provides a legal justification for using trials to prosecute civilians on U.S. soil, even where loyal civil courts did exist. The grant of authority here is enormous, particularly in that it specifically authorizes trials of civilians for all acts that would constitute violations of the laws of war. Halleck specifically extended subject matter and *in personam* jurisdiction to those offenses explaining that, for offenses not falling under court-martial jurisdiction, “we must be governed by the general code of war.”<sup>168</sup> On this view, almost all of the activities of guerrillas in Missouri, including the very act of being a guerrilla, could constitute a violation of the laws of war, and could be tried before a

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<sup>164</sup> O.R., I, 8, 476.

<sup>165</sup> See *supra* Part II.A for Mexican precedent.

<sup>166</sup> 1 1862 Dep’t of Mo., Gen. Orders No. 1, *supra* note 95.

<sup>167</sup> See *supra* note 154 and accompanying analysis.

<sup>168</sup> See WILLIAM WINTHROP, DIGEST OF OPINIONS OF THE JUDGE ADVOCATE GENERAL 334 (U.S. Gov’t Prtg. Office 1880) (defining military offense as, in part, violations of the laws of war). 1 1862 Dep’t of Mo., Gen. Orders No. 1, *supra* note 95. Halleck, when using the term general code of war means those offenses against the laws of war; see HALLECK, *supra* note 10, at 830 (using “code of war” and “the laws of war”); see also 1 WINTHROP, *supra* note 16, at 42 (describing military offenses under the “unwritten customs and laws of war”).

military rather than by a civil court.<sup>169</sup> The order describes a number of acts that constituted violations of the laws of war, including “murder, robbery, theft, arson,” and expressly stated that guerrillas could not receive a “military exemption to the crimes they may commit.”<sup>170</sup>

This provision sets forth a broad swath of authority by which guerrillas and other insurgents could be tried. The main intellectual leap from the commissions of the Mexican War to those of the Civil War is contained within the cited line of the order.<sup>171</sup> In Mexico, General Scott had not defined the jurisdiction of military commissions to include offenses against the laws of war. Instead, as discussed previously, these crimes were tried before the experimental “Councils of War,” which were called only three times and tried only twelve individuals.<sup>172</sup> Halleck, by contrast, added to the jurisdiction of the military commission all breaches of the laws of war, expanding the authority of the commissions enormously. Essentially, Halleck subsumed Scott’s Councils of War into Scott’s military commissions, but used the commissions to try primarily those offenses that would have been tried before Councils of War. This creative innovation allowed for the broad application of military commissions in Missouri, and later across much of the United States, to try the many different offenses deemed to violate the laws of war.

The overall impact of General Order No. 1 was enormous. Halleck, although using jurisdictional language that harked back to the commissions in Mexico, was actually using martial law to authorize a very different sort of commission that he intended to use to “put down these insurgents and bridge-burners with a strong hand.”<sup>173</sup> In short, he was setting forth a broad legal basis for using the commissions as a weapon by which he could root-out the guerrillas and insurgents wreaking havoc in Missouri.<sup>174</sup> In Missouri, Halleck created a powerful

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<sup>169</sup> See 2 WINTHROP, *supra* note 16, at 10–11 (describing guerilla activity and being a guerilla as among the most typical violations of the law of war).

<sup>170</sup> 1 1862 Dep’t of Mo., Gen. Orders No. 1, *supra* note 95.

<sup>171</sup> *Id.*

<sup>172</sup> See 2 WINTHROP, *supra* note 16, at 60; Glazier, *Kangaroo Court or Competent Tribunal?*, *supra* note 2, at 2033 (these councils tried, primarily, guerrillas committing violations of the laws of war and individuals caught enticing U.S. Soldiers to desert); see also Myers, *supra* note 35, at 228 (tracing the foundation of modern commissions to the councils of war).

<sup>173</sup> O.R., I, 8, 476.

<sup>174</sup> *Id.*

hybrid commission,<sup>175</sup> using his legal expertise to devise a very innovative solution to a problem that could not easily be countered with armies in the field.<sup>176</sup> The commissions used in Missouri, from the start, were designed to try civilian insurgents, whereas those in Mexico were designed primarily to try American Soldiers. The commissions in Missouri were more closely related to Halleck's conceptions of martial law, which allowed for the complete suspension or overriding of civil courts, than to any previous American military precedent, particularly Scott's commissions in Mexico.

#### B. The Expansion of Commissions Beyond Missouri: Support from Washington and the Promulgation of the Lieber Code

In the middle of 1862, the war sat at a crossroads. The period from the middle of 1862 through the middle of 1863 is often described as a moment that marked a philosophical transition in the Union war effort. For example, military historian Mark Grimsley describes this period as marking the end of a war on conciliation and the beginning of a hard

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<sup>175</sup> Although Halleck's commissions in Missouri stemmed from two previous tribunals—the military commissions and councils of war used in Mexico—the modern military commission was truly born in Missouri in 1862. The creation of a tribunal tailored to the specific conditions of a military theater is a precedent that we cannot afford to ignore today. For example, currently, policymakers are grappling with difficulties that will arise trying terrorist suspects, such as Khalid Sheikh Mohammed, in federal district courts. See, e.g., Scott Shane & Benjamin Weiser, *U.S. Drops Plan for a 9/11 Trial in New York City*, N.Y. TIMES, Jan. 29, 2010, at A1 (potentially moving terror trials outside of New York City due to political opposition and cost of security associated with them). Rather than viewing the current decision as binary—either the military will try the suspected terrorists in military courts or federal district courts will try them as criminals—a hybrid approach must be reached that recognizes and addresses the unique issues that will arise when trying terrorists. See Myers, *supra* note 35, at 237–40 (making similar suggestions and observations based on the creation of new military tribunals in Mexico under General Scott). Following in the footsteps of Henry Halleck and Winfield Scott, the creation a tribunal that affords sufficient procedure to satisfy the Constitution but that also can also respond to changing national security concerns that will arise in these types of trials must be seriously considered if the United States is going to respond to the terrorist threat adequately.

<sup>176</sup> See FELLMAN, *supra* note 76. Halleck's creation and use of a legal weapon reinforces the idea that military lawyers can enhance the fighting capabilities of the armed forces and that lawfare is not necessarily a strategy that can only be used to the disadvantage of the United States. See *supra* pp. 20–22. The fruitful role that military lawyers could potentially play is particularly true as the military devises strategies to deal with insurgencies and terrorists in the 21st century; like it did in Missouri, the military must learn to use the law to its advantage.

war.<sup>177</sup> This shift can be seen in many areas, such as the emancipation of slaves, some of the first sieges of and bombardments of major cities, the first major conscription in American history, and the increased targeting of civilian property by northern armies. The Civil War had transformed from a “gentleman’s war” involving uniformed armies, to a much harder, more modern war, affecting the entire population. In the words of contemporary newspapers, the “Kid Gloves” had been abandoned and Union armies had begun to “wage war in downright, deadly earnest.”<sup>178</sup>

As part of this trend towards a harder war, military commissions expanded from an almost exclusive use in Missouri in 1862 to widespread use across almost every military department by 1864. Beginning in the middle of 1862, the administration in Washington began to lend support to the expansion of military commissions and to exercise centralized control over the trials via the Judge Advocate General’s Office.<sup>179</sup>

On 5 April 1862, Secretary of War Stanton wrote to General Halleck, expressing his approval of several military commissions that had recently taken place in Missouri.<sup>180</sup> Stanton wrote that he “heartily approved” of the commissions and stated that the form of procedure used in Missouri should be copied in other departments.<sup>181</sup> Importantly, the two trials for which Stanton voiced approval were both cases in which the jurisdictional foundation for the commissions stemmed from Halleck’s innovation in General Order No. 1 to expand the jurisdiction of military commissions to include those offenses against the laws of war (offenses that would have been tried by a Council of War, if at all, in Mexico).<sup>182</sup>

The first case mentioned was the trial of Edmund Ellis, in which a commission convicted him on 25 February 1862, for “violating the laws of war by publishing intelligence to enemy” in his local newspaper, *The Boone County Standard*.<sup>183</sup> Interestingly, this was one of the few non-violent offenses tried in Missouri in 1862.<sup>184</sup> The second trial of which

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<sup>177</sup> For description, examples and extensive discussion, see MARK GRIMSLEY, *THE HARD HAND OF WAR* 67–151 (1995).

<sup>178</sup> *Id.* at 89 (quoting the *Chicago Tribune* and *New York Times* from July 1862).

<sup>179</sup> See *infra* Part IV.

<sup>180</sup> O.R., II, 1, 276.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> 1862 Dep’t of Miss., Gen. Orders No. 11, *supra* note 102.

<sup>184</sup> See *supra* note 93.

Stanton approved was similar to the standard fare for Missouri—the prosecution of William Kirk for his role in a guerrilla band known as “Jeff Thompson’s band” under the general charge “violation of the laws of war.”<sup>185</sup> The specifications of the charge indicate that Kirk was involved in a variety of illegal activities beyond being a member of the band, such as robbery and pillaging of civilians.<sup>186</sup> Both individuals were found guilty; Kirk was ultimately sentenced to three years imprisonment, and Ellis had his press materials confiscated and was banished from Missouri.<sup>187</sup> More important than the fate of these two individuals is the strong signal of approval from the War Department for the broad application of the military commissions against offenses that were violations of the laws of war—offenses that were not within the jurisdiction of military commissions until just four months earlier.<sup>188</sup>

As further evidence of Washington’s approval of the Missouri trials, Stanton forwarded Halleck’s General Order No. 9 from the Department of the Mississippi to General Fremont—now commanding the Mountain Department in modern day West Virginia<sup>189</sup> (an area that was also experiencing growing difficulties with guerrillas).<sup>190</sup> This order contained Kirk’s trial and information on the trials of thirteen other men, all of whom were involved with guerrillas or who had violated the laws of war in some way.<sup>191</sup> The message states that, “[t]he Secretary approves of this form of procedure in like cases, especially in regard to guerrillas of which there are several instances in this order.”<sup>192</sup> Although the order was possibly partially a rebuke of Fremont for his actions in Missouri the previous year,<sup>193</sup> it also shows that the military administration in Washington supported the commissions occurring in Missouri, to the point that they actually were instructing other department commanders to mimic them in countering guerrillas and other violators of the laws of war.<sup>194</sup>

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<sup>185</sup> O.R., II, 1, 276.

<sup>186</sup> Headquarters, Dep’t of the Miss., Gen. Orders No. 9 (1862) [hereinafter 1862 Dep’t of Miss., Gen. Orders No. 9] (on file with Library of Cong., Wash., D.C.).

<sup>187</sup> *Id.*

<sup>188</sup> See 1 1862 Dep’t of the Mo., Gen. Orders No. 1, *supra* note 95.

<sup>189</sup> O.R., II, 2, 283.

<sup>190</sup> SEAN MICHAEL O’BRIEN, MOUNTAIN PARTISANS, at xxiii (1999).

<sup>191</sup> 1862 Dep’t of Miss., Gen. Orders No. 9, *supra* note 186.

<sup>192</sup> O.R., II, 2, 283.

<sup>193</sup> See *supra* pp. 9–12.

<sup>194</sup> See, e.g., O.R., II, 1, 276; O.R., II, 2, 283.

Further support for the use of military commissions again came from the Lincoln Administration in September 1862. On 24 September 1862, President Lincoln suspended habeas corpus for all individuals who had been arrested or who were confined by military authority, court-martial, or military commission.<sup>195</sup> In addition to this widespread suspension of habeas corpus, Lincoln also extended the authority of military commissions nationwide:

[B]e it ordered . . . that during the existing insurrection and as a necessary measure for suppressing the same, all Rebels and Insurgents, their aiders and abettors within the United States, and all persons discouraging volunteer enlistments, resisting militia drafts, or guilty of any disloyal practice, affording aid and comfort to Rebels against the authority of the United States, shall be subject to martial law and liable to trial and punishment by Courts Martial or Military Commission.<sup>196</sup>

This order swept into the jurisdiction of military commissions a variety of offenses that could be categorized as disloyal, focusing particularly on interference with the war effort, as opposed to outright violent rebellion (as was already being tried in Missouri).<sup>197</sup>

As is seen in Lincoln's habeas corpus decree and in Stanton's instructions to department commanders to use commissions, the bulk of the authority for military commissions came from the executive branch; however, Congress did, on several occasions, expand the jurisdiction of military courts during the war. On 2 March 1863, Congress authorized the trial of a number of common law crimes committed by U.S. Soldiers and for the trial of spies or other individuals captured lurking about Union lines.<sup>198</sup> Except for those individuals captured spying and lurking,

<sup>195</sup> 5 COLLECTED WORKS OF LINCOLN 436–37 (Roy P. Basler et al. eds., 1953–55); *see also* O.R. III, 2, 587.

<sup>196</sup> *See* source cited *supra* note 195.

<sup>197</sup> Additionally, although this order reads as though it expands both the jurisdiction of military commissions and courts-martial, in reality it just expanded the jurisdiction of military commissions, as the jurisdiction of courts-martial could only be altered via statute. *See* 1 WINTHROP, *supra* note 16, at 101.

<sup>198</sup> 12 Stat. 736–37 (1863) (reading, in pertinent part, “in time of war, insurrection, or rebellion, murder, assault and battery with intent to kill, manslaughter, mayhem, wounding by shooting or stabbing with an intent to commit murder, robbery, arson, burglary, rape, assault and battery with intent to commit rape, and larceny shall be punishable by the sentence of a general court-martial or military commission when

this act did not authorize jurisdiction over civilian citizens (who ultimately comprised a significant portion of those tried by commission). Additionally, through a series of statutes passed between 1862 and 1864, Congress authorized trial of contractors, suppliers, and inspectors by military trial.<sup>199</sup>

However, the absence of authorization by Congress for trials of civilians by commission in the Act of 2 March 1863 was not interpreted by the military to limit their ability to try these individuals in areas where trials were already occurring. Rather, this statutory authorization was simply viewed as additional authorization beyond that already possessed through the departmental general orders.<sup>200</sup> This stands in clear contrast with the view of General Scott in Mexico, who authorized the commissions to “suppress these disgraceful acts abroad until Congress could be stimulated to legislate on the subject.”<sup>201</sup>

The view of General Scott—that military commissions existed only in areas where Congress had yet to legislate—is much more in line with

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committed by persons who are in the service of the United States, and subject to the Articles of War . . .”).

<sup>199</sup> In 1862, Congress passed legislation that allowed military suppliers to be subject to military justice as “part of the land or naval forces of the United States” by court-martial. *See* 12 Stat. 596, § 16 (1862). Additionally, in 1863, this act was expanded to make contractors and others subject to court-martial, in an act entitled an “Act to prevent and punish Frauds upon the Government of the United States.” 12 Stat. 696 (1863). In 1864, legislation dealing with the Quartermaster’s Department made inspectors faced with charges of corruption, willful neglect, or fraud triable before either a court-martial or military commission. 13 Stat. 397, § 6 (1864). This series of statutes created a confusing collage of concurrent jurisdiction resulting in trials of contractors, inspectors, and suppliers before both courts-martial and military commissions.

<sup>200</sup> This viewpoint is clearly displayed in General Orders No. 13, Department of Missouri, promulgated on 22 April 1863, by the headquarters of General Samuel Curtis. *See* Headquarters, Dep’t of Mo., Gen. Orders (1863) (on file with Library of Cong., Wash., D.C.). The order described the manner by which individuals committing different types of crimes would be tried, addressing spies, guerrillas, those corresponding with the enemy, those giving aid to the enemy, those making disloyal statements, and those violating the laws of war more generally. The order prescribed trial by military commission for all but those corresponding with the enemy, for which trial by court-martial was instructed. The order also, in addition to these instructions, quoted the portions of the congressional legislation of 2 March 1863, dealing with U.S. Soldiers committing common law crimes and spies. Rather than viewing this act as some instruction from Congress that conflicted with what had been occurring in Missouri for over a year, the Act was viewed as an additional jurisdictional basis for military commissions, standing alongside the jurisdiction authorized by Halleck in General Orders No. 1 of 1862.

<sup>201</sup> FISHER, *supra* note 2, at 33.

the modern view of the power of the executive during wartime. Although the exact locus of the power to authorize military commissions still remains unclear, in *Hamdan v. Rumsfeld*<sup>202</sup> and *Hamdi v. Rumsfeld*<sup>203</sup> the Supreme Court seemed to agree that these types of constitutional issues should be decided within the tripartite framework of Justice Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, which places great weight on Congressional authorization.<sup>204</sup> However, in *Hamdan* and *Hamdi*, the Justices disagreed exactly where in that framework the modern military commissions and other executive action was situated at various times over the past decade.<sup>205</sup> Although application of the modern formula remains vague, it is much closer to Scott's, which places great weight on the actions of Congress, than to Lincoln and Halleck's, which viewed the authorization of military commissions as squarely within the power of the executive.<sup>206</sup>

The strongest measure of support from Washington for military commissions came in the form of the Lieber Code, which was promulgated in April 1863 by the Department of War.<sup>207</sup> Several months earlier, in August 1862, General Halleck (soon after being made General-in-Chief of the U.S. Armies) wrote to Francis Lieber, a Professor at

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<sup>202</sup> 548 U.S. at 593.

<sup>203</sup> 542 U.S. 507, 536 (2004).

<sup>204</sup> See *Hamdan v. Rumsfeld*, 548 U.S. 557, 593 (2006) ("Whether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers.") (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952)); *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) ("We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens.") (O'Connor plurality) (citing *Youngstown*, 343 U.S. at 587).

<sup>205</sup> *Hamdan*, 548 U.S. at 567 (holding that military commissions lacked the power to proceed because they violated the Uniform Code of Military Justice and four Geneva Conventions); *Hamdi*, 542 U.S. at 518 (O'Connor plurality) (finding that Congress had authorized detention of unlawful combatants in its Authorization for Use of Military Force); see also Peter J. Spiro, *Hamdan v. Rumsfeld*, 126 S.Ct. 2749, 100, AM. J. INT'L L. 888, 889-895 (2006); Samuel Estreicher & Diarmuid O'Scannlain, *Hamdan's Limits and the Military Commissions Act*, 23 CONST. COMMENT. 403, 407 (2006); see generally William G. Howell, *Wartime Judgment of Presidential Power: Striking Down but Not Back*, 93 MINN. L. REV. 1778 (2009).

<sup>206</sup> Interestingly, although the Lincoln administration viewed the establishment of military commissions within the power of the executive, it deferred without protest to congressional legislation mandating the process by which these commissions were reviewed. See *infra* Part IV.A.

<sup>207</sup> See 1863 War Dep't, Gen. Orders No. 100, *supra* note 14, reprinted in RICHARD HARTIGAN, *LIEBER'S CODE AND THE LAW OF WAR* (Precedent 1983).

Columbia College and an expert on the laws of war, for guidance on how to deal with the guerillas plaguing Missouri.<sup>208</sup> Francis Lieber was born in Germany in 1798<sup>209</sup> and immigrated to the United States in 1826.<sup>210</sup> While living in Europe, Lieber served in the Colbert Regiment and fought in the Hundred Days War and was also seriously wounded at the Battle of Namur.<sup>211</sup> Upon settling in the United States, Lieber spent nearly twenty years as a Professor of History and Political Economy at South Carolina College and later moved to New York in 1857, where he took up a post at Columbia College as a Professor of History and Political Economy.<sup>212</sup> Already well-known prior to the Civil War, Lieber, in the winter of 1861–62 presented a series of lectures on “The Laws and Usages of War,” which garnered much public attention and displayed his expertise in the area.<sup>213</sup>

The initial letter from Halleck began a chain of correspondence and discussion that culminated in the promulgation of the Lieber Code several months later.<sup>214</sup> In his response, Lieber spoke at great length regarding the difficulties that irregular enemy soldiers could create and discussed means of dealing with them.<sup>215</sup> Lieber again wrote to Halleck in November 1862, urging the passage of a more comprehensive code defining the “Laws and Usages of War, and on which Our Articles of War are silent.”<sup>216</sup> Indeed, if this project had been completed as it was originally envisioned, it would have more clearly defined the types of

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<sup>208</sup> See also HOGUE, *supra* note 19, at 53.

<sup>209</sup> See FRANK FREIDEL, FRANCIS LIEBER: NINETEENTH CENTURY LIBERAL 2 (1947).

<sup>210</sup> *Id.* at 46.

<sup>211</sup> Captain William S. Shepard, *One Hundredth Anniversary of the Lieber Code*, 21 MIL. L. REV. 157, 157 (1963).

<sup>212</sup> *Id.* at 158.

<sup>213</sup> See FREIDEL, *supra* note 209, at 322–24; see also, HOGUE, *supra* note 19, at 51, 53; Shepard, *supra* note 211, at 157. See Childress, *supra* note 25, at 37 (observing that Henry Halleck personally requested 5000 copies of the lecture for distribution among the northern armies).

<sup>214</sup> HOGUE, *supra* note 19, at 53.

<sup>215</sup> Lieber created a fine distinction between partisans, authorized by the Confederate government, from non-authorized guerrillas, similar to those in Missouri. Partisans would be “answerable for the commission of those acts which the law of war grants no protection, and by which the soldier forfeits being treated as a prisoner of war.” Otherwise, partisans would be treated as prisoners of war. However, guerrillas, which Lieber characterized as “self-constituted sets of armed men in times of war, who form no integrant part of the organized army . . . take up arms and lay them down at intervals and carry on petty war [guerrilla] chiefly by raids, extortion, destruction, and massacre.” O.R., III, 2, 307–08.

<sup>216</sup> See FISHER, *supra* note 2, at 74.

offenses and punishments that Halleck had assumed the authority to try by military commission in Missouri under General Order No. 1 almost a year earlier.<sup>217</sup> Initially, Halleck seemed to dismiss the proposal, but about a month later, on 17 December 1862, the Secretary of War, by Special Order No. 399, authorized a committee of five people—four U.S. generals and Professor Lieber—to “propose amendments or changes in the Rules and Articles of War, and a Code of Regulations for the government of armies in the field, as authorized by the laws and usages of war.”<sup>218</sup>

The code was primarily drafted by Lieber and drew upon material he had previously prepared for his lectures on the laws and usages of war at Columbia and in his earlier correspondence with Halleck regarding guerillas.<sup>219</sup> The final code was approved and issued as General Order No. 100 and was entitled “Instructions for the Government of Armies of the United States in the Field.”<sup>220</sup> It consisted of 157 articles organized into ten sections and was promulgated on 24 April 1863.<sup>221</sup> The instructions were issued without Congressional approval, and rather, took something more in the form of an executive order.<sup>222</sup> The Code as ultimately approved did not, in fact, alter the Articles of War; rather, it limited itself to more generally delineating the common law of war.<sup>223</sup>

The Lieber Code did not specifically address the commissions occurring in Missouri.<sup>224</sup> However, the Code provided strong authority

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<sup>217</sup> 1 1862 Dep’t of Mo., Gen. Orders No. 1, *supra* note 95.

<sup>218</sup> George Davis, *Doctor Francis Lieber’s Instructions for the Government of Armies in the Field*, 1 AM. J. INT’L L. 13, 19 (1907); *see also* O.R., III, 2, 951. The remainder of the committee consisted of Generals. George Hartstuff, John Martindale, George Cadwalader, and Ethan Allen Hitchcock. Shepard, *supra* note 211, at 159.

<sup>219</sup> HOGUE, *supra* note 19, at 55; Childress, *supra* note 25, at 38.

<sup>220</sup> 1863 War Dep’t Gen. Order No. 100, *supra* note 14, *reprinted in* RICHARD HARTIGAN, LIEBER’S CODE AND THE LAW OF WAR (Precedent 1983).

<sup>221</sup> *Id.*

<sup>222</sup> *See* FISHER, *supra* note 2, at 74 (describing the Lieber Code as an executive decree). Despite carrying the term “code” in its name, the Lieber Code was actually not a statute passed by Congress. Rather, it was a General Orders promulgated by the War Department under the authority of Secretary of War Edwin Stanton. *See* 1863 War Dep’t, Gen. Orders No. 100, *supra* note 14, *reprinted in* RICHARD HARTIGAN, LIEBER’S CODE AND THE LAW OF WAR (Precedent 1983).

<sup>223</sup> For a detailed account of the drafting of the Code, *see* FREIDEL, *supra* note 209, at 332–34.

<sup>224</sup> *See generally* 1863 War Dep’t, Gen. Orders No. 100, *supra* note 14, *reprinted in* RICHARD HARTIGAN, LIEBER’S CODE AND THE LAW OF WAR (Precedent 1983).

and support for the Missouri commissions. First, the Code expressly provided for the suspension of civil and criminal courts, reading:

Martial law in a hostile country consists in the suspension by the occupying military authority of the criminal and civil law . . . and in the substitution of military rule and force for the same, as well as in the dictation of general laws, as far as military necessity requires this suspension, substitution, or dictation.<sup>225</sup>

This concept of martial law is very similar to Halleck's, as expressed in his treatise, which was the definition that provided the theoretical foundation for expanding the authority of military commissions in Missouri.<sup>226</sup> Halleck's General Order No. 1 is entirely consistent with this provision, as it similarly expanded military jurisdiction to all "military offenses" (meaning violations of the laws of war), even where loyal civil tribunals exist.<sup>227</sup>

Second, in Articles 12 and 13, the Code even more clearly expresses approval of the Missouri commissions.<sup>228</sup> Article 12 reads, "[w]henver feasible, martial law is carried out in cases of individual offenders by military courts."<sup>229</sup> While there were two types of military courts during the Civil War—courts-martial and military commissions, Article 13 went further to delineate the types of offenses which could be tried by these courts: "Military jurisdiction is of two kinds: First, that which is conferred and defined by statute; second, that which is derived from the common law of war."<sup>230</sup> Article 13 continues, "[m]ilitary offenses under the statute law must be tried in the manner therein directed; but military offenses which do not come within the statute must be tried and punished under the common law of war."<sup>231</sup> Lieber then applied this broader concept to the United States, writing, "[i]n the armies of the United States the first [statutory law] is exercised by courts-martial; while cases which do not come within the Rules and Articles of War, or the jurisdiction conferred by statute on courts-martial, are tried by military

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<sup>225</sup> *Id.* art. 3.

<sup>226</sup> *See supra* note 154.

<sup>227</sup> 1863 War Dep't, Gen. Orders No. 100, art 3, *supra* note 14, reprinted in RICHARD HARTIGAN, LIEBER'S CODE AND THE LAW OF WAR (Precedent 1983).

<sup>228</sup> *Id.* arts. 12 & 13.

<sup>229</sup> *Id.* art. 12.

<sup>230</sup> *Id.* art. 13.

<sup>231</sup> *Id.*

commissions [common law of war].”<sup>232</sup> Article 13 almost exactly repeated the distinction made between offenses triable by courts-martial and those triable by military commissions in Halleck’s General Order No. 1 description of violations of the “general code of war.”<sup>233</sup>

This provision of the Lieber Code served to expand military commission jurisdiction nationwide in the same manner that General Order No. 1 did in Missouri, providing an authoritative grant of subject matter and *in personam* jurisdiction to military commissions for the trial of those individuals who violate the laws of war.<sup>234</sup> The provisions in the Lieber Code on military commission jurisdiction seem to not only have built upon the precedent of Halleck’s orders in Missouri, but were actually shaped directly by Halleck himself. A draft of the Code, submitted to Halleck by Lieber for comments in February 1863, reveals Halleck’s influence.<sup>235</sup> The original provision in the draft written by Lieber, reads, “Whenever feasible, Martial Law is carried out, in cases of individual offences, by courts-martial.”<sup>236</sup> In this provision, Lieber made no distinction between courts-martial and other types of military courts, suggesting that Lieber was not aware of the inability of courts-martial to try many offenses due to the statutory limits on their jurisdiction.<sup>237</sup>

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<sup>232</sup> *Id.*

<sup>233</sup> These offenses were to be tried before military commissions, while violations of statutory code were to be tried before courts-martial. See 1 1862 Dep’t of Mo., Gen. Orders No. 1, *supra* note 95. Halleck wrote:

No case which, by the Rules and Articles of War, is triable by a court-martial will be tried by a military commission. Charges, therefore, preferred against prisoners before a military commission should be “Violation of the laws of war,” and never, “Violation of the Rules and Articles of War,” which are statutory provisions, defining and modifying the general laws of war in particular cases and in regard to particular persons and offenses. They do not apply to cases not embraced in the statute; but all cases so embraced must be tried by a court-martial. In other cases we must be governed by the general code of war.

*Id.*

<sup>234</sup> 1863 War Dep’t, Gen. Orders No. 100, art. 13, *supra* note 14, reprinted in RICHARD HARTIGAN, LIEBER’S CODE AND THE LAW OF WAR (Precedent 1983).

<sup>235</sup> Francis Lieber, Preliminary Draft of the Lieber Code 5 (Feb. 1863) (unpublished draft, on file with The Huntington Library, San Marino, Ca.).

<sup>236</sup> *Id.*

<sup>237</sup> *Id.* Article 13, which specifically divided military jurisdiction between courts-martial and military commission in the completed Code, did not exist in the draft. *Id.*

Halleck, in his comments to the draft, points out this problem, scratching out “courts-martial,” and replacing it with the more general term “military courts.”<sup>238</sup> Additionally, Halleck added a comment “courts-martial in our system is a court of limited jurisdiction. Military courts in general are here intended.”<sup>239</sup> Article 12, in the completed version, follows Halleck’s comment, and speaks in more general terms, reading, “martial law is carried out in cases of individual offenders by military courts.”<sup>240</sup> Additionally, in the completed Code, an additional article is added—Article 13—which repeats the substance of Halleck’s comment, describing the very limitation in court-martial jurisdiction pointed out by Halleck.<sup>241</sup> The Code, in its final form, noted the division between statutory and common law military offenses and, for the first time, granted nationwide subject matter and *in personam* jurisdiction to military commissions for the violations of the common law of war.<sup>242</sup>

In other sections, the Lieber Code discusses some common offenses that are violations of the common law of war. The Code retains the distinction between partisans and guerrillas from Lieber’s letter in August, reading in Article 82 that, “[m]en, or squads of men, who commit hostilities, whether by fighting, or inroads for destruction or plunder . . . without commission . . . if captured, are not entitled to the privileges of prisoners of war, but shall be treated summarily as highway robbers or pirates.”<sup>243</sup> In Article 84, the code also addresses irregular combatants, stating, “[a]rmed prowlers . . . who steal within the lines of the hostile army for the purpose of robbing, killing, or of destroying bridges, roads, or canals, or of robbing or destroying the mail, or of cutting the telegraph wires, are not entitled to the privileges of the prisoner of war.”<sup>244</sup> The code proceeded to discuss treatment of those who give information to the enemy, defining a “traitor” as “a person in a place or district under martial law who, unauthorized by the military commander, gives information of any kind to the enemy, or holds intercourse with him” in Article 90, and, then in Article 91, states that the punishment for war-traitors is severe, and that if it consists of “betraying to the enemy anything concerning the condition, safety, operations, or

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<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

<sup>240</sup> 1863 War Dep’t, Gen. Orders No. 100, art. 12, *supra* note 14, reprinted in RICHARD HARTIGAN, *LIEBER’S CODE AND THE LAW OF WAR* (Precedent 1983).

<sup>241</sup> *Id.* art. 13.

<sup>242</sup> *Id.*

<sup>243</sup> *Id.* art. 82.

<sup>244</sup> *Id.* art. 84.

plans of the troops holding or occupying the place or district, [the] punishment is death.”<sup>245</sup> The code also makes, in Article 88, spying a violation of the common law of war.<sup>246</sup>

The Lieber Code, when viewed as a whole, sets forth a broad basis for trial by military commission—expressing clear approval by the Department of War for the commissions then occurring in Missouri. Aside from adopting the same bases the Missouri commissions adopted for jurisdiction, the Code also expressly stated that many of the commonly occurring offenses, such as being a guerrilla or having intercourse of the enemy, were violations of the common law of war and triable by military commission.<sup>247</sup> By setting forth a much fuller description of the laws of war than had previously existed, the Lieber Code can be viewed as an important criminal directive, providing individual judge advocates guidance over the types of offenses that could be charged as violations of the laws of war.

Although the Code did not comprehensively overhaul the Articles of War by definitively setting forth the laws of war (which was one of the initial goals of the project), the completed Code was actually more useful in practice. The Code left many of the details of which offenses were triable by commission up to the individual department commanders, judge advocates, and the War Department, while still providing general guidance.<sup>248</sup> The broad definition of the common law of war in the Code allowed the commissions to become a tool that could be molded to the particular needs of each department, rather than being closely defined in a limiting sort of way.<sup>249</sup>

In 1864, Lieber wrote to Halleck describing earlier correspondence between him and General John Dix regarding the jurisdiction of military commissions.<sup>250</sup> Prompted by a recent decision in which a blockade

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<sup>245</sup> *Id.* arts. 90–91.

<sup>246</sup> *Id.* art. 88.

<sup>247</sup> *See, e.g.*, arts. 82, 84 (guerrilla warfare) & arts. 90–91 (intercourse with enemy).

<sup>248</sup> *See generally* 1863 War Dep’t, Gen. Orders No. 100, *supra* note 14, *reprinted in* RICHARD HARTIGAN, *LIEBER’S CODE AND THE LAW OF WAR* (Precedent 1983).

<sup>249</sup> Compare the commissions held in the Middle Department, focusing on intercourse with the enemy, see *infra* pp. 44–45, with those held in the Department of the Cumberland, where many of the defendants were guerrillas or other irregular combatants, see *infra* pp. 43–44. The broad definition of the law of war enabled this flexible tailoring to local conditions.

<sup>250</sup> *THE LIFE AND LETTERS OF FRANCIS LIEBER* 347–48 (Thomas Sargent Perry ed., Boston, James R. Osgood & Co. 1882).

runner was released due to lack of jurisdiction, General Dix, Commander of the Department of the East, wrote to Lieber, asking, “Can any military court or commission, in a department not under martial law, take cognizance of, and try a citizen for, any violation of the law of war, such citizen not being connected in any wise with the military service of the United States?”<sup>251</sup> Lieber’s response pointedly describes the type of jurisdiction that he envisioned his Code would grant military commissions. Lieber responded:

undoubtedly a citizen under these conditions can, or rather must, be tried by military courts, because there is no other way to try him and repress the crime which may endanger the whole country; it is very difficult to say how far martial law extends . . . it must never be forgotten that the *whole country* is always at war with the enemy.<sup>252</sup>

In 1864, Halleck described the jurisdiction of military commissions in even more expansive terms, writing, “Congress has not defined or limited their jurisdiction, which remains coextensive with the objects of their creation, that is, the trial of offenses under the common laws of war . . . there is nothing in the Constitution or laws, or in the nature of these tribunals to limit them to districts under martial law.”<sup>253</sup>

These quotes very aptly describe the directives issued to Union armies in the middle of 1863 in General Order No. 100: the Lieber Code allowed for the trial before military commission of almost any offense, except those under statutory court-martial jurisdiction (which were already triable by the military), committed almost anywhere in the United States. That military commissions became common all over the United States almost immediately afterwards should not come as a surprise.

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<sup>251</sup> *Id.*

<sup>252</sup> *Id.*

<sup>253</sup> Henry Wager Halleck, *Military Tribunals and Their Jurisdiction*, 5 AM. J. INT’L L. 958, 966 (1911) (letter found among Halleck’s papers detailing the expansive authority of military tribunals in wartime).

## C. The “National Explosion” &amp; the Role of the Lieber Code

The enormous grant of authority given by the War Department to individual department commanders in the Lieber Code almost immediately had a marked impact on the use of military commissions. In 1863 there were at least 200 defendants tried by military commission outside of Missouri.<sup>254</sup> However, this number does not tell the entire story—almost all of these commissions occurred from May 1863 onwards. For example, in the Department of the Cumberland (Eastern Tennessee),<sup>255</sup> in the first half of 1863, only a handful of commissions occurred (probably under ten defendants).<sup>256</sup> However, by the middle of the year, and particularly towards its close, the pace of trials had quickened (at least thirty-five defendants were tried).<sup>257</sup> In the Middle Department (Maryland and Delaware),<sup>258</sup> no military commissions occurred until near the end of the year, when, at the close of 1863, at least fifteen defendants were suddenly tried.<sup>259</sup> The change was also pronounced in the Department of Ohio, consisting of Ohio, Illinois, Michigan, Indiana, and parts of Kentucky.<sup>260</sup> Prior to April 1863, there

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<sup>254</sup> I found records of 186 non-Missouri commissions in 1863. While this number is smaller than the actual figure, it still provides a fairly complete picture of the commissions for the year. See 1863 War. Dep't, Gen. Orders, *supra* note 93; Headquarters, War Dep't, Gen. Court-Martial Orders 1864 [hereinafter 1864 War Dep't, Gen. Court-Martial Orders] (on file with N.Y. Hist. Soc'y); Headquarters, War Dep't, Gen. Court-Martial Orders 1865 [hereinafter 1865 War Dep't, Gen. Court-Martial Orders] (on file with N.Y. Hist. Soc'y); XVI Corps, Gen. Orders (1863); Headquarters, Middle Dep't, Gen. Orders (1863) [hereinafter 1863 Middle Dep't, Gen. Orders] (on file with Library of Cong., Wash., D.C.); Headquarters, Dep't of the Potomac, Gen. Orders (1863) (on file with N.Y. Hist. Soc'y); Headquarters, Dep't of the Cumberland, Gen. Orders (1863) [hereinafter 1863 Dep't of Cumberland, Gen. Orders] (on file with Library of Cong., Wash., D.C.); U.S. Forces, Gen. Orders (1863) (on file with Nat'l Archives, Wash., D.C.); Headquarters, Dep't of Va., Gen. Orders (1863) (on file with N.Y. Pub. Library); Headquarters, Dep't of Va. and N.C., Gen. Orders (1863) (on file with N.Y. Pub. Library); Headquarters, Dep't of the Gulf, Gen. Orders (1863) (on file with Library of Cong., Wash., D.C.); Headquarters, Dep't of the S., Gen. Orders (1863) (on file with Library of Cong., Wash., D.C.); Headquarters, Dep't of Ohio, Gen. Orders (1863) [hereinafter 1863 Dep't of Ohio, Gen. Orders] (on file with N.Y. Pub. Library); Headquarters, Dist. of S.C., Gen. Orders (1863) (on file with U.S. Military Acad., West Point, N.Y.); O.R. II, 5, 536; O.R. II, 6, 218.

<sup>255</sup> THIAN, *supra* note 51, at 56.

<sup>256</sup> 1863 Dep't of the Cumberland, Gen. Orders, *supra* note 254; 1863 War. Dep't, Gen. Orders, *supra* note 93; 1864 War Dep't, Gen. Court-Martial Orders, *supra* note 254.

<sup>257</sup> See sources cited *supra* note 256.

<sup>258</sup> THIAN, *supra* note 51, at 73.

<sup>259</sup> 1863 Middle Dep't, Gen. Orders, *supra* note 254; 1863 War. Dep't, Gen. Orders, *supra* note 93; 1864 U.S. War Dep't, Gen. Court-Martial Orders, *supra* note 254.

<sup>260</sup> THIAN, *supra* note 51, at 84.

were likely no military commissions in this department.<sup>261</sup> However, beginning approximately around the time of the promulgation of the Lieber Code, there were at least forty defendants tried by commission through the end of the year.<sup>262</sup>

Nationwide, from the beginning of the war to the end of April 1863—a period of almost two years—outside of Missouri there were likely fewer than 150 defendants tried by commission.<sup>263</sup> By contrast, in the last eight months of 1863, alone, there were at least 150 defendants tried by commission outside of Missouri.<sup>264</sup> This pattern, starting in the middle of 1863, is difficult to discern if the commissions occurring in Missouri are included in the totals, as the large number of commissions held in Missouri in 1863 masks the sudden growth in commissions elsewhere (in Missouri the commission steadily increased in volume until the end of 1864).<sup>265</sup>

The commissions outside of Missouri accelerated in pace towards the end of 1863, setting the stage for 1864—the year when, by far, the most military commissions were held.<sup>266</sup> In 1864, an astounding 750 defendants were tried by commission outside of Missouri.<sup>267</sup> Very

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<sup>261</sup> 1863 Dep't of Ohio, Gen. Orders, *supra* note 254; 1863 War. Dep't, Gen. Orders, *supra* note 93; 1864 War Dep't, Gen. Court-Martial Orders, *supra* note 254.

<sup>262</sup> See sources cited *supra* note 261.

<sup>263</sup> See 1861 Dep't of Potomac, Gen. Orders, *supra* note 52 and notes 142 (1862 non-Missouri commissions), 254 (1863 non-Missouri commissions).

<sup>264</sup> See *supra* note 254.

<sup>265</sup> Approximately 500 of commissions occurred during 1863 in the Department of the Missouri. See Headquarters, Dep't of Mo., Gen. Orders (1863) (on file with the Library of Cong., Wash., D.C.); Headquarters, Dist. of Neb., Gen. Orders (1863) (on file with N.Y. Hist. Soc'y); Headquarters, Dist. of Southwest Mo., Gen. Orders (1863) (on file with N.Y. Hist. Soc'y); Headquarters, Dist. of Cent. Mo., Gen. Orders (1863) (on file with N.Y. Hist. Soc'y); Headquarters, Dist. of St. Louis, Gen. Orders (1863) (on file with N.Y. Hist. Soc'y); 1863 War. Dep't, Gen. Orders, *supra* note 93; 1864 War Dep't, Gen. Court-Martial Orders, *supra* note 254; O.R. II, 6, 753. By 1863 the commissions in Missouri had truly become a machine—of the almost 500, defendants about 450 were convicted (a conviction rate of eight-five percent). Of the approximately 450 convictions, only twenty-seven were reversed at the departmental or War Department level (less than six percent). See 1863 War. Dep't, Gen. Orders, *supra* note 93; 1864 U.S. War Dep't, Gen. Court-Martial Orders, *supra* note 254.

<sup>266</sup> See *infra* note 267.

<sup>267</sup> Based on the likely number of commissions contained in the General Orders Volumes not located, there were likely somewhere between 750 and 1000 defendants tried in all departments, not including Missouri, during 1864. See 1864 War Dep't, Gen. Court-Martial Orders, *supra* note 254; 1865 War Dep't, Gen. Court-Martial Orders, *supra* note 254; Headquarters, Middle Dep't, Gen. Orders (1864) [hereinafter 1864 Middle Dep't,

clearly highlighting the change in national policy toward commissions that occurred over the second half of 1863 is the drastic shift in geographic distribution of the commissions. Whereas, up until the middle of 1863, the vast majority of commissions were held in Missouri, by the end of 1864, the majority of commissions were being held outside of Missouri.<sup>268</sup> However, it is not surprising that the Lieber Code had a disparate impact outside of the Department of Missouri. The provisions in the Lieber Code that granted subject matter jurisdiction to military commissions were actually almost identical the provisions that already had been in effect in Missouri for over a year (in the form of Halleck's General Orders No. 1).<sup>269</sup> It should also not be surprising that a broad grant of authority nationwide would have a profound effect on the number of military commissions in 1863 and 1864 when, in early 1862,

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Gen. Orders] (on file with Library of Cong., Wash., D.C.); Headquarters, Dep't of the Potomac, Gen. Court-Martial Orders (1864) (on file with N.Y. Hist. Soc'y); Headquarters, Dep't of Ark., Gen. Orders (1864) (on file with U.S. Military Acad., West Point, N.Y.); Headquarters, Dep't of the Cumberland, Gen. Orders (1864) [hereinafter 1864 Dep't of Cumberland, Gen. Orders] (on file with Library of Cong., Wash., D.C.); Headquarters, Dist. of St. Mary's, Gen. Orders (1864) (on file with Nat'l Archives, Wash., D.C.); Headquarters, Dep't of Pa., Gen. Orders (1864) [hereinafter 1864 Dep't of Pa., Gen. Orders] (on file with Nat'l Archives, Wash., D.C.); Headquarters, Dep't of Va. and N.C., Gen. Orders (1864) (on file with N.Y. Pub. Library); Headquarters, Dep't of the Gulf, Gen. Orders (1864) (on file with Library of Cong., Wash., D.C.); Headquarters, Dep't of Kan., Gen. Orders (1864) (on file with N.Y. Hist. Soc'y); Headquarters, Dep't of the Susquehanna, Gen. Orders (1864) [hereinafter 1864 Dep't of Susquehanna, Gen. Orders] (on file with Nat'l Archives, Wash., D.C.); Headquarters, Dep't of Ohio, Gen. Orders (1864) [hereinafter 1864 Dep't of Ohio, Gen. Orders] (on file with N.Y. Pub. Library); O.R. II, 7, 1214; O.R. II, 8, 502.

Additionally, there were approximately another approximately 652 of individuals tried in Missouri in 1864. To place this figure in context: by 1864 the commissions had reached the point where if spread evenly across the year, there were about two defendants tried by commission per day in the Department of Missouri alone. *See* Headquarters, Dep't of Mo., Gen. Orders (1864) [hereinafter 1864 Dep't of Mo., Gen. Orders] (on file with Library of Cong., Wash., D.C.); Headquarters, Dist. of St. Louis, Gen. Orders (1864) (on file with N.Y. Hist. Soc'y); Headquarters, Dist. of Cent. Mo., Gen. Orders (1864) (on file with N.Y. Hist. Soc'y); Headquarters, Dist. of Rolla, Gen. Orders (1864) (on file with N.Y. Hist. Soc'y); Headquarters, Dist. of Southwest Mo., Gen. Orders (1864) (on file with N.Y. Hist. Soc'y); Headquarters, Dist. of Neb., Gen. Orders (1864) (on file with N.Y. Hist. Soc'y); Headquarters, Dist. of N. Mo., Gen. Orders (1864) (on file with N.Y. Hist. Soc'y); 1864 War Dep't, Gen. Court-Martial Orders, *supra* note 254; 1865 War Dep't, Gen. Court-Martial Orders, *supra* note 254.

<sup>268</sup> Over fifty percent of the defendants tried in 1864 were tried outside of the Department of Missouri in 1864. *See supra* note 267. By comparison, in 1863, about seventy-five percent of those tried were tried in the Department of Missouri. *See supra* notes 254 (1863 non-Missouri commissions) & 265 (1863 Missouri commissions).

<sup>269</sup> *See supra* p. 37.

almost identical provisions had already had an enormous and sudden impact in Missouri.<sup>270</sup>

The types of offenses tried before commissions that appear throughout the country in 1863 and 1864 are very diverse, a testament to broad subject matter jurisdiction granted by the Lieber Code.<sup>271</sup> For example, the commissions held in the western departments were similar to those already occurring in Missouri. Most of the defendants in these commissions had been implicated in irregular warfare. In these western departments, guerrillas were a constant problem. For example, during General William Sherman's Atlanta campaign in the summer of 1864, the number of men assigned to protecting the supply line to Chattanooga from guerrillas nearly equaled the number of men actively serving on the front.<sup>272</sup> Of the approximately 150 individuals tried in the Cumberland in 1864, only about fifty were tried for offenses not related to the guerrilla war.<sup>273</sup> The Department of Ohio, at this point made up only of parts of Eastern Tennessee and Kentucky, also had a similar distribution of trials.<sup>274</sup> Most of the remainder of the individuals tried in these western departments in 1864 were charged with a variety of fraud-based offenses against the U.S. Government.<sup>275</sup>

Standing in contrast to the commissions in Tennessee and Kentucky, where the majority of the defendants were captured in open rebellion,<sup>276</sup> are those of the Middle Department and Washington, D.C.<sup>277</sup> In these

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<sup>270</sup> See *supra* Part II.C.

<sup>271</sup> See *supra* pp. 39–40.

<sup>272</sup> JAMES MCPHERSON, *BATTLE CRY OF FREEDOM* 719 (Oxford University Press 1988).

<sup>273</sup> 1864 Dep't of Cumberland, Gen. Orders, *supra* note 267; 1864 U.S. War Dep't, Gen. Court-Martial Orders, *supra* note 254; 1865 U.S. War Dep't, Gen. Court-Martial Orders, *supra* note 254. About ten percent of the total defendants tried by commission in 1864 were from the Cumberland. Overall, the total conviction rate in the Cumberland commissions was approximately seventy percent. 1864 Dep't of Cumberland, Gen. Orders, *supra* note 267.

<sup>274</sup> 1864 Dep't of Ohio, Gen. Orders, *supra* note 267 (fourteen out of fifteen trials were for guerrilla related offenses).

<sup>275</sup> See 1864 Dep't of the Cumberland, Gen. Orders, *supra* note 267. Some examples are prosecutions for embezzlement and fraud (Gen. Orders No. 42), selling U.S. property (Gen. Orders No. 13) (Case NN-3275).

<sup>276</sup> See *supra* pp. 43–44.

<sup>277</sup> See 1864 War Dep't, Gen. Court-Martial Orders, *supra* note 254 (for D.C. commissions in 1864); 1865 War Dep't, Gen. Court-Martial Orders, *supra* note 254 (same). In 1864, there were at least 150 defendants tried by commission in Washington D.C. There are only records for four trials in Washington, D.C., prior to 1864 (and all of these were held in December, 1863). See Headquarters, War Dep't, Gen. Court-Martial

areas, where guerrillas were less common, the commissions focused mainly on fraud and non-violent forms of disloyalty, such as communications with the enemy or sedition.<sup>278</sup> Additionally, a large number of individuals were tried after being caught aiding in the desertion of U.S. Soldiers.<sup>279</sup> As most Union Soldiers attempting to return home from Virginia had to travel through the railroad hubs of Washington and Baltimore, a small industry cropped up around this constant northward flow of deserters.<sup>280</sup>

Additionally, the military commissions occurring in 1864 were not limited to areas around and near the warring armies. In fact, there were a surprising number of commissions held deep inside the Northern States. Many of the defendants in these trials were actually southerners captured or tried while imprisoned in the north. For example, N.C. Trowbridge was tried in Boston Harbor in June 1864, after he was captured traveling from Mississippi to New York without authority.<sup>281</sup> Overall, the number of commissions in the North was rather small—likely somewhere between three percent and six percent of commissions in 1864.<sup>282</sup> Although a minority of commissions, the presence of a not insignificant number of trials in the Northern States supports Francis Lieber’s statement about nationwide military jurisdiction when he wrote that “it is very difficult to say how far martial law extends . . . it must never be forgotten that the *whole country* is always at war with the enemy.”<sup>283</sup> For

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Orders No. 5 (1864) (on file with N.Y. Hist. Soc’y); Headquarters, War Dep’t, Gen. Court-Martial Orders No. 7 (1864) (on file with N.Y. Hist. Soc’y).

For Middle Department commissions in 1864, see 1864 Middle Dep’t, Gen. Orders, *supra* note 267; 1864 War Dep’t, Gen. Court-Martial Orders, *supra* note 254; 1865 War Dep’t, Gen. Court-Martial Orders, *supra* note 254.

<sup>278</sup> See sources cited *supra* note 277.

<sup>279</sup> See, e.g., Case NN-3154; Case NN-3156; Headquarters, Middle Dep’t, Gen. Orders No. 129 (1864) (on file with Library of Cong., Wash., D.C.); Case NN-2846; Headquarters, War Dep’t, Gen. Court-Martial Orders No. 362 (1864) (on file with N.Y. Hist. Soc’y).

<sup>280</sup> Overall, of the approximately ninety-nine individuals tried in total in the Middle Department in 1864, twenty-nine were acquitted, creating a conviction rate of just over 70% for the year. See 1864 Middle Dep’t, Gen. Orders, *supra* note 267; 1864 War Dep’t, Gen. Court-Martial Orders, *supra* note 254; 1865 War Dep’t, Gen. Court-Martial Orders, *supra* note 254.

<sup>281</sup> Headquarters, War Dep’t, Gen. Court-Martial Orders No. 269 (1864) (on file with N.Y. Hist. Soc’y). Boston was home to a number of trials, all located at Fort Warren, in Boston Harbor. See NEELY, *supra* note 18, at 173.

<sup>282</sup> See NEELY, *supra* note 18, at 173 (finding that five percent of the commissions were held north of the border states and the District of Columbia).

<sup>283</sup> See *supra* note 252 and accompanying text.

example, in the Department of Pennsylvania, commissions were used primarily to counter several outbreaks of draft resistance among Irish coalworkers and suspected Copperheads.<sup>284</sup> Approximately sixty individuals were tried in Pennsylvania during 1864.<sup>285</sup> Although the offenses tried in the Northern States did not seriously threaten the Union war effort, the flexible jurisdiction of the commissions, particularly considering the expansive scope of martial law and military jurisdiction under the Lieber Code, made these commissions a useful tool for rooting out disloyal individuals and countering threats deep within the Union.

Although there is strong evidence that the Lieber Code deeply impacted the military justice system during the Civil War, providing the legal authority for the trial of thousands of individuals throughout the entire country, the generally accepted view among recent historians is that the Lieber Code had little or no effect on conduct during the Civil War.<sup>286</sup> The Lieber Code has been viewed since the war as an important milestone in international humanitarian law,<sup>287</sup> but it is also accepted that, during the Civil War, the combatants paid little attention to it. Historian Harry Stout writes, “Union generals showed scant interest in the code and soldiers none. Confederates probably studied it more closely for its vagueness in preventing ‘retaliation’ or revenge on enemies and its wide-open definition of ‘military necessity’ that, if necessary enough, could justify just about anything.”<sup>288</sup>

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<sup>284</sup> See 1864 Dep’t of the Susquehanna, Gen. Orders, *supra* note 267; 1864 Dep’t of Pa., Gen. Orders, *supra* note 267. The term “copperhead” was applied to northerners who secretly favored the Confederacy.

<sup>285</sup> See Case NN-3348; Case NN-1478; Case NN-1400. One of the outbreaks of resistance occurred in the coal mining regions of eastern Pennsylvania, and involved a group called the “Buckshots,” which, interestingly, was predecessor to the Molly Maguires (a clandestine Irish organization that would become famous in the late 1870s due to a series of sensational trials related to coalfield crimes). See generally KEVIN KENNY, MAKING SENSE OF THE MOLLY MAGUIRES (1998). The Buckshots, comprised almost entirely of Irish-Catholic coal miners, organized to resist the draft, harbor deserters, and commit a variety of other disloyal acts. Case NN-1400; Headquarters, Dep’t of the Susquehanna, Gen. Orders No. 23 (1864) (on file with Nat’l Archives, Wash., D.C.); Headquarters, Dep’t of the Susquehanna, Gen. Orders No. 24 (1864) (on file with Nat’l Archives, Wash., D.C.). This particular series of commissions tried twenty-one defendants in Reading—twelve were found guilty and eventually sentenced to hard labor for the duration of the war. *Id.* Most defendants were acquitted as they could only be connected to the meetings in an extenuated manner. *Id.*

<sup>286</sup> See, e.g., HARRY S. STOUT, UPON THE ALTAR OF THE NATION 193 (Viking 2006); GRIMSLEY, *supra* note 177, at 149–51.

<sup>287</sup> See, e.g., HOGUE, *supra* note 19, at 58–59; Childress, *supra* note 25, at 70; Paust, *supra* note 25, at 114; GRIMSLEY, *supra* note 177, at 149.

<sup>288</sup> STOUT, *supra* note 286.

Professor Stout is undoubtedly correct that when Sherman shelled Atlanta in 1864, or when Sherman's armies systematically pillaged South Carolina in 1865, neither he nor his men were referring to a pocket edition of the Lieber Code.<sup>289</sup> Professor Mark Grimsley writes, "[O]ften touted as a humanitarian milestone, Lieber's code was thoroughly dedicated to providing the ethical justification for a war aimed at the destruction of the Confederacy . . . . The range of permissible activities was . . . made, in large degree, a matter of the motivations of Union commanders."<sup>290</sup> The generally held view on the Code is that during the Civil War the combatants most likely paid little attention to it as there is very little evidence that it was ever used in the field, and, even if the combatants were using it, it had little effect as the Code's flexible notions of necessity and retaliation allowed for almost any conduct to arguably fit within the its confines.<sup>291</sup>

However, the impact of the Lieber Code on the system of military commissions seems to have been enormous,<sup>292</sup> a finding that seemingly contrasts starkly with commonly held views on the Code. A possible explanation for these disparate findings is one of focus. Previous historians have not noticed the profound effect on the military justice system because they directed their attention almost exclusively on the impact of the Lieber Code as a code of conduct (which it was intended to be).<sup>293</sup> In doing so, they failed to consider the impact of the Lieber Code as a legal code (which it was also intended to be).<sup>294</sup> In the field, a code of conduct is an *ex ante* measure used to prevent and shape future conduct. In this respect, as recent historians have clearly and accurately

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<sup>289</sup> *Id.* at 368, 420; HOGUE, *supra* note 19, at 57.

<sup>290</sup> GRIMSLEY, *supra* note 177, at 149–51.

<sup>291</sup> *See, e.g.*, FREIDEL, *supra* note 209, at 336–37; *see supra* note 286.

<sup>292</sup> *See supra* pp. 41–46.

<sup>293</sup> Most prominently, Professors Grimsley and Stout analyze the impact of the Code as a restraining force (or more accurately, lack thereof) on the conduct of the armies in the field. *See supra* note 286. For example, Professor Stout describes the code as a "liberal code of military conduct." STOUT, *supra* note 286, at 193.

<sup>294</sup> Professor Stout suggests the Code had little legal impact, writing, "The code protected American officers and soldiers from virtually any reprisal. While a few soldiers were tried and executed for rape during the war, there would be no trials for destruction of civilian property or lives." *See* STOUT *supra* note 286, at 193. However, this view of the Code entirely ignores the thousands of trials held under its authority throughout the country beginning in the middle of 1863, and instead focuses on those cases that punished Union soldiers whose conduct violated its provisions. Professor Grimsley describes the code as having "legal purposes," but when using the term he focuses on the specific provisions that prohibited or authorized particular conduct in the field. *See* GRIMSLEY, *supra* note 177, at 149–50.

recorded, the Lieber Code had almost no effect on individual conduct in the field.<sup>295</sup> Here, the Lieber Code was “hazy at best,” and did indeed leave the “discernment of its exact location . . . to the commander on the scene.”<sup>296</sup> Rather than defining permissible conduct in a manner that could easily be applied, it was instead a flexible document that allowed almost any conduct to be justified under the rubric of military necessity and retaliation.<sup>297</sup>

A legal code is, however, an entirely different creature. As a legal code, the Lieber Code was incredibly effective because it granted enormous power to military courts by setting forth a broad and flexible foundation for military jurisdiction.<sup>298</sup> This jurisdictional foundation stemmed, at least indirectly, from the theories of military law held by Henry Halleck, which allowed civilian criminal law to be subsumed into the military justice system in all areas where martial law had been declared.<sup>299</sup> The Lieber Code repeated this grant of jurisdiction and was the first nationwide authoritative jurisdictional basis—both *in personam* and subject matter—for military commissions.<sup>300</sup> This was an expansive grant of power that was essentially a *carte blanche* for the military justice system.

The Supreme Court upheld this grant of authority in *Ex parte Vallandigham*.<sup>301</sup> Clement Vallandigham was convicted by commission in Ohio, in May 1863, for giving an inflammatory and disloyal speech.<sup>302</sup> He was initially sentenced to imprisonment for the remainder of the war, but this sentence was commuted to banishment—a punishment he challenged in federal court.<sup>303</sup> The Supreme Court held that it did not have the jurisdiction to review a decision of a military commission, writing that “the authority to be exercised by a military commission is

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<sup>295</sup> See, e.g., *supra* note 286.

<sup>296</sup> GRIMSLEY, *supra* note 177, at 151.

<sup>297</sup> STOUT, *supra* note 286, at 192. See Headquarters, War Dep’t, Gen. Orders No. 100, *supra* note 14, arts. 16, 27 (1863), reprinted in RICHARD HARTIGAN, LIEBER’S CODE AND THE LAW OF WAR (Precedent 1983).

<sup>298</sup> See *supra* Part III.B.

<sup>299</sup> See *supra* note 154 and accompanying text.

<sup>300</sup> See *supra* Part III.B.

<sup>301</sup> 68 U.S. 243 (1864).

<sup>302</sup> Fisher, *supra* note 2, at 56–58.

<sup>303</sup> Headquarters, Dep’t of Ohio, Gen. Orders No. 68 (1863) (on file with N.Y. Pub. Library); Belknap, *see supra* note 2, at 456–57.

[not] judicial.”<sup>304</sup> Additionally, the Court quoted approvingly from the 13th Article of the Lieber Code, which described the difference between court-martial and military commission jurisdiction.<sup>305</sup> With the Supreme Court essentially deferring to the Lieber Code’s interpretation of the authority of military commissions, almost any offense, committed almost anywhere in the country, which could not be tried before a court-martial, could now be tried before a military commission.<sup>306</sup>

Additionally, as a criminal code, the Lieber Code very conveniently defines and describes those offenses that violate the laws of war (which were now firmly within the jurisdiction of military commissions nationwide).<sup>307</sup> The Code sets forth a much needed description of the laws of war, providing a framework within which individual judge advocates could operate.<sup>308</sup> Indeed, there is evidence that within the Judge Advocate General’s Office the Lieber Code was already being used in 1863 to define the contours of offenses and sentences. For example, on 20 November 1863, when reviewing the conviction and sentence of Francis Armstrong, a Confederate soldier charged with being a “military insurgent” after he was captured recruiting inside Union lines, Judge Advocate General Joseph Holt referred to the Code when upholding the conviction and sentence:

The offenses committed by the accused are such as have been frequently committed by perfidious men in the border states, and such as have in many cases been adjudged by Military Commissions as fully meriting the enforcement of the death penalty . . . . Professor Lieber

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<sup>304</sup> *Ex parte Vallandigham*, 68 U.S. (1 Wall.) 243, 253 (1864). The Supreme Court wrote, “Nor can it be said that the authority to be exercised by a military commission is judicial in that sense. It involves discretion to examine, to decide and sentence, but there is no original jurisdiction in the Supreme Court to issue a writ of habeas corpus ad subjiciendum to review or reverse its proceedings, or the writ of certiorari to revise the proceedings of a military commission.” *Id.*

<sup>305</sup> *See id.* A great deal of literature has already been published on *Vallandigham*. *See, e.g.*, GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME* (2004); Michael Kent Curtis, *Lincoln, Vallandigham, and Anti-War Speech in the Civil War*, 7 WM. & MARY BILL RTS. J. 105 (1998); Belknap, *supra* note 2, at 455. As *Vallandigham* is only related to this article in the sense that in it the judiciary ceded authority to the military, it is unnecessary to delve into the details of this already thoroughly analyzed decision (which was relatively atypical for a military commission).

<sup>306</sup> *See supra* pp. 38–40.

<sup>307</sup> *See* 1863 War Dep’t, Gen. Orders No. 100, *supra* note 14, *reprinted in* RICHARD HARTIGAN, *LIEBER’S CODE AND THE LAW OF WAR* (Precedent 1983).

<sup>308</sup> *Id.*

in his code . . . expressly lays it down, that such offenders, if captured are not entitled to the privilege of prisoners of war, but may be dealt with according to the circumstances of the case.<sup>309</sup>

Although Major General Holt was the most senior figure in the military justice system, it is quite likely that the judge advocates who prosecuted all of the military commissions in the field were also using the Lieber Code as a guide, since their superiors were using it as a reference during the appellate process.<sup>310</sup>

In fact, there is evidence that defendants were actually charged in some military departments for violations of actual provisions of the Lieber Code. In the Middle Department, where the commissions often targeted the flow of information between the citizens of Maryland and the Confederate armies campaigning just miles away in northern Virginia, of the approximately ninety-nine individuals tried in the Middle Department in 1864, over half of those were tried for offenses related to communication with the enemy.<sup>311</sup> It is in this Department that the Lieber Code's facilitation of commissions in the second half of the war is most clear: Of the fifty-five individuals charged with an offense related to communication with the enemy, forty-nine were actually charged with violating the applicable provision of the Lieber Code (the 86th Article).<sup>312</sup> In these trials, the commissions explicitly stated that their authority to try this particular offense derived directly from the Lieber Code, as the offense was one that was recognized in the Code as a violation of the laws of war.<sup>313</sup>

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<sup>309</sup> Case MM-0617; Headquarters, War Dep't, Gen. Court-Martial Orders No. 23 (1864) (on file with N.Y. Hist. Soc'y); *see also* NEELY, *supra* note 18, at 171. O.R. II, 6, 1031.

<sup>310</sup> *See supra* note 309.

<sup>311</sup> *See* 1864 Middle Dep't, Gen. Orders, *supra* note 267; 1864 War Dep't, Gen. Court-Martial Orders, *supra* note 254; 1865 War Dep't, Gen. Court-Martial Orders, *supra* note 254.

<sup>312</sup> *See supra* note 311. The charges generally read, "Intercourse with the enemy in violation of the 86th article of General Orders No. 100."

<sup>313</sup> The 86th Article of the Lieber Code was potentially an incredibly powerful tool—under its provisions "All intercourse between the territories occupied by belligerent armies, whether by traffic, by letter, by travel, or in any other way, ceases" and "[c]ontraventions . . . are highly punishable." *See* 1863 War Dep't, Gen. Orders No. 100, *supra* note 14, reprinted in RICHARD HARTIGAN, *LIEBER'S CODE AND THE LAW OF WAR* (Precedent 1983). In reality, this provision could never have been enforced to its fullest; however, it was a convenient charge for the prosecution of individuals whose contact with the Confederacy potentially threatened the war effort. In a number of the cases this charge was paired with a charge of spying or recruiting for the Confederacy. If a spying

By expanding the military commission to include violations of the laws of war, the Lieber Code laid a fundamental foundation for the modern day military commission. The innovations of Henry Halleck and Francis Lieber in 1862 and 1863 transformed the military commission, previously only a venue for trying crimes committed in occupied territory where courts-martial did not have jurisdiction, into one that had specific jurisdiction to try violations of the laws of war.<sup>314</sup> In the modern era, it is unquestioned that military commissions have subject matter and *in personam* jurisdiction to try violations of the laws of war,<sup>315</sup> and most of the commissions used following the Civil War, most notably many of those used during World War II and currently at Guantanamo Bay, are direct descendents of the Civil War commissions.<sup>316</sup>

Although the modern commissions are quite different from those of the Civil War, most of these modern commissions would not be jurisdictionally possible if the Councils of War had not been merged into Scott's military commission in Halleck's General Orders No. 1 and in the Lieber Code. For example, the Military Commissions Act of 2006, defined the subject matter jurisdiction of the commissions as "any offense made punishable by this chapter or the law of war when committed by an alien unlawful enemy combatant before, on, or after September 11, 2001."<sup>317</sup> Likewise, the Military Commissions Act of

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or recruiting charge could not be proven, often the more simple charge of communication with the enemy could be proven. *See, e.g.*, Headquarters, Middle Dep't, Gen. Orders No. 3 (1864) (on file with Library of Cong., Wash., D.C.); Headquarters, Middle Dep't, Gen. Orders No. 26 (1864) (on file with Library of Cong., Wash., D.C.); Headquarters, Middle Dep't, Gen. Orders No. 28 (1864) (on file with Library of Cong., Wash., D.C.); Headquarters, Middle Dep't, Gen. Orders No. 43 (1864) (on file with Library of Cong., Wash., D.C.); Headquarters, Middle Dep't, Gen. Orders No. 61 (1864) (on file with Library of Cong., Wash., D.C.); Headquarters, War Dep't, Gen. Court-Martial Orders No. 152 (1864) (on file with N.Y. Hist. Soc'y); Headquarters, War Dep't, Gen. Court-Martial Orders No. 248 (1864) (on file with N.Y. Hist. Soc'y).

<sup>314</sup> *See supra* pp. 27–28, 38–40.

<sup>315</sup> *See* Glazier, *Neglected History of the Military Commission*, *supra* note 2, at 80 ("The use of military commissions to try violations of the laws of war that Congress has not statutorily 'defined and punished' seems well established.")

<sup>316</sup> *See infra* pp. 51–54.

<sup>317</sup> 10 U.S.C.S § 948d (Lexis 2010) (amended by the Military Commissions Act of 2009). The Uniform Code of Military Justice also recognizes that a major role of the modern military commission is the trying violations of the laws of war, reading,

The provisions of this chapter [10 U.S.C.S. §§ 801 et seq.] conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of

2009, the current regime governing military commissions, defines commission subject matter jurisdiction in similar terms. Commissions currently have jurisdiction to try offenses “made punishable by this chapter [10 USCS § 948a et seq.], sections 904 and 906 of this title [10 USCS § 904 and 906] (articles 104 and 106 of the Uniform Code of Military Justice), or the law of war,”<sup>318</sup> when committed by an alien unprivileged enemy belligerent. Although separated from the Lieber Code by nearly 150 years and multiple Supreme Court decisions in the area, the connection between the Military Commissions Acts of 2006 and 2009 and the Lieber Code (which authorized trials for violations of the “common law of war”), or Halleck’s General Orders No. 1 (which authorized trials for violations of the “general code of war”), is inescapably clear.

In *Hamdan v. Rumsfeld*, the Supreme Court delved into the history of the military commission to determine the constitutionality of the military commissions held at Guantanamo Bay during the first half of this decade.<sup>319</sup> Justice John Paul Stevens, writing for the Court, noted that, during the Civil War, General Winfield Scott’s military commissions (designed to try “ordinary crimes committed in occupied territory”) and Councils of War (designed to try “offenses against the law of war”) were merged into a unified commission.<sup>320</sup> Later in his opinion, Justice

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war may be tried by military commissions, provost courts, or other military tribunals.

10 U.S.C. § 821 (2006).

<sup>318</sup> 10 U.S.C.S. § 948d (Military Commissions Act of 2009). Additionally, many of the offenses specifically codified in the Military Commissions Act of 2009 were either already violations of the laws of war already (such as “spying,” “rape,” “pillaging,” or “wrongfully aiding the enemy”), or are offenses that define their contours with reference to the laws of war (for example, “murder in violation of the law of war,” or “destruction of property in violation of the law of war”). *See id.* § 950t.

<sup>319</sup> 548 U.S. 557, 590 (2006).

<sup>320</sup> *Id.* (internal citations omitted).

The military commission, a tribunal neither mentioned in the Constitution nor created by statute, was born of military necessity . . . the commission “as such” was inaugurated in 1847 . . . As commander of occupied Mexican territory, and having available to him no other tribunal, General Winfield Scott that year ordered the establishment of both ‘military commissions’ to try ordinary crimes committed in the occupied territory and a “council of war” to try offenses against the law of war . . . When the exigencies of war next gave rise to a need for use of military commissions, during the Civil War, the dual system favored by General Scott was not adopted. Instead, a single tribunal often took jurisdiction over ordinary crimes,

Stevens, writing at this point for himself, stated that, thanks to this merger of jurisdiction, modern military commissions may try “[v]iolations of the laws and usages of war cognizable by military tribunals only,” and “[b]reaches of military orders or regulations for which offenders are not legally triable by court-martial under the Articles of [W]ar.”<sup>321</sup> Justice Stevens, however, does not mention the important role of the Lieber Code in his analysis of this transformation, instead suggesting that the change was more organic and less centralized.<sup>322</sup>

Although recent scholars have also noted that this transformation in jurisdiction during the Civil War was an important development that provided for the trial of violations of the laws of war before commissions, they too provide little explanation for why or how this important development occurred.<sup>323</sup> As discussed above, the two prongs of this subject matter jurisdiction were set forth together for the first time in Halleck’s General Order No. 1 in 1862, and were expanded nationwide in the Lieber Code in 1863.<sup>324</sup> Largely overlooked by the legal historians and constitutional law scholars who have analyzed the history of the military commissions over the past few years, the Lieber

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war crimes, and breaches of military orders alike. As further discussed below, each aspect of that seemingly broad jurisdiction was in fact supported by a separate military exigency.

*Id.*

<sup>321</sup> *Id.* at 597 (quoting W. WINTHROP, *MILITARY LAW AND PRECEDENTS* 839 (2d rev. ed. 1920)).

<sup>322</sup> *Id.*

<sup>323</sup> Legal historians, most notably William Winthrop and David Glazier, have noted the merger of Scott’s Councils of War and Scott’s military commissions during the Civil War, but have spent little time explaining the development of this process. See, e.g., Glazier, *Kangaroo Court or Competent Tribunal?*, *supra* note 2, at 2033 (noting merger); 2 WINTHROP, *supra* note 16, at 60–61 (mentioning the merger and the role of Halleck’s General Orders No. 1); Myers, *supra* note 35, at 237 (briefly noting the influence of Councils of War during the Civil War); Glazier, *Neglected History of the Military Commission*, *supra* note 2, at 39–43 (briefly noting the role of the Lieber Code and Halleck’s General Orders No. 1 in the development of the laws of war and the merger of military commission jurisdiction); David Glazier, *Turmoil Over the Guantanamo Commissions*, 12 LEWIS & CLARK L. REV. 131, 136–37 (2008) (noting the merger of the jurisdiction during the Civil War); George Gordon Battle, *Military Tribunals*, 29 VA. L. REV. 255, 263–64 (1943) (same); Bickers, *supra* note 2, at 908–09 (same); Alissa J Kness, Note, *The Military Commissions Act of 2006: An Unconstitutional Response to Hamdan v. Rumsfeld*, 52 S.D. L. REV. 382, 391–92 (2007) (same); Thravalos, *supra* note 2, at 745 (same); Major Michael O. Lacey, *Military Commissions: A Historical Survey*, ARMY LAW., Mar. 2002, at 41, 43 (same).

<sup>324</sup> See *supra* Parts III.A, III.B.

Code revolutionized the American military commission in 1863.<sup>325</sup> In this regard, the Lieber Code is directly connected to the modern commissions on a deeply fundamental level, as it definitively established for the first time that military commissions have subject matter and *in personam* jurisdiction to try violations of the laws of war. For better or worse, if it was not for Henry Halleck and Francis Lieber, the military commissions used in World War II and over the past decade at Guantanamo Bay would not have been possible, or even imaginable.

#### IV. The Creation of a Commissions Framework and The Transition to Reconstruction

##### A. Military Commissions in the War Department: The Review Process and the Creation of the Judge Advocate General's Office

The second important element that greatly shaped the expansion of the commissions during the Civil War—the first being the jurisdictional expansion under the Lieber Code—was the growth of the Judge Advocate General's Office, and later, the Bureau of Military Justice.<sup>326</sup> The increased centralization of the military justice system was one of the primary reasons that the Lieber Code had such a profound and immediate impact on the commissions in 1863.<sup>327</sup>

From the earliest commissions in 1861, the general procedural rules used in courts-martial were replicated in the commissions.<sup>328</sup> Additionally, the basic procedure for reviewing courts-martial also was followed by commissions.<sup>329</sup> By comparison, if a parallel method of review were to be followed today, military commissions could potentially be reviewed by the U.S. Court of Appeals for the Armed Forces and, possibly, by the U.S. Supreme Court on certiorari.<sup>330</sup>

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<sup>325</sup> See *supra* Part III.B.

<sup>326</sup> See *infra* pp. 57–58, 62–63.

<sup>327</sup> See *supra* Part III.C.

<sup>328</sup> 2 WINTHROP, *supra* note 16, at 63–65; Glazier, *Kangaroo Court or Competent Tribunal?*, *supra* note 2, at 2037–38; BENET, *supra* note 42, at 12 (describing the manner by which the commissions in the Mexican-American War followed court-martial procedure).

<sup>329</sup> Glazier, *Kangaroo Court or Competent Tribunal?*, *supra* note 2, at 2037–38.

<sup>330</sup> See 10 U.S.C. §§ 867–867a (2006). By contrast, military commissions held under the authority of the Military Commissions Act of 2009 will follow a review procedure separate from courts-martial. Military commissions will be reviewed in most cases, first, by a special Court of Military Commission Review, second, by the U.S. Court of Appeals

The basic system for the review of courts-martial at the beginning of the Civil War was defined by the Articles of War.<sup>331</sup> Without delving into unnecessary details, after a prisoner was convicted and sentenced, according to the 65th Article of War:

No sentence of a court-martial shall be carried into execution until after the whole proceedings shall have been laid before the officer ordering the same, or the officer commanding the troops for the time being; neither shall any sentence of a general court martial, in the time of peace, extending to the loss of life, or the dismissal of a commissioned officer, or which shall, either in time of peace or war, respect a general officer, be carried into execution, until after the whole proceedings shall have been transmitted to the Secretary of War, to be laid before the President of the United States for his confirmation or disapproval, and orders in the case.<sup>332</sup>

Article 65 lays out two important rules: first, no sentence may be carried into execution until the entire record is reviewed by the commanding or reviewing officer, and second, no death sentences in time of peace may be carried into effect until the record has been transmitted to the Secretary of the War and approved by the President.<sup>333</sup> In the Civil War, court-martial (and military commission) files were ultimately reviewed by the district or department commander who authorized the court-martial and their order was promulgated in the general orders for that department or district.<sup>334</sup> Aside from those sentences requiring Presidential approval, the proceedings of a court-martial did not need to be reviewed by any authority beyond the commanding officer before the sentence was executed.<sup>335</sup> The proceedings of the court-martial were then forwarded to the Department of War, where the record was filed and

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for the District of Columbia Circuit, and finally, by the U.S. Supreme Court on writ of certiorari. *See id.* § 950c–g (Military Commissions Act of 2009).

<sup>331</sup> 2 Stat. 367 (1806) (art. 65).

<sup>332</sup> *Id.*

<sup>333</sup> *Id.*; *see* WILLIAM C. DE HART, OBSERVATIONS ON MILITARY LAW, AND THE CONSTITUTION AND PRACTICE OF COURTS MARTIAL 203 (New York, D. Appleton & Co. 1861). *See also* 1 WINTHROP, *supra* note 16, at 651. Here, Winthrop incorrectly reads this provision as requiring that death sentences be approved by the President only during time of war. *Id.*

<sup>334</sup> 2 Stat. 367 (1806) (art. 65); DE HART, *supra* note 333, at 203–04; Appendix B.

<sup>335</sup> *See* DE HART, *supra* note 333, at 226.

saved.<sup>336</sup> Even for those sentences that did not require presidential approval, the President could still step in and mitigate the sentence (as could happen if, say, a mother or local official wrote to the President requesting leniency).<sup>337</sup>

During the first two years of the Civil War, only a small number of military commissions were reviewed in Washington.<sup>338</sup> In 1861, no commissions were reviewed.<sup>339</sup> In 1862, only three commissions were reviewed, all of which were death sentences reviewed personally by President Lincoln.<sup>340</sup> However, none of those sentences were reviewed by Lincoln until Congress altered the operation of the 65th Article of War to require presidential review of all death sentences during both war and peacetime.<sup>341</sup> It was not until the second half of 1862 that any sort of regular system was put in place for centralized review of commissions.<sup>342</sup>

Despite the review of only a few commissions by the War Department, by the middle of 1862 hundreds of military commissions—and even more courts-martial—were starting to be held in the field,<sup>343</sup> and the organizational structure to process and try this many cases was

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<sup>336</sup> *Id.* at 227.

<sup>337</sup> *Id.* at 222.

<sup>338</sup> See Headquarters, War Dep't, Gen. Orders (1861) [hereinafter 1861 Dep't of War, Gen. Orders] (on file with N.Y. Hist. Soc'y); 1862 War Dep't, Gen. Orders, *supra* note 93.

<sup>339</sup> See 1861 War Dep't, Gen. Orders, *supra* note 338.

<sup>340</sup> See Headquarters, War Dep't, Gen. Orders No. 170 (1862) (on file with Library of Cong., Wash., D.C.); Headquarters, War Dep't, Gen. Orders, Gen. Orders No. 174 (1862) (on file with Library of Cong., Wash., D.C.); Headquarters, War Dep't, Gen. Orders No. 206 (1862) (on file with Library of Cong., Wash., D.C.).

<sup>341</sup> See *infra* pp. 59–60.

<sup>342</sup> Because President Lincoln was not required to review death sentences until the middle of 1862, there were death sentences upheld at the department level in 1862 that never appear in the War Department General Orders and that bear no evidence that they were ever reviewed by President Lincoln due to the operation of the 65th Article of War. See, e.g., Case II-0832 (trials of Henry Kuhl and Hamilton Windon); Headquarters, Dep't of the Miss., Gen. Orders No. 6 (1862) (on file with Library of Cong., Wash., D.C.); Headquarters, Dep't of the Miss., Gen. Orders No. 12 (1862) (on file with Library of Cong., Wash., D.C.); Headquarters, Dep't of the Miss., Gen. Orders No. 15 (1862) (on file with Library of Cong., Wash., D.C.); Headquarters, Dep't of the Miss., Gen. Orders No. 19 (1862) (on file with Library of Cong., Wash., D.C.); Headquarters, Dep't of the Miss., Gen. Orders No. 37 (1862) (on file with Library of Cong., Wash., D.C.).

<sup>343</sup> See, e.g., 2 1862 Dep't of Mo., Gen. Orders, *supra* note 93; 1862 Dep't of Potomac, Gen. Orders, *supra* note 142; 1862 Dep't of the S., Gen. Orders, *supra* note 142; 1862 Dep't of the Gulf, Gen. Orders, *supra* note 142; 1862 War Dep't, Gen. Orders, *supra* note 93; 1863 War Dep't, Gen. Orders, *supra* note 93.

sorely lacking. For example, in 1862, Brigadier General John Schofield, wrote from Missouri:

I am really very much concerned as to the means of getting rid of the large number of prisoners already held in this division, which number is daily and hourly being most alarmingly increased. Generally speaking the officers are required for field service and in the majority of cases they are illiterate and wholly unacquainted with the duties of military commissions. On an average I think I may safely assert that not one out of a dozen is capable of writing out the proceedings of a commission .

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In another instance, commanders from the Mountain Department wrote several letters to Washington, repeatedly requesting approval to execute the sentence of several prisoners who had been tried by commission.<sup>345</sup> The letters display clear frustration at a lack of response in Washington regarding the prisoners (at one point the War Department was not even aware that commission files had been forwarded to Washington).<sup>346</sup>

Responding to this lack of review, Congress authorized the appointment of a judge advocate “to whose office shall be returned, for revision, the records and proceedings of all courts-martial and military commissions, and where a record shall be kept of all proceedings had thereupon.”<sup>347</sup> The Act also created a corps of judge advocates, who “shall perform the duties of judge advocate for each army to which the respectively belong, under the direction of the judge advocate general.”<sup>348</sup> Under this authority, by the end of the war, thirty-nine officers were appointed in the corps, most of whom had prior legal training, (among them, the now famous “Blackstone of military law,” William Winthrop).<sup>349</sup> This legislation created the basic framework by which military commissions and courts-martial would be both prosecuted and reviewed. Without the creation of this office and corps it is unlikely

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<sup>344</sup> O.R., II, 4, 55.

<sup>345</sup> *See id.* O.R. II, 4, 63, 354–55.

<sup>346</sup> *Id.*

<sup>347</sup> 12 Stat. 598, § 5 (1862).

<sup>348</sup> *Id.* § 6.

<sup>349</sup> THEOPHILUS FRANCIS RODENBOUGH ET AL., *THE ARMY OF THE UNITED STATES: HISTORICAL SKETCHES OF STAFF AND LINE WITH PORTRAITS OF GENERALS-IN-CHIEF* 37 (Maynard, Merrill, & Co. 1896).

that even a fraction of the commissions ultimately tried could have been held.

Under the authority of this Act, Lincoln appointed Joseph Holt to the Office of The Judge Advocate General in early September.<sup>350</sup> Lincoln's appointee, Joseph Holt, likely shaped the physical administration of military justice more than any other individual. Although the theoretical footwork necessary to lay the legal foundations for the commissions was masterminded mostly by Henry Halleck and Francis Lieber, first in Missouri, and then later nationwide,<sup>351</sup> Holt's played an important role in the day-to-day operation of the military justice system. Indeed, almost every court-martial and military commission file would have passed through his office<sup>352</sup>—often through his very hands.<sup>353</sup>

Under the legislation of 1862, Holt's office was responsible for reviewing the proceedings of all military commissions and courts-martial and then maintaining a record of each.<sup>354</sup> After a commission was approved by a department commander, the majority of cases passed through the office without comment and the convictions and sentence stood. Sometimes, however, cases would be passed from Holt's office to Lincoln for review. These files generally included a description of the case and a recommended course of action, which Lincoln generally followed. Some of these reviews were mandated by law—in cases such as death penalties—and others were reviewed due to letters, requests, recommendations, or appeals mailed to the White House, the Office of The Judge Advocate, or the War Department.<sup>355</sup> The impact of the new organization was quickly apparent. During 1863, fifty-four military commissions were formally reviewed by Lincoln, with twenty-four

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<sup>350</sup> ELIZABETH LEONARD, LINCOLN'S AVENGERS 26 (2004).

<sup>351</sup> See *supra* pp. 27–28, 38–40.

<sup>352</sup> 12 Stat. 598, § 5 (1862).

<sup>353</sup> See Appendix B.

<sup>354</sup> *Id.*

<sup>355</sup> Other than the requirement under the legislation of 1862 that the Office of The Judge Advocate General review and approve each commission, see *supra* note 347 and accompanying text, and the variety of statutes requiring Presidential review of death sentences, see *infra* pp. 59–60, there was not a formally written review process. However, each file now housed at the National Archives bears a number of dated arrival, departure, and approval stamps made by the different military departments and offices in Washington as the file was reviewed. This record makes tracing the path of a particular commission file possible. This description of the “typical” review process is based off of observations made while reviewing a broad sample of files at the National Archives. See *supra* Appendix B.

reversed by Lincoln.<sup>356</sup> Of the commissions reviewed, forty-seven were reviews of death sentences.<sup>357</sup> Following the President's approval or disapproval, the President's order would be promulgated as a War Department General Order to be issued to the various departments.<sup>358</sup> The Judge Advocate General's Office surely expedited this process—rather than having to review an entire file, Lincoln could use Holt's summary and recommendation as a guide and reference.

The regulations regarding mandatory Presidential review were altered several times during the war. In July 1862, Congress modified the operation of Article 65, requiring the approval of the President in all cases of death sentences during both peace and wartime, rather than just during peacetime.<sup>359</sup> In fact, the first commission reviewed by Lincoln in 1862 explicitly made mention of this act.<sup>360</sup> The second change, in March 1863, created some exceptions to newly created mandatory Presidential review of all death sentences.<sup>361</sup> Congress authorized the execution of death sentences upon approval of the general commanding in the field for cases in which the defendant was “convicted as a spy or deserter, or of mutiny or murder.”<sup>362</sup> For military commissions, this exception would be most felt in cases of murder and spying (soon after transferred by Congress into military commission jurisdiction).<sup>363</sup> Additionally, in July 1864, the exception for those death penalty offenses tried by commission that did not need to be approved by the President was further broadened to include all those sentences imposed upon “guerrilla-marauders for robbery, arson, burglary, rape, assault with intent to commit rape, and for violations of the laws and customs of war.”<sup>364</sup> Although the President could still invoke his right to mitigate sentences, most of the offenses tried before military commission no longer needed to be reviewed by the President, even if the defendant was sentenced to death.<sup>365</sup> Interestingly, although the executive branch

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<sup>356</sup> See 1863 War Dep't, Gen. Orders, *supra* note 93.

<sup>357</sup> *Id.*

<sup>358</sup> See generally 1862 War Dep't, Gen. Orders, *supra* note 93; 1863 War Dep't, Gen. Orders, *supra* note 93; 1864 War Dep't, Gen. Court-Martial Orders, *supra* note 254; 1865 War Dep't, Gen. Court-Martial Orders, *supra* note 254.

<sup>359</sup> 12 Stat. 598, § 5 (1862).

<sup>360</sup> See Headquarters, War Dep't, Gen' Orders No. 170 (1862) (on file with Library of Cong., Wash., D.C.).

<sup>361</sup> 12 Stat. 737, § 38 (1863).

<sup>362</sup> *Id.*

<sup>363</sup> See *id.* at 736–37.

<sup>364</sup> 13 Stat. 356, ch. 215, § 1 (1864).

<sup>365</sup> *Id.*

powered the jurisdictional expansion of the military commissions during the Civil War, it was Congress that determined the manner by which the military commissions would be reviewed within the executive once the trials were held.

The number of cases reviewed in Washington in 1864 and 1865 and promulgated in the War Department General Orders was quite large. In 1864, 289 cases were reviewed in the War Department after being forwarded by the Office of The Judge Advocate General or Bureau of Military Justice.<sup>366</sup> Of those cases, only ten were reversed in full (well under five percent).<sup>367</sup> Although only a handful of judgments were overturned, it was common for the sentence to be mitigated to a less severe punishment—eighty-seven of the sentences were mitigated (about thirty percent of those reviewed).<sup>368</sup> Additionally, most of the cases reviewed at the War Department level had already been reviewed at least once by a department or district commander, and sometimes by both.<sup>369</sup> Therefore, the truly defective trials or charges had generally already been filtered out, and most of their review at this level was focused on whether the actual sentence was deserved.<sup>370</sup>

In 1865, 341 commission files for crimes committed during the war were reviewed by President Lincoln or the War Department.<sup>371</sup> Many of these files were for defendants tried during 1864, the year in which the most defendants were tried.<sup>372</sup> The rate at which judgments and sentences were reversed or mitigated increased in 1865.<sup>373</sup> Of the 341 files reviewed, forty-eight were reversed entirely, and 169 sentences were mitigated to some lesser punishment (rates of about fifteen and fifty percent respectively).<sup>374</sup> However, the reversal rate is slightly misleading—of those files, twenty-nine were from a single commission

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<sup>366</sup> See 1864 War Dep't, Gen. Court-Martial Orders, *supra* note 254.

<sup>367</sup> *Id.*

<sup>368</sup> *Id.*

<sup>369</sup> See *id.* About one-third of the commissions reviewed in 1864 were actually reviewed the first time by the Department of War. *Id.* These commissions, called "special military commissions," were authorized directly by the orders of the Secretary of War, and therefore, also needed to be approved directly by him. *Id.* All of these commissions were tried in Washington, D.C. and are a significant portion of the commissions held in Washington in 1864 and 1865. *Id.*

<sup>370</sup> *Id.*

<sup>371</sup> See 1865 War Dep't, Gen. Court-Martial Orders, *see supra* note 254.

<sup>372</sup> See *supra* note 267.

<sup>373</sup> 1865 War Dep't, Gen. Court-Martial Orders, *supra* note 254.

<sup>374</sup> *Id.*

that was overturned due to problems in procedure.<sup>375</sup> After files from that commission are removed the reversal rate falls to five percent, much closer to the reversal rate for 1864.<sup>376</sup>

Likely, two of the main reasons for the increased number of mitigated sentences were the assassination of President Lincoln and the end of the war. Lincoln's successor, President Andrew Johnson, was far more liberal in mitigating sentences than Lincoln ever had been.<sup>377</sup> The ink on many sentences had barely dried before they were mitigated by Johnson, often to nothing.<sup>378</sup> This policy of reconciliation and leniency was a factor in the growing conflict between Johnson and the radical wing of the Republican Party.<sup>379</sup> In all likelihood, however, with hostilities at a close, Lincoln may also have mitigated many of the harsher sentences to encourage reconciliation and closure as part of the broader reconstruction plans.<sup>380</sup>

Although the sheer number of commissions reviewed makes the process sound rather inhuman and cold, in actuality, the files were reviewed quite carefully by Lincoln, Holt, and others.<sup>381</sup> Franklin S. Williams, tried in March 1864, in Tennessee, was convicted of violating an oath of allegiance and of being a guerrilla and was sentenced to death.<sup>382</sup> The crux of the case was the determination of whether Williams was a voluntary participant in the ravages of his guerrilla band or whether he was forced into the unit.<sup>383</sup> The testimony on the subject was conflicting, and the commission convicted him based largely on the testimony of the prosecution's witnesses.<sup>384</sup> Holt carefully considered the case, writing to Lincoln about the testimony of each witness—

<sup>375</sup> See Case OO-0663; Headquarters, War Dep't, Gen. Court-Martial Orders No. 267 (1865) (on file with N.Y. Hist. Soc'y) (disapproving commission due to highly irregular procedure).

<sup>376</sup> 1865 War Dep't, Gen. Court-Martial Orders, *supra* note 254.

<sup>377</sup> *Id.*

<sup>378</sup> *Id.*

<sup>379</sup> See Detlev Vagts, *Military Commissions: The Forgotten Reconstruction Chapter*, 23 AM. U. INT'L L. REV. 231, 241–51 (2008) (describing the politics of the commissions during Reconstruction); KENNETH STAMPP, *THE ERA OF RECONSTRUCTION, 1865–1877* 83–86 (1965) (describing the disintegrating relationship between President Johnson and the increasingly radical Republic Congress).

<sup>380</sup> STAMPP, *supra* note 379, at 48 (describing Lincoln's Reconstruction plans).

<sup>381</sup> See Appendix B.

<sup>382</sup> Case MM-1408; Headquarters, War Dep't, Gen. Court-Martial Orders No. 210 (1864) (on file with N.Y. Hist. Soc'y).

<sup>383</sup> See sources cited *supra* note 382.

<sup>384</sup> *Id.*

highlighting the contradictions—and closed by expressing doubt as to whether a death sentence on such deeply conflicting evidence was just.<sup>385</sup> Several weeks later, on 9 July, Lincoln followed Holt’s advice, disapproving of the sentence and sparing the prisoner’s life.<sup>386</sup> Williams was ultimately sentenced to hard labor for the duration of the war, a sentence that ultimately lasted about one year.<sup>387</sup>

Holt and Lincoln were also willing to not only delve into the record to probe the factual findings of the commission, but also to review the commissions for procedural correctness.<sup>388</sup> Although, in individual cases, the overturning of a case due to neglect of procedural technicalities may seem like a minor technicality, this type of review ensured that the commissions followed uniform procedure that had been designed to ensure reasonably fair and efficient trials. Nathan Wilson and John Eller were both convicted in Missouri on charges including murder, horse stealing, and “being a bad and dangerous man.”<sup>389</sup> The convictions were overturned due to procedural details. Wilson hanged a neighbor, and (not to be outdone) Eller murdered a man and stole his horse.<sup>390</sup> The evidence in the commission was strong and both men were sentenced to death.<sup>391</sup> However, Holt recommended that the sentences not be carried out because the commission had neglected to include a notation that two-thirds of the commission approved of the death sentence—a procedural requirement under the 87th Article of War.<sup>392</sup> Lincoln approved the recommendation and both men were released.<sup>393</sup> Although the citizens of northern Missouri surely would have preferred Eller and Wilson dead, their release suggests that the commissions were hardly kangaroo courts.<sup>394</sup>

A final change by Congress slightly altered the regular path of commission cases through the offices of Washington, and further strengthened the administrative framework of the military justice system.

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<sup>385</sup> *Id.*

<sup>386</sup> *Id.*

<sup>387</sup> *Id.*

<sup>388</sup> See sources cited *supra* Appendix B.

<sup>389</sup> Case MM-0517; Headquarters, War Dep’t, Gen. Orders No. 230 (1863) (on file with Library of Cong., Wash., D.C.).

<sup>390</sup> See sources cited *supra* note 389.

<sup>391</sup> *Id.*

<sup>392</sup> *Id.*

<sup>393</sup> *Id.*

<sup>394</sup> See *supra* note 129 (for discussion of claims that Civil War commissions were kangaroo courts).

In June 1864, the Bureau of Military Justice was established to further aid in the effective management of the tens of thousands of court-martial and commission files submitted to Washington.<sup>395</sup> This department was made permanent following the war in 1866, and was given responsibility for reviewing commissions.<sup>396</sup> Holt, not surprisingly, was promoted to the head of the Bureau.<sup>397</sup> Under General Order No. 270, all communications pertaining to questions of military justice were required to be addressed to The Judge Advocate General in the Bureau.<sup>398</sup> Additionally, department commanders were required to forward to the Office of The Judge Advocate General list of all cases tried and to be tried within their department.<sup>399</sup> Generally, the creation of this office did not materially alter the route of commission files; rather, the main difference now was additional stops before the Secretary of War. Holt could report irregularities in proceedings or deficient sentences directly to the Secretary of War for action. Additionally, petitions for leniency were often forwarded directly to the Secretary of War for consideration.<sup>400</sup>

The creation of the Office of The Judge Advocate General and Bureau of Military Justice constructed an administrative framework by which the commissions could be centrally controlled, directed, and managed. Like a regiment on the battlefield, the more regulated and disciplined justice system was actually more efficient and effective in practice. It is doubtful that the existing military justice system could have ever managed to try 3000 to 4000 defendants by commission and even greater numbers by court-martial.<sup>401</sup> Prior to the creation of the Office of The Judge Advocate General, most cases were prosecuted by

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<sup>395</sup> 13 Stat. 144, ch. 144, § 5 (1864).

<sup>396</sup> RODENBOUGH, *supra* note 349, at 37.

<sup>397</sup> LEONARD, *supra* note 350, at 26.

<sup>398</sup> Headquarters, War Dep't, Gen. Court-Martial Orders No. 270 (1864) (on file with N.Y. Hist. Soc'y).

<sup>399</sup> *Id.*

<sup>400</sup> *See supra* note 355 & app. B.

<sup>401</sup> *See supra* note 18. In March 1865, Holt wrote to Secretary of War, Edwin Stanton, and reported that 33,896 court-martial and commission files had been reviewed in Washington since November, 1863. O.R. III, 5, 1216. The report also stated that in the period from September, 1862 to November 1863, that another 17,357 files had been reviewed. *Id.* Additionally, in November 1865, Holt wrote to Stanton again, and stated that 16,591 court-martial and military commission files had been "received, reviewed, and filed" since March, 1865. *See* O.R. III, 5, 490. In all, from the creation of the Judge Advocate's Office in September 1862, to November 1865, Holt reported that 67,844 court-martial and commission files were reviewed in Washington.

an ad hoc arrangement of volunteer judge advocates who were quickly shown to be incapable of handling the growing caseload.<sup>402</sup> Toward the end of 1862, these volunteers were replaced with a group legally trained and far more skillful judge advocates who were responsible for prosecuting offenses under the direct control of Holt.<sup>403</sup> These judge advocates contributed to the creation of the machine-like commission system that existed from 1863 onwards.

Procedurally speaking, the commissions later in the war resemble one another. Almost without exception, the military commissions had procedural and evidentiary rules that were very similar or identical to those used in courts-martial.<sup>404</sup> Any variation later in the war exists only between different departments rather than between the type of military trial.<sup>405</sup> Rather than being viewed as a separate entity, distinct from the court-martial system (as the current commissions are), the Civil War commissions were very closely related to courts-martial.<sup>406</sup> Likely, if it had not been for the limited jurisdiction of courts-martial, courts-martial, rather than military commissions, would have been used to try most of the commission defendants during the Civil War. By contrast, although clearly related, there were a number of significant differences between the procedure used in modern courts-martial and the procedure used in the military commissions held under the authority of the Military Commissions Act of 2006.<sup>407</sup>

The more centralized system that was formed later in the war allowed for coordinated application of commissions across various

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<sup>402</sup> Consider the quote of General Schofield, *supra* note 344 (describing the ineffective management of cases in 1862).

<sup>403</sup> 12 Stat. 598, § 5 (1862).

<sup>404</sup> See 2 WINTHROP, *supra* note 16, at 64–65 (describing the similar procedure). The actual transcripts of the cases often can only be distinguished from each other by checking whether a particular trial was assembled as a court-martial or as a military commission. See Appendix B.

<sup>405</sup> See Appendix B.

<sup>406</sup> Glazier, *Kangaroo Court or Competent Tribunal?*, *supra* note 2, at 2037–38.

<sup>407</sup> See, e.g., Richard V. Meyer, *When a Rose Is Not a Rose: Military Commissions v. Courts-Martial*, 5 J. INT'L CRIM. JUST. 458 (2007) (discussing and analyzing the differences between court-martial and military commission procedure under the Military Commissions Act of 2006). Commissions held under the authority of the Military Commissions Act of 2009 also likely will vary from those used in courts-martial, although to what extent is currently unclear. See 10 U.S.C. § 949a(a) (2006) (Military Commissions Act of 2009) (“Pre trial, trial, and post-trial procedures, including elements and modes of proof, for cases triable by military commission under this chapter may be prescribed by the Secretary of Defense.”).

military departments—a fact that helps explain the sudden explosions of commissions in the middle of 1863 following the promulgation of the Lieber Code.<sup>408</sup> With a corps of judge advocates in place, the Code could be implemented almost immediately.<sup>409</sup> Additionally, the increased involvement of the War Department in military justice as the war progressed, particularly after the creation of the Bureau of Military Justice (part of the War Department), allowed for closer coordination between department commanders and judge advocates.<sup>410</sup> The creation of more developed and integrated military justice system enabled the application of commissions in almost every war department, forming a conduit by which policy could easily be transferred to the ground and molded to departmental needs by individual judge advocates.

This military justice establishment created by Congress was the second crucial piece standing behind the growth of military commissions in the Civil War (the first being the legal groundwork laid by Halleck and Lieber). The critical role that judge advocates and the Office of The Judge Advocate General played in applying and tailoring this new weapon cannot be overstated. As displayed by the experience of officers in Missouri in 1862, the military justice system would have quickly choked upon itself had a mechanism for trying defendants quickly and predictably not been put in place.<sup>411</sup> Although, in 1862, a few hundred defendants could be squeezed through this bottleneck, it would not have been possible to try the enormous number of defendants nationwide in 1864 without this more organized system.<sup>412</sup> The authorization in the Lieber Code to use commissions broadly would have been without teeth had it not been for the administrative framework already in place to implement the policy. The legal weapon was crafted by Henry Halleck and Francis Lieber, but it was wielded, quite effectively, by The Judge Advocate General's Office.

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<sup>408</sup> See *supra* Part III.C.

<sup>409</sup> 12 Stat. 598, § 5, 6 (1862).

<sup>410</sup> See *supra* pp. 63–64.

<sup>411</sup> See *supra* note 344.

<sup>412</sup> See *supra* note 401.

## B. The End of the War and Reconstruction

The last year of the Civil War, 1865, saw the commissions continue much as those in 1863 and 1864, with new trials slowing in the middle of the year. In the first few months of 1865, there were at least 609 defendants tried by commission, a total number that is quite high considering it only includes commissions for offenses committed through approximately May 1865.<sup>413</sup> Although Missouri again had the most commissions for a single department (at least 143),<sup>414</sup> this figure is greatly outnumbered by the commissions outside of Missouri (close to 500).<sup>415</sup> This is a continuation of the trend seen in 1864, with the commissions becoming increasingly important to the war effort throughout the country, rather than remaining a Missouri phenomenon.

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<sup>413</sup> This study stops in May, 1865. Often the General Orders volumes do not include the date of the original trial or of the offense. Included in the total of "Civil War commissions" are all those that had an underlying offense that was more likely than not committed prior to the end of May, 1865. This end point is admittedly arbitrary, but slight changes in the methodology, such as using trial date, would not seriously alter the data. See 1865 U.S. War Dep't, Gen. Court-Martial Orders, *supra* note 254; Headquarters, War Dep't, Gen. Court-Martial Orders (1866) (on file with the N.Y. Hist. Soc'y); Headquarters, Military Div. of the Tenn., Gen. Orders (1865) (on file with N.Y. Hist. Soc'y); Headquarters, Middle Dep't, Gen. Orders (1865) (on file with Library of Cong., Wash., D.C.); Headquarters, Middle Dep't, Gen. Orders (1866) (on file with Library of Cong., Wash., D.C.); Headquarters, Dep't of Ark., Gen. Orders (1865) (on file U.S. Military Acad., West Point, N.Y.); Headquarters, Dep't of the Cumberland, Gen. Court-Martial Orders (1865) (on file with Library of Cong., Wash., D.C.); Headquarters, Dep't of the Pacific, Gen. Orders (1865) (on file with Library of Cong., Wash., D.C.); Headquarters, Dep't of the E., Gen. Orders (1865) (on file with Library of Cong., Wash., D.C.); Headquarters, Dep't of Fla., Gen. Orders (1865) (on file with Library of Cong., Wash., D.C.); Headquarters, Dep't of Ga., Gen. Orders (1865) (on file with Library of Cong., Wash., D.C.); Headquarters, Dep't of Va., Gen. Orders (1865) (on file with N.Y. Pub. Library); Headquarters, Dist. of E. Va., Gen. Orders (1865) (on file with Nat'l Archives, Wash., D.C.); Headquarters, Dep't of Va. and NC., Gen. Orders (1865) (on file with N.Y. Pub. Library); Headquarters, Dep't of the Gulf, Gen. Orders (1865) (on file with Library of Cong., Wash., D.C.); Headquarters, Dep't of Kansas, Gen. Orders (1865) (on file with N.Y. Hist. Soc'y); Headquarters, Dep't of N.C., Gen. Orders (1865) (on file with Nat'l Archives, Wash., D.C.); Headquarters, Dep't of the S., Gen. Orders (1865) (on file with Nat'l Archives, Wash., D.C.); Headquarters, Dist. of E. S.C., Gen. Orders (1865) [hereinafter 1865 Dist. of E. S.C.] (on file with Nat'l Archives, Wash., D.C.); Headquarters, Dep't of Pa., Gen. Orders (1865) (on file with Nat'l Archives, Wash., D.C.); Headquarters, Dep't of Mo., Gen. Orders (1865) (on file with Library of Cong., Wash., D.C.); Headquarters, Dist. of N. Mo., Gen. Orders (1865) (on file with N.Y. Hist. Soc'y); Headquarters, Dist. of Rolla, Gen. Orders (1865) (on file with N.Y. Hist. Soc'y); Headquarters, Dist. of Cent. Mo., Gen. Orders (1865) (on file with N.Y. Hist. Soc'y); Headquarters, Dist. of St. Louis, Gen. Orders (1865) (on file with N.Y. Hist. Soc'y).

<sup>414</sup> See *supra* note 413.

<sup>415</sup> See *id.*

The main trend present in the 1865 commissions that distinguishes them from the earlier commissions is the transformation of the Union armies from armies of conquest to armies of peacekeeping and occupation. An increasing number of commissions were directed at the trial of civilians who, unlike those in Missouri, were not acting under the color of military authority.<sup>416</sup> Instead, the trials were taking the place of civilian law in areas where military occupation was already necessary. The trials did not stop at the end of the Civil War.<sup>417</sup> Rather, they continued in this form well into Reconstruction, ending only after the readmission of the Confederate States into the Union.<sup>418</sup> However, the total number of commissions following the war was much lower. Overall, there were at possibly 1500 more commissions held during Reconstruction. These commissions were used to reestablish authority in the southern states and to try a host of different offenses.<sup>419</sup>

## V. Conclusion

On the night of 20 September 1863, near Mound City, Kansas, William Pitman and three other men broke into the home of Thomas Scott.<sup>420</sup> Pitman and his fellow robbers were all members of a guerrilla band that was known for terrorizing the local area;<sup>421</sup> consistent with their dubious reputation, Pitman's group held the entire Scott family hostage, only sparing their lives after being paid \$78.<sup>422</sup> Although this type of shocking behavior would clearly be illegal in any era of

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<sup>416</sup> For example, Anthrum McConnell was tried for murder and attempted murder stemming from an incident where McConnell and several other African-American men assaulted the home of Joseph Ford, a plantation owner in early May in the Georgetown District. The men killed one man, J.W. Skinner, and also attempted to murder Ford and Ford's nephew. The men chased Skinner from the home and shot him in nearby woods, and fired upon Ford and his nephew in the home. McConnell was convicted in July 1865, and was sentenced to be hanged. However, his sentence was later mitigated to ten year's hard labor. See Case MM-2696; Dist. of E. S.C., Gen. Orders No. 12 (1865) (on file with Nat'l Archives, Wash., D.C.).

<sup>417</sup> NEELY, *supra* note 18, at 178–79.

<sup>418</sup> *Id.*

<sup>419</sup> For discussions of the Reconstruction trials, see Detlev Vagts, *Military Commissions: The Forgotten Reconstruction Chapter*, 23 AM. U. INT'L L. REV. 231 (2008); Vagts, *supra* note 2, at 40; NEELY, *supra* note 18, at 178–79. As the current study cuts off in May 1865, these commissions are mentioned only because the transition into the Reconstruction commissions can already be in some departments during the Civil War.

<sup>420</sup> Case LL-1231.

<sup>421</sup> *Id.*

<sup>422</sup> *Id.*

American history, Pitman normally could expect to be tried in a civilian criminal court. However, as Pitman's offense occurred during wartime in an area where martial law had been declared, it became a war crime—a violation of the laws of war. Accordingly, like thousands of other individuals during the Civil War, Pitman was tried and convicted before a military commission, which was held in October 1863, in the Department of Missouri.<sup>423</sup>

To the modern observer, it does not necessarily seem surprising that individuals violating the laws of war, such as William Pitman, were tried before military commissions during the Civil War. Indeed, the military commission has become the primary venue by which modern war crimes are tried. However, it was actually not until the Civil War that the subject matter and *in personam* jurisdiction of the military commission was expanded so as to allow for the trial of violations of the laws of war.<sup>424</sup> Previously, military commissions only had the jurisdiction to try violations of military orders or criminal law committed by American Soldiers when courts-martial or civilian criminal courts lacked jurisdiction. Violations of the laws of war had only been tried in Scott's short-lived Councils of War in the Mexican-American War.<sup>425</sup> A testament to the relative youth of the United States during the Civil War, it had previously been unnecessary to develop a venue with specific jurisdiction over these kinds of offenses.

As noted in this article, the merging of these two types of jurisdiction occurred, first, in Missouri in 1862 through Henry Halleck's General Order No. 1<sup>426</sup> and, second, nationwide in 1863 through the Lieber Code.<sup>427</sup> Despite modern recognition as a milestone in international law, the Lieber Code has generally been regarded as having had almost no effect on the Civil War itself.<sup>428</sup> However, a close analysis of the records of the military commissions in the Civil War shows that, in fact, the Lieber Code was the primary source of jurisdictional authorization for the thousands of military commissions that were held during the second

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<sup>423</sup> The testimony of several eyewitnesses and the victims not surprisingly trumped that of Pitman's mother and brother (who both testified that William was home sick in bed on the night of the robbery), and Pitman was sentenced to hard labor for two years. *Id.*

<sup>424</sup> See *supra* Part III.A, III.B.

<sup>425</sup> See *supra* Part II.A.

<sup>426</sup> See *supra* Part III.A.

<sup>427</sup> See *supra* Part III.B.

<sup>428</sup> See *supra* pp. 46–47.

half of the Civil War.<sup>429</sup> Further, the Code was also an important criminal directive, providing individual judge advocates in the field with a useful guide for charging violations of the laws of war. In this regard, the writing and promulgation of the Lieber Code was an incredibly important moment in the war effort that very tangibly affected thousands of individuals. This finding requires that historians reconsider some of their basic conclusions about the role of the Lieber Code in the Civil War.

Additionally, as the primary basis for the expansion of military commission jurisdiction to violations of the laws of war, the promulgation of Lieber Code was a revolutionary moment in the history of the military commission. Even though the trials held in the Civil War under the authority of the Lieber Code were very different from those that are being held today at Guantanamo Bay, the modern commissions are fundamentally linked to the Lieber Code on a deep level. Previously overlooked by legal historians and the Supreme Court in *Hamdan v. Rumsfeld*, it was in fact Halleck's and Lieber's jurisdictional innovations in 1862 and 1863 that laid the foundation for almost all of the military commissions held after the Civil War.<sup>430</sup> Discovering this fundamental connection to the Lieber Code does not necessarily alter conceptions of the efficacy or legality of the modern commissions, but it does provide a much richer picture of the historical foundations of one of the most controversial areas of modern military law.

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<sup>429</sup> See *supra* Part III.B, III.C.

<sup>430</sup> See *supra* pp. 51–54.

## Appendix A

### Description of Research Methodology

During the American Civil War, the records of military commissions were maintained at several levels of the War Department. As a result, a record exists, in theory, for each commission file in at least two, and often more, locations. The process by which commission files were reviewed during the war created this duplicative record-keeping system.

The original transcript of each trial is currently stored in Record Group 153 at the National Archives in a collection of folios labeled using an alphanumeric system. During the Civil War, the record of each trial would be forwarded to the commanding officer of the military district or department, who would then review the file and issue a general order either approving or disapproving the findings and sentence of the commission. These general orders would usually be collected and issued in yearly volumes for each district and department. The records usually included the name of the defendant, the date and location of the trial, the charges and specifications against the defendant, the findings and sentence of the commission, and the specific orders of the commanding officer. Additionally, some trials were also reviewed at the U.S. War Department, where a similar general order would be produced.

For example, Aaron Alderman was tried on 20 September 1864 and was charged with “Robbery” and “Being a Guerilla.”<sup>431</sup> The commission found Alderman guilty of all charges and sentenced him to hard labor for a term of twenty years.<sup>432</sup> The commission file was forwarded to Major General Dodge, Commander of the Department of Missouri, who reviewed the proceedings and affirmed the findings and sentence.<sup>433</sup> A general order was then promulgated recording this review.<sup>434</sup> Afterwards, the file was forwarded to Washington for review and record-keeping.<sup>435</sup> As the proceedings were not overturned, no further action was taken on this file in the War Department for almost a year.<sup>436</sup> However, based on

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<sup>431</sup> See Case NN-3356.

<sup>432</sup> *Id.*

<sup>433</sup> See Headquarters, Dep’t of Mo., Gen. Orders No. 243 (1864) (on file with Library of Cong., Wash., D.C.).

<sup>434</sup> *Id.*

<sup>435</sup> 12 Stat. 598, § 5 (1862).

<sup>436</sup> See Case NN-3356.

petition for clemency, President Johnson reviewed the file and released both Aaron Alderman and his brother, Charles Alderman, in June 1865.<sup>437</sup> When the men were released, an additional general order was issued from the Department of War ordering the release.<sup>438</sup> This process has created a paper record of the trial of Aaron Alderman in three separate locations.

In my research, I compiled data from a number of these sources. As data recorded in the department general orders volumes can be compiled more quickly and in a more organized fashion than can the data recorded in the full case transcripts at the National Archives, the bulk of my research was completed using the district, department, and War Department general orders records. Fortunately, I was able to locate and review all of the War Department general orders volumes, most of the department level general orders volumes, and many of district level general orders volumes. This research process allowed me to compile basic information on a large percentage of the military commissions held during the Civil War. This information provided the statistical framework through which I was able to make broad conclusions on the timing and the location of the commissions.

Additionally, I surveyed a relatively large number of the trial transcripts (about 150) from the National Archives. I pulled specific files that contained the trials for which I already had basic information from the general orders volumes. I also pulled random files. I surveyed the files at the National Archives for two primary reasons: first, to confirm that the information recorded in the general orders volumes was in fact accurate; and second, to provide a richer picture of the trials themselves. To my relief, the information in the general orders accurately reflected the transcripts at the National Archives.

Throughout the article, references to the total number of defendants tried or commissions held represent the number reported in the Departmental General Orders volumes for the respective year. While some of the cumulative numbers represent estimates, and hence some inaccuracy, the discrepancy is not significant. It was not possible to compensate for original delays in reporting that would allow all cases to be placed in the year which they were actually decided. Some of the

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<sup>437</sup> *Id.*

<sup>438</sup> See Headquarters, War Dep't, Gen. Court-Martial Orders No. 320 (1865) (on file with the N.Y. Hist. Soc'y).

commissions appearing in the first weeks of a particular year's General Orders may have in fact been tried in the last weeks of the previous year. For example, the trial of Neptune was recorded in the 1863 General Orders for the Department of the South.<sup>439</sup> The defendant was actually tried on 22 December 1862.<sup>440</sup> Such small discrepancies are not problematic, however, because the total figures are still useful in describing and evaluating overall trends with which this article is primarily concerned. However, whenever possible, this article counted commissions appearing in the General Orders of the War Department within the year when the trial actually occurred to compensate for the lag between trial and War Department review, which, in those records, was often several months.

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<sup>439</sup> Headquarters, Dep't of the S., Gen. Orders. No. 1 (1863) (on file with Library of Cong., Wash., D.C.).

<sup>440</sup> See Case KK-0504.

**Appendix B****Summary of National Archive Files Surveyed**

**Note:** Each of the alpha-numeric codes below refers to a folio of case transcripts. Generally, each of these folios contains somewhere between five and fifteen actual trials, usually all related to each other in both time and geography.<sup>441</sup>

**1861:****Department of the Missouri:**

KK-0824

**Department of the Potomac:**

II-0766

**Western Department:**

II-0471

II-0473

**1862:****Department of the Gulf:**

KK-0693

**Department of the Missouri:**

KK-0821

KK-0822

KK-0823

KK-0825

MM-0517

MM-0136

NN-0008

NN-0009

**Mountain Department:**

II-0832

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<sup>441</sup> See Records of the Office of The Judge Advocate General, National Archives, Record Group 153.

**Department of New Mexico:**

KK-0289

**Department of the South:**

KK-0504

**Department of Tennessee:**

KK-0285

**Department of Virginia:**

KK-0435

**1863:****XVI Corps:**

LL-1165

**XVII Corps:**

NN-2840

**Department of the Cumberland:**

LL-1155

NN-1076

NN-1078

NN-1403

NN-1487

**Department of the Gulf:**

LL-1655

**Department of the Missouri:**

LL-1231

LL-1238

LL-1267

LL-1268

LL-1275

LL-1277

LL-1302

LL-1304

MM-0617

MM-0642

MM-1005

NN-0100  
NN-0105  
NN-1391  
NN-1410

**Department of Ohio:**  
MM-0079

**Department of Virginia:**  
LL-0391

**1864:**

**Department of Alabama:**  
NN-1816

**Department of Arkansas:**  
MM-1406  
MM-1407  
NN-1966

**Department of the Cumberland:**  
MM-1408  
NN-1403  
NN-1487  
NN-1820  
NN-3275

**Department of Kansas:**  
NN-2161

**Middle Department:**  
NN-3154  
NN-3156

**Department of the Missouri:**  
LL-1277  
LL-2638  
NN-1389  
NN-1410  
NN-1815  
NN-1967

NN-2224  
NN-2733  
NN-3352  
NN-3353  
NN-3356  
NN-3520

**Department of Ohio:**

NN-2404

**Department of Pennsylvania:**

NN-3348

**St. Mary's District:**

NN-1975

**Department of the Susquehanna:**

NN-1400

**Department of Tennessee:**

NN-2841

**U.S. Department of War:**

NN-2163  
NN-2674  
NN-2846  
NN-2847

**Department of the East:**

NN-3642

**1865:**

**Department of the Cumberland:**

OO-0662

**Department of the East:**

NN-3642

**Department of Florida:**

MM-3028

**Department of the Missouri:**

MM-1912

NN-3352

NN-3520

OO-0255

**Department of the Shenandoah:**

MM-2094

**Department of South Carolina:**

MM-2696

**Department of Virginia:**

OO-0663

**“S.O.S.”: SAVE OUR SERVICE MARKS**

MAJOR JEFFREY T. BRELOSKI\*

*Soldiers join the Army to become part of a values and tradition based culture. While the Army Values help deepen existing personal values, such as family bonds, work ethic, and integrity, it is tradition that ties Soldiers and their families into military culture. Unit history is an important factor for that bonding, since Soldiers want to belong to organizations with distinguished service records. Unit names, such as the Big Red One, Old Ironsides, All Americans, and Spearhead carry an extensive history. To sustain tradition, leaders must teach Soldiers the history that surrounds unit crests, military greetings, awards, decorations, and badges. Through leading by example, teaching, and upholding traditions, leaders ensure that the Army's culture becomes an integral part of every member of the Army team and adds purpose to their lives.<sup>1</sup>*

**I. Introduction**

Since September 11th, 2001, domestic support for the U.S. Army has been overwhelming.<sup>2</sup> This public support ranges from messages to

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<sup>1</sup> U.S. DEP'T OF ARMY, FIELD MANUAL 6-22, ARMY LEADERSHIP: COMPETENT, CONFIDENT, AND AGILE § 8-8 (Oct. 2006).

<sup>2</sup> ERIC V. LARSON & BOGDAN SAVYCH, AMERICAN PUBLIC SUPPORT FOR U.S. MILITARY OPERATIONS FROM MOGADISHU TO BAGHDAD 92–93 (Rand 2005).

troops from private citizens<sup>3</sup> to free goods and services from corporations.<sup>4</sup> Visible signs of support are more pervasive in cities near U.S. Army installations. In these cities, you cannot travel five minutes without seeing a yellow ribbon magnet on a vehicle with the phrase “support our troops.” You cannot walk through a gym without seeing a local unit’s t-shirt with some motivational motto.<sup>5</sup> Finally, you cannot pass through an installation without seeing a hat with some kind of military symbol.<sup>6</sup> This significant display of public support contributes to the morale of Soldiers everywhere. However, the public’s support of our Soldiers may actually harm the U.S. Army by endangering its marks.<sup>7</sup>

<sup>3</sup> See, e.g., U.S. Dep’t of Defense, Message Submit Form, <http://www.americasupportsyou.mil/americasupportsyou/Message.aspx?SectionID=5> (last visited Jan. 7, 2009). For example, the America Supports You website allows people to send servicemembers support messages. *Id.*

<sup>4</sup> See, e.g., Walt Disney World, News Rumors Photos Reviews Discussion Forum, <http://www.wdwmagic.com/Resorts/Walt-Disney-World-Resorts-information/News/05Jan2009-Disney's-Armed-Forces-Salute-2009---Complimentary-5-Day-tickets.htm> (last visited Jan. 7, 2009). Walt Disney World offers complimentary five-day passes to active duty and retired servicemembers. *Id.*

<sup>5</sup> The 2d Battalion, 3d Special Forces Group (Airborne) motto is “WE DO BAD THINGS TO BAD PEOPLE.” Prince Harry of England wore a hat stitched with this motto while he served in Afghanistan. Posting of Debarshi to Huh?, <http://persophile.blogspot.com/2008/03/prince-harry-does-bad-things-to-bad.html> (Mar. 3, 2008, 16:07 EST).

<sup>6</sup> Many military retirees wear baseball hats with the unit patch of their former unit.

<sup>7</sup> “The term ‘mark’ includes any trademark, service mark, collective mark, or certification mark.” Lanham Act, 15 U.S.C. § 1127 (2006). A service mark is

any word, name, symbol, or device, or any combination thereof—

- (1) used by a person, or
- (2) which a person has a bona fide intention to use in commerce and applies to register on the principal register established by this Act,

to identify and distinguish the services of one person, including a unique service, from the services of others and to indicate the source of the services, even if that source is unknown. Titles, character names, and other distinctive features of radio or television programs may be registered as service marks notwithstanding that they, or the programs, may advertise the goods of the sponsor.

*Id.* A collective mark is

a trademark or service mark—

- (1) used by the members of a cooperative, an association, or other collective group or organization, or
- (2) which such cooperative, association, or other collective group

United States Army phrases, unit patches, mottos, and symbols displayed on merchandise are marks that represent U.S. Army units individually and the U.S. Army as a whole.<sup>8</sup> Consequently, the U.S. Army has an interest in protecting its marks.<sup>9</sup> When used to identify the origin and goodwill of the U.S. Army, these phrases, unit patches, mottos, and symbols function as trademarks.<sup>10</sup> Trademark law protects the connection between a particular mark and its origin.<sup>11</sup> Nevertheless,

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or organization has a bona fide intention to use in commerce and applies to register on the principal register established by this Act, and includes marks indicating membership in a union, an association, or other organization.

*Id.* A certification mark is

any word, name, symbol, or device, or any combination thereof—

- (1) used by a person other than its owner, or
- (2) which its owner has a bona fide intention to permit a person other than the owner to use in commerce and files an application to register on the principal register established by this Act, to certify regional or other origin, material, mode of manufacture, quality, accuracy, or other characteristics of such person's goods or services or that the work or labor on the goods or services was performed by members of a union or other organization.

*Id.*

<sup>8</sup> Memorandum from Ronald J. James, Assistant Sec'y of the Army (Manpower and Reserve Affairs), to Admin. Assistant to the Sec'y of the Army et al., subject: Army Trademark Licensing Program (13 Jan. 2009) [hereinafter James Memo]. In addition to phrases and symbols, a mark can include any word, name, or device or any combination. 15 U.S.C. § 1127. However, this article will only focus on U.S. Army phrases and symbols as a complete discussion of every type of mark and the law governing it would be too lengthy and too unwieldy for the scope of this article.

<sup>9</sup> See U.S. DEP'T OF ARMY, REG. 672-8, MANUFACTURE, SALE, WEAR, AND QUALITY CONTROL OF HERALDIC ITEMS para. 2-5 (5 Apr. 1996) [hereinafter AR 672-8].

<sup>10</sup> James Memo, *supra* note 8. The Lanham Act defines a trademark as

any word, name, symbol, or device, or any combination thereof—

- (1) used by a person, or
- (2) which a person has a bona fide intention to use in commerce and applies to register on the principal register established by this Act, to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown.

15 U.S.C. § 1127.

<sup>11</sup> *Hanover Star Milling Co. v. Metcalf*, 240 U.S. 403, 412 (1916). For example, when you see a blue oval with script lettering on an automobile, you may think of Ford Motor Company. When you hear "all the news that's fit to print," you may think of the *New*

that connection can be broken if the originator of the mark loses control of its mark, resulting in the potential abandonment of trademark rights.<sup>12</sup>

The U.S. Army has been developing marks to specifically identify and distinguish different units, specialties, and installations within the U.S. Army for the past 200 years.<sup>13</sup> One example is the U.S. Special Operations Command (USSOCOM); their mission is to “[p]rovide fully capable Special Operations Forces to defend the United States and its interests.”<sup>14</sup> The Shoulder Sleeve Insignia (SSI) distinguishing their unit is the following:

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*York Times*. The symbol and phrase are trademarks of their respective companies. Similarly for the U.S. Army, when Soldiers see a black patch with an eagle, they immediately think of the symbol representing the 101st Airborne Division. In 1981, N.W. Ayer & Son, the first advertising agency in the United States, created “Be all you can be,” a catchy phrase the U.S. Army used to recruit people. Scripophily, N.W. Ayer & Sons (First advertising agency in the United States), <http://www.scripophily.net/naysonde19.html> (last visited Mar. 2, 2009).

<sup>12</sup> *First Interstate Bancorp v. Stenquist*, 1990 U.S. Dist. LEXIS 19426, at \*7 (N.D. Cal. July 13, 1990). For example, if civilians change the designs of U.S. Army marks and the U.S. Army does not intervene, the U.S. Army may lose trademark rights in those marks. Loss of control of a mark, a common law doctrine, is one method of losing trademark rights and can occur through naked licensing, failure to police, or dilution. See *infra* notes 128, 208, 220 and accompanying text (explaining the doctrine of loss of control of a mark).

<sup>13</sup> E-mail from J. Scott Chafin, Trademark and Copyright Attorney, USALSA, to author (8 Jan. 2009, 07:39 EST) [hereinafter Chafin e-mail] (on file with author). However, “unit insignia did not really become widespread in use even remotely like it is today until the Civil War, when the large-scale movement of many units on a personnel-dense battlefield required that commanders know which soldiers belonged with which unit.” *Id.* Mr. Scott Chafin holds the position of Trademark and Copyright Attorney in the Regulatory Law and Intellectual Property Division, U.S. Army Legal Services Agency (USALSA), a field operating agency of The Judge Advocate General of the Army. Mr. Chafin is primarily responsible for trademark and copyright law matters, with trademark protection, enforcement, and licensing occupying the bulk of his practice. In that capacity, he files applications to register trademarks with the U.S. Patent and Trademark Office and maintains existing registrations. Currently, he manages over 200 federal trademark registrations and pending applications. In addition, by direction of the Secretary of the Army, Mr. Chafin’s office is responsible for providing legal services to the U.S. Army Trademark Licensing Program. Mr. Chafin received a Bachelor of Science degree from Stephen F. Austin State University, Nacogdoches, Texas, in 1971, and a Juris Doctor degree from the University of Texas at Austin in 1975. Mr. Chafin is a member of the State Bar of Texas and the American Intellectual Property Law Association and is also a registered patent attorney, U.S. Patent and Trademark Office.

<sup>14</sup> Headquarters, U.S. Special Operations Command Home Page, <http://www.socom.mil/> (last visited Jan. 16, 2009).



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Although traditional trademark law is but one method of protecting the U.S. Army's marks, the U.S. Army may inadvertently lose claim to exclusive ownership and control of its marks with its increased commercial popularity under traditional trademark law. Private companies targeting the military population often attempt to capitalize on the U.S. Army marks. SOCOM GEAR<sup>16</sup> is an example of such a company; it sells tactical gear and weapons online. Their logo is the following:



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<sup>15</sup> This patch is the official SSI of USSOCOM. Google, Google Image Search, <http://images.google.com/imghp?hl=en&tab=wi> (search for "ussocom patch," follow [www.globalspecialoperations.com](http://www.globalspecialoperations.com) hyperlink) (last visited Jan. 16, 2009).

<sup>16</sup> SOCOM GEAR Home Page, <http://www.socomgear.com/english/> (last visited Jan. 16, 2009) [hereinafter SOCOM GEAR].

<sup>17</sup> This is SOCOM GEAR's logo. *Id.*

The striking similarities between both graphics may mislead and deceive the public into believing the U.S. Army endorses SOCOM GEAR.<sup>18</sup> As The U.S. Army could even lose its rights to the USSOCOM mark due to the demanding requirements of trademark protection, requirements that the U.S. Army's marks are not always able to meet.<sup>19</sup> If the U.S. Army loses exclusive rights in its marks to a company, the loss could result in that company charging the U.S. Army for use of the marks in commercials,<sup>20</sup> preventing Soldiers from using the term "Hooah!,"<sup>21</sup> or altering the appearance of current U.S. Army marks. To prevent these problems, Congress should pass a special statute that supplements traditional trademark law ensuring the U.S. Army maintains exclusive ownership rights in its marks and thereby preserves its significantly rich military history.

Part II of this article explains the fundamental principles of trademark law. With a rudimentary understanding of these principles, Part III next introduces how trademarks function in the commercial world. Part IV explains how phrases and symbols uniquely function in the military, especially Army settings, and notes how, in recognizing these important functions, the U.S. Army's senior leadership has called for additional protections. As an increasing number of Army phrases and symbols have been licensed, the leadership has increasingly scrutinized

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<sup>18</sup> *United States Navy Weekly Inc. v. Fed. Trade Comm'n*, 207 F.2d 17, 18 (D.C. Cir. 1953) (affirming that United States Navy Weekly misled and deceived the public into believing that the U.S. Navy endorsed the company). *See, e.g.*, *Fed. Trade Comm'n v. Army and Navy Trading Co.*, 88 F.2d 776, 777 (D.C. Cir. 1937) (upholding an order to eliminate the words "Army and Navy" from a private company's trade name on the basis that "their use was to the injury of competitors and the public"). In this case, in fact, the threat of public confusion was so great, that the court rejected the use of qualifiers on the basis that they were nevertheless contradictory with the single theme represented in the name. *Id.* at 779–80 (rejecting the following disclaimers "Not Connected with the Army and Navy," "Not Connected with the Government," "Not a Government Store," "Not Affiliated with the United States Government," and "We Do Not Handle Exclusively Army and Navy Goods").

<sup>19</sup> *See infra* Part V.C and accompanying text (explaining the doctrine of loss of control of a mark).

<sup>20</sup> *See* Captain Robert F. Altherr, Jr., *Patents, Copyrights, and Trademarks Note: Be All You Can Be (R) and the Army Mule*, *ARMY LAW.*, Dec. 1986, at 52, 52 (providing an example where a company attempted to register the Army Mule, which could have complicated licensing efforts by West Point).

<sup>21</sup> "Hooah!" refers "to or mean[s] anything and everything except 'no.'" Hooah, <http://www.cavhooah.com/hooah.htm> (last visited Jan. 19, 2009).

the U.S. Army's trademark program,<sup>22</sup> uncovering many of the Lanham Act's deficiencies in protecting U.S. Army marks.<sup>23</sup>

Part V builds upon the deficiencies identified in Part IV and provides specific scenarios where the U.S. Army could lose exclusive rights in its phrases and symbols, demonstrating the shortcomings of traditional trademark law. These shortcomings of the Lanham Act reveal the need for complementary protection to adequately preserve U.S. Army phrases and symbols. Part VI supports the adoption of a special statute, similar to statutes already protecting both the U.S. Marine Corps and U.S. Coast Guard,<sup>24</sup> that Congress should pass augmenting phrase and symbol<sup>25</sup> protection under current trademark law. With these necessary interventions, the U.S. Army can finally enjoy complete protection of its marks.

## II. Fundamental Principles of Trademark Law

Enacted in 1946, the Lanham Act has the objective of protecting "legitimate business and the consumers of the country" and does this by providing a set of federal legal rights and remedies for trademark owners.<sup>26</sup> Before identifying the problems with the Lanham Act,<sup>27</sup> this

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<sup>22</sup> Telephone Interview with J. Scott Chafin, Trademark and Copyright Attorney, in Arlington, Va. (Jan. 16, 2009) [hereinafter Chafin Interview]; see U.S. DEP'T OF DEF., DIR. 5535.09, DOD BRANDING AND TRADEMARK LICENSING PROGRAM 3 (19 Dec. 2007) [hereinafter DoDD 5535.09]; see also James Memo, *supra* note 8.

<sup>23</sup> Chafin Interview, *supra* note 22.

<sup>24</sup> See Marine Corps, 10 U.S.C. § 7881 (2006) (protecting Marine Corps marks); Coast Guard [and other names] 14 U.S.C. § 639 (2006) (protecting Coast Guard marks). See also *infra* notes 303–08 and accompanying text (discussing statutory protection for a host of other governmental and organizational marks)

<sup>25</sup> I will refer to U.S. Army identifiers as "phrases and symbols" in the special statute as opposed to "marks" under the Lanham Act. A "mark" is a term of art that has achieved protection under the Lanham Act. Although some U.S. Army "symbols" are capable of becoming "marks" under the Lanham Act, many fail to meet the requirements.

<sup>26</sup> *Two Pesos v. Taco Cabana*, 505 U.S. 763, 781–82 (1992) (Stevens, J., concurring).

The basic purpose of the Federal Trademark Act is twofold: One is to protect the public so it may be confident in purchasing a product bearing a particular trademark which it favorably knows, it will get the product in which it asks for and wants to get. Second, where the owner of a trademark has spent energy, time and money in presenting to the public the product, he is expected in his investment from its misappropriation by pirates and cheats.

part begins with a basic understanding of the background and principles of trademark law, including the earliest goals of trademark law and the reasons why commercial companies, consumers, and Congress had an interest in protecting the origin of any product. Further, this part examines the development of protective procedures that culminated in the Lanham Act.

#### A. Objectives of Trademark Protection

The goal of trademark law is to link a mark to the origin of a particular product.<sup>28</sup> Trademark law protects this link by guarding an organization's<sup>29</sup> investment in goodwill<sup>30</sup> and a consumer's investment in an authentic product.<sup>31</sup> Governmental organizations, including military agencies, are eligible for trademark protection even if their business is not predicated on commercial ventures. For ease of reference, this article uses the term "company" broadly to include military and nonprofit agencies. United States trademark law stems from the Lanham Act,<sup>32</sup> which seeks to shield companies from unfair competition.<sup>33</sup> The Lanham Act preserves a company's investment in developing a mark and prevents third parties from using the mark to confuse consumers.<sup>34</sup> Decision makers at companies understand the importance of safeguarding their companies' marks and consequently spend large

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S. REP. NO. 1333, at 8137.

<sup>27</sup> 15 U.S.C. §§ 1051–1141 (2006).

<sup>28</sup> *Hanover Star Milling Co. v. Metcalf*, 240 U.S. 403, 412 (1916).

<sup>29</sup> Many other entities such as non-profit organizations and governmental agencies may own trademark rights as well. Chafin e-mail, *supra* note 13.

<sup>30</sup> For example, NBC's marks of the NBC chime and the rainbow peacock are associated with NBC's services. *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 162 (1995).

<sup>31</sup> *In re E. I. Du Pont de Nemours & Co.*, 476 F.2d 1357, 1360 (C.C.P.A. 1973) (quoting S. REP. NO. 1333, 79th Cong., 2d Sess. (1946), *in* U.S.C.C.A.N., 79th Cong., 2d Sess. at 1274–8 (1946)). Domestic trademark law protects consumers when they purchase authentic Nike shoes with the swoosh mark in the United States. Other countries often fail to provide the same protections. For example, Shoemanchina Trading Company sells "Niike" Air Max Plus shoes, cheap reproductions of the authentic Nike shoes. Ecplaza Global, Niike Shoes, Air Max Plus-4, Shoemanchina Trading Co., Ltd., [http://www.ecplaza.net/product/85040\\_221812/niike\\_shoes\\_air\\_max\\_plus4.html](http://www.ecplaza.net/product/85040_221812/niike_shoes_air_max_plus4.html) (last visited May 16, 2009).

<sup>32</sup> Lanham Act, 15 U.S.C. §§ 1051–1141 (2006).

<sup>33</sup> *See* *Ames Pub. Co. v. Walker-Davis Publ'ns, Inc.*, 372 F. Supp. 1, 11 (E.D. Pa. 1974) (defining the intent of the Lanham Act).

<sup>34</sup> *See id.* (explaining the purpose of the Lanham Act).

amounts of money to protect them.<sup>35</sup> Still, companies' efforts do not always deter infringers, who often ignore trademark laws, and often have to pay millions in damages when pursued in courts.<sup>36</sup>

Congress designed the Lanham Act to protect companies in their development of marks and to prevent consumer confusion as to the origin of marks.<sup>37</sup>

The intent of this [Lanham] Act is to regulate commerce<sup>38</sup> within the control of Congress by making actionable the deceptive and misleading use of marks in such commerce; to protect registered marks used in such commerce from interference by State, or territorial legislation; to protect persons engaged in such commerce against unfair competition; to prevent fraud and deception in such commerce by the use of reproductions, copies, counterfeits, or colorable imitations of registered marks; and to provide rights and remedies stipulated by treaties and conventions respecting trademarks, trade names, and unfair

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<sup>35</sup> See *McNeil Consumer Brands v. United States Dentek Corp.*, 116 F. Supp. 2d 604, 606 (E.D. Pa. 2000) (finding McNeil spent over \$220 million a year in developing the Tylenol mark); see also *Starbucks Corp. v. Wolfe's Borough Coffee, Inc.*, 559 F. Supp. 2d 472, 477 (S.D.N.Y. 2008) (finding that Starbucks spent over \$136 million in developing the Starbucks mark over three years); *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4, 7 (2d Cir. 1976) (discussing the large sums of money Abercrombie and Fitch spent to develop its Safari mark).

<sup>36</sup> See Posting of Kalyan C. Kankanala to Sinapse, <http://brainleague.blogspot.com/2008/05/adidas-wins-305-million-dollars-as.html> (May 7, 2008, 16:07 EST) (reporting the \$305 million damages awarded to Adidas for Collective Brands' infringement of Adidas' three stripe mark).

<sup>37</sup> *Ames Pub. Co., Inc.*, 372 F. Supp. at 11.

<sup>38</sup> See *infra* note 97 defining use in commerce under the Lanham Act. "The term 'use in commerce' means the bona fide use of a mark in the ordinary course of trade, and not made merely to reserve a right in a mark." 15 U.S.C. § 1127 (2006). McDonalds clearly uses their slogan "I'm lovin' it" in commerce. See McDonald's Home Page, McDonald's Internet Site Terms and Conditions, <http://www.mcdonalds.com/terms.html> (last visited Mar. 1, 2009) (listing all of McDonald's trademarks). McDonald's uses the slogan in television commercials, prints it on their cups, and displays it on the side of their trucks. In contrast, many, U.S. Army marks, such as unit crests, are not used in the same manner. *But cf.* U.S. Trademark No. 2272122 (filed June 19, 1998) (providing the registration for The Judge Advocate General's Legal Center and School's crest as a service mark with the words *Reverentia Legum*). Altherr, *supra* note 20, at 52.

competition entered into between the United States and foreign nations.<sup>39</sup>

Despite over sixty years since its enactment, these objectives have remained virtually unchanged.

#### B. Basis of the Lanham Act

Lawmakers initially experienced difficulty in passing the Lanham Act as it treated trademarks like copyrights<sup>40</sup> and patents.<sup>41</sup> Similar treatment seemed logical to lawmakers as copyrights, patents, and trademarks form the three major intellectual property rights.<sup>42</sup> Like the Patent Act<sup>43</sup> and the Copyright Act,<sup>44</sup> early trademark law found its constitutional roots in the Patents and Copyrights clause.<sup>45</sup> However, the *Trade-mark Cases* in 1879 invalidated this constitutional basis for the 1870 Trademark Act.<sup>46</sup> The Supreme Court held that because trademarks did not relate to an invention or a creative work, the Patents and Copyrights clause of the Constitution did not apply.<sup>47</sup> Instead, the Court held that trademarks

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<sup>39</sup> 15 U.S.C. § 1127.

<sup>40</sup> Copyrights protect “literary, artistic, and scientific works.” Patrick H. Hu, “*Mickey Mouse*” in *China: Legal and Cultural Implications in Protecting U.S. Copyrights*, 14 B.U. INT’L L.J. 81, 81 n.29 (1996).

<sup>41</sup> Patent law protects “functional” inventions. Dennis S. Karjala, *Copyright Protection of Computer Documents, Reverse Engineering, and Professor Miller*, 19 DAYTON L. REV. 975, 976–77 (1994). “A work is ‘functional’ if it performs some utilitarian task other than to inform, entertain, or portray an appearance to human beings.” *Id.* at 977. Some examples of functional inventions include the laser, nicotine patches, and software encryption. Peacock Myers, P.C., Patents, [http://www.peacocklaw.com/Spec\\_Patents.html](http://www.peacocklaw.com/Spec_Patents.html) (last visited Jan. 8, 2009).

<sup>42</sup> Elizabeth Ferrill, *Clearing the Swamp for Intellectual Property Harmonization: Understanding and Appreciating the Barriers to Full TRIPS Compliance for Industrializing and Non-industrialized Countries*, 15 U. BALT. INTELL. PROP. L.J. 137, 147 (2007). Trade secret is the other area of intellectual property law. *Id.*

<sup>43</sup> The U.S. Patent Act, 35 U.S.C. §§ 1–376 (2006).

<sup>44</sup> 17 U.S.C. §§ 1301–1332 (2006).

<sup>45</sup> Congress has the power “[t]o promote the progress of science and useful arts, by securing for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries.” U.S. CONST. art. I, § 8, cl. 8.

<sup>46</sup> See *Trade-Mark Cases*, 100 U.S. 82, 93 (1879) (invalidating the 1870 and 1876 Trademark Acts, because they were enacted beyond congressional power).

<sup>47</sup> *Id.* at 94.

identify a particular class or quality of goods as the manufacture, produce, or property of the person who puts them in the general market for sale; that the sale of the article so distinguished is commerce; that the trademark is, therefore, a useful and valuable aid or instrument of commerce, and its regulation by virtue of the clause belongs to Congress, and that the act in question is a lawful exercise of this power.<sup>48</sup>

The Supreme Court, in dicta, commented that the Commerce Clause<sup>49</sup> would not authorize the 1870 and 1876 Trademark Acts.<sup>50</sup> Later, in 1946, however, Congress limited the Lanham Act to “in the use of commerce” and thus secured a constitutional basis for regulating marks in the Commerce Clause.<sup>51</sup> Without the “in the use of commerce” prong or some other constitutional tie-in, Congress would exceed its power by creating the Lanham Act.<sup>52</sup>

This part introduced the goals of traditional trademark law—preserving a company’s investment in goodwill and protecting consumers from counterfeit products.<sup>53</sup> Congress considered both and attempted to protect those interests by creating the Trademark Acts. This proved to be a daunting task of trial and error. However, by the middle of the twentieth century, Congress succeeded in codifying trademark law in the Lanham Act.

### III. Trademarks in the Commercial World

This part explores the challenges presented by the interpretation of the Lanham Act and the practical aspects of its provisions on companies.

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<sup>48</sup> *Id.* at 95.

<sup>49</sup> Congress has the power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” U.S. CONST. art. I, § 8, cl. 3.

<sup>50</sup> See *Trade-Mark*, 100 U.S. at 97–98 (finding no language in the Acts to restrict trademark to use in commerce).

<sup>51</sup> Mathias Strasser, *The Rational Basis of Trademark Protection Revisited: Putting the Dilution Doctrine into Context*, 10 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 375, 427 (2000). Congress has the power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” U.S. CONST. art. I, § 8, cl. 3.

<sup>52</sup> *Trade-Mark*, 100 U.S. at 96–97.

<sup>53</sup> *In re E. I. Du Pont de Nemours & Co.*, 476 F.2d 1357, 1360 (C.C.P.A. 1973) (quoting S. REP. NO. 1333, 79th Cong., 2d Sess. (1946), in U.S.C.C.A.N., 79th Cong., 2d Sess. at 1274-8 (1946)).

It begins with a discussion about the subject matter requirements of trademark protections; how companies establish rights in their marks; and how they register their marks with the U.S. Patent and Trademark Office (USPTO).<sup>54</sup> It also outlines the many protections, remedies, and defenses under the Lanham Act.

#### A. Subject Matter of Trademarks

Almost anything that can distinctly connect a mark to the origin of its source is eligible for trademark protection.<sup>55</sup> Most people are familiar with the common categories of trademarks such as phrases<sup>56</sup> and symbols.<sup>57</sup> However, trademark law protects numerous other categories. For example, in 1995, the Supreme Court found that trademark law protects the color green when related to dry cleaning pads.<sup>58</sup> In *Qualitex*, a company that made green dry cleaning pads, sued Jacobson, a rival company, for selling dry cleaning pads with the same green color Qualitex already registered with the USPTO.<sup>59</sup> Going beyond the color issue, the Court also cited other unusual examples capable of trademark protection such as: “a particular shape (of a Coca-Cola bottle), a particular sound (of NBC’s three chimes), and even a particular scent (of plumeria blossoms on sewing thread).”<sup>60</sup> The Supreme Court even extended trademark protection in the design and motif of a restaurant.<sup>61</sup>

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<sup>54</sup> The USPTO “process[es] patent and trademark applications and disseminat[es] patent and trademark information.” United States Patent and Trademark Office, Introduction, <http://www.uspto.gov/web/menu/intro.html> (last visited Mar. 2, 2009).

<sup>55</sup> Richard Chappo, *You Can Trademark a Lot More Than You Think*, EZINE, Feb. 13, 2007, available at <http://ezinearticles.com/?You-Can-Trademark-a-Lot-More-Than-YouThink&id=453370>.

<sup>56</sup> For example, M&M’s trademarked phrase is “melts in your mouth, not in your hands.” M&M’s, M&M’s About M&Ms: History, <http://www.m-ms.com/us/about/mmshistory/> (last visited Jan. 8, 2009). Taco Bell urges you to “think outside the bun.” Taco Bell Home Page, <http://www.tacobell.com/> (last visited Jan. 8, 2009). Burger King assures you that you can “have it your way.” Burger King Home Page, <http://www.burgerking.com/bkglobal/> (last visited Jan. 8, 2009).

<sup>57</sup> Nike’s well-recognized symbol is the swoosh. Nike, NikeStore: Customer Service: Privacy/Security, <http://www.nike.com/renov/nikestore/us/v1/us/en/info/privacy.jsp?item=terms&sitesrc=USLP> (last visited Jan. 8, 2009). Adidas distinguishes its shoes with the 3-stripes device on the sides of its shoes. Adidas, Adidas—Legal, <http://www.adidas.com/us/shared/legal.asp> (last visited Jan. 8, 2009).

<sup>58</sup> *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 166 (1995).

<sup>59</sup> *Id.* at 161.

<sup>60</sup> *Id.* at 162.

<sup>61</sup> *See Two Pesos v. Taco Cabana*, 505 U.S. 763, 776 (1992) (holding inherently distinctive trade dress does not require secondary meaning for trademark protection).

## B. Distinctiveness<sup>62</sup>

In addition to proper subject matter, trademark law also requires a potential mark achieve distinctiveness.<sup>63</sup> The more distinctive a mark, the more protection trademark law provides.<sup>64</sup> Courts often group marks into three broad categories with varying levels of protection, depending on their strength: 1) inherently distinctive marks (fanciful, arbitrary, and suggestive marks) receive automatic protection; 2) potentially distinctive marks (descriptive marks) frequently receive protection; and 3) non-distinctive marks (generic marks) never receive protection.<sup>65</sup> Each of these marks and their level of protection are discussed separately below. These categorical distinctions place a value on original and creative ideas that easily distinguish products or services.

### 1. *Inherently Distinctive Marks*

Within the inherently distinctive category, there are three types of marks, each receiving a different level of protection under trademark law. The first group of inherently distinctive marks consists of marks that are fanciful.<sup>66</sup> These marks enjoy absolute protection, because they are totally invented words that have no meaning on their own.<sup>67</sup> A great example of a fanciful mark in the U.S. Army is the term “Hooah!,” discussed later in this article.<sup>68</sup> Trademark law provides marks that are arbitrary with the second highest degree of protection.<sup>69</sup> Arbitrary marks

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Many other companies also have buildings that serve as marks such as Pizza Hut and its distinctive red roof. Pizza Hut, PizzaHut.com—Terms of Use, <http://www.pizzahut.com/TermsOfUse.aspx> (last visited Jan. 8, 2009).

<sup>62</sup> Distinctiveness is the characteristic of a symbol that distinguishes the source of a product from another source. Lanham Act, 15 U.S.C. § 1052 (2006). A discussion of this is necessary to demonstrate how much time and expense a special statue will save.

<sup>63</sup> 1-2 JEROME GILSON, GILSON ON TRADEMARKS 2.01 (2008).

<sup>64</sup> See generally *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4 (2d Cir. 1976) (providing a thorough explanation of distinctiveness).

<sup>65</sup> *Id.* at 9.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 11 n.12. Examples include the names “Kodak” and “Exxon.” Kodak, History of Kodak, <http://www.kodak.com/global/en/corp/historyOfKodak/historyIntro.jhtml?pq-path=2687> (last visited Mar. 2, 2009) (displaying the development of the Kodak logo); posting of Kevlou to Everything 2, <http://www.everything2.net/title/Exxon> (Aug. 30, 2002, 0:27:03 EST) (explaining how Exxon developed its name).

<sup>68</sup> See *infra* notes 224–30 and accompanying text (explaining the problems the U.S. Army has with its fanciful mark).

<sup>69</sup> *Abercrombie*, 537 F.2d at 9.

are actual words, but they are words used in an unusual way that do not describe the product.<sup>70</sup> The last group of inherently distinctive marks, suggestive marks, requires imagination to connect the mark with the source.<sup>71</sup>

## 2. Potentially Distinctive Marks

Descriptive marks are similar to suggestive marks, but there is no leap required to associate the mark with the source; these marks tell something about the actual product.<sup>72</sup> Descriptive marks enjoy trademark protection as distinctive marks unless they are merely descriptive.<sup>73</sup>

A mark is merely descriptive if it immediately conveys to one seeing or hearing it knowledge of the ingredients, qualities, or characteristics of the goods or services with which it is used; whereas, a mark is suggestive if imagination, thought, or perception is required to reach a conclusion on the nature of the goods or services.<sup>74</sup>

Trademark law, however, protects merely descriptive marks that acquire secondary meaning.<sup>75</sup> “Secondary meaning will be acquired when most

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<sup>70</sup> *Id.* at 11 n.12. Examples include Sun for microcomputers and Apple for home computers.

<sup>71</sup> *Id.* at 11 (citing *Stix Prods., Inc. v. United Merchs. & Mfrs. Inc.*, 295 F. Supp. 479, 488 (S.D.N.Y. 1968)). An example of a suggestive mark is Amazon.com. Amazon.com does not sell items associated with the Amazon River instead, the name suggests that the selection on Amazon.com is as large as the river. The logo reinforces this idea as an arrow under the Amazon.com logo points from the “A” to the “Z” meaning the website has everything from “A” to “Z.” Amazon.com Home Page, <http://www.amazon.com/> (last visited May 18, 2009).

<sup>72</sup> *Id.* at 10. For example, “Holiday Inn” describes a hotel; “All Bran” describes a cereal; and “Vision Center” describes an eyeglass shop. Harvard Law Sch., Overview of Trademark Law, <http://cyber.law.harvard.edu/metaschool/fisher/domain/tm.htm> (last visited Jan. 8, 2009). Trademark law protects these descriptive marks.

<sup>73</sup> Lanham Act, 15 U.S.C. § 1052 (2006). Merely descriptive examples include “Fast Baud” for modems, “104 Key” for keyboards and “Light” for laptops. Daniel A. Tysver, *Strength of Trademarks*, Bit Law, <http://www.bitlaw.com/trademark/degrees.html> (last visited Jan. 8, 2009).

<sup>74</sup> *In re Application of Quik-Print Copy Shops, Inc.*, 616 F.2d 523, 525 (C.C.P.A. 1980) (quoting *In re Abcor Dev. Corp.*, 588 F.2d 811, 813–14 (C.C.P.A. 1978)).

<sup>75</sup> *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4, 9 (2d Cir. 1976). Examples of descriptive marks that have attained secondary meaning include “Kool” for

consumers think of a word not as descriptive but as the name of the product. Advertising, sales, and use will tend to establish secondary meaning.”<sup>76</sup> The test to gain protection is whether consumers mentally link the mark with the source of the product.<sup>77</sup>

West Point provides a perfect example of the transformation from a descriptive mark that has attained secondary meaning.<sup>78</sup> The military referred to the west bank of the Hudson River as West Point during the Revolutionary War.<sup>79</sup> Consequently, West Point referred to its geographical location and was thus descriptive. However, over the past 200 years, West Point has come to identify the source of the product rather than the location.<sup>80</sup>

### 3. *Non-distinctive Marks*

A mark is generic and thus non-distinctive “if the primary significance of the trademark is to describe the type of product rather than the producer . . . .”<sup>81</sup> Trademark law does not protect generic marks.<sup>82</sup> An example of a generic term is shredded wheat, where the term describes the product and not the source.<sup>83</sup>

A mark that once enjoyed trademark protection as an inherently distinctive mark or as a potentially distinctive mark can eventually become generic.<sup>84</sup> This genericide<sup>85</sup> occurs when consumers relate a

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menthol cigarettes and “Chap Stick” for lip balm. Free Advice, Secondary Meaning—What is it?, [http://law.freeadvice.com/intellectual\\_property/trademark\\_law/secondary\\_meanings.htm](http://law.freeadvice.com/intellectual_property/trademark_law/secondary_meanings.htm) (last visited May 18, 2009).

<sup>76</sup> *Zatarains, Inc. v. Oak Grove Smokehouse, Inc.*, 698 F.2d 786, 795 (5th Cir. 1983).

<sup>77</sup> *Id.* at 794 (citing *Coca-Cola Co. v. Koke Co. of Am.*, 254 U.S. 143, 145 (1920)). Courts use survey evidence to prove whether the link exists. *Id.* at 795 (citing *Vision Ctr. v. Opticks, Inc.*, 596 F.2d 111, 119 (5th Cir. 1979)).

<sup>78</sup> U.S. Trademark No. 2320987 (filed Nov. 25, 1998).

<sup>79</sup> United States Military Acad., USMA Bicentennial, <http://www.usma.edu/bicentennial/history/> (last visited Jan. 22, 2010).

<sup>80</sup> *See* U.S. Trademark No. 2320987 (filed 25 Nov. 25 1998) (identifying the eight categories the West Point trademark is registered).

<sup>81</sup> *Filipino Yellow Pages, Inc. v. Asian Journal Publ'ns., Inc.*, 198 F.3d 1143, 1147 (9th Cir. 1999) (quoting *Anti-Monopoly, Inc. v. Gen. Mills Fun Group*, 611 F.2d 296, 304 (9th Cir. 1979) (emphasis added)).

<sup>82</sup> *Id.*

<sup>83</sup> *Kellogg Co. v. Nat'l Biscuit Co.*, 305 U.S. 111, 116 (1938).

<sup>84</sup> *King-Seeley Thermos Co. v. Aladdin Indus., Inc.*, 321 F.2d 577, 579 (2d Cir. 1963).

mark to the product rather than to the source of the product.<sup>86</sup> Companies must balance the risk of their mark becoming so well-known that it no longer serves as a source identifier with the desire to enhance the marketability of the product through consumer knowledge of the mark.<sup>87</sup> This also occurs in the U.S. Army. Later, this article will explain and discuss how the M4 mark became generic for carbine rifles.<sup>88</sup>

### C. Functionality

After determining that a mark is the proper subject matter of trademark law and that it is distinctive, companies have to ensure that it is not functional.<sup>89</sup> Functional marks are not subject to trademark protection.<sup>90</sup> A “functional feature” is something critical to the usability of a product; it is a design feature necessary for the item to work.<sup>91</sup> The U.S. Army’s digital pattern on the Army Combat Uniform (ACU) is an example of a functional feature.<sup>92</sup> When used on the ACU, the digital pattern serves as camouflage for a Soldier and is thus functional.

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<sup>85</sup> Genericide is “the deterioration of a trademark into a generic name.” 1-2 GILSON, *supra* note 63, at 2.02. Examples include “[y]o-yo, thermos, aspirin, cellophane, [and] escalator.” *Id.*

<sup>86</sup> *King-Seeley*, 321 F.2d at 578.

<sup>87</sup> Current examples of this include Federal Express and Google. Federal Express does not want “FedEx it” to generically mean ship something fast, but they still want people to think of their company when they want to ship something, enhancing their business. Similarly, Google does not want “Google it” to mean generally do an Internet search. Both companies want their marks to represent the sources of their services.

<sup>88</sup> *See infra* Part V.C and accompanying text (explaining the evolution from M4 as a registered trademark to its genericide demise).

<sup>89</sup> There are two types of functionality. De jure functionality occurs when a mark is essential to the operation of the product and you cannot make it another way “without either lessening the efficiency or materially increasing expense.” *In re Morton-Norwich Prods., Inc.*, 671 F.2d 1332, 1339 (C.C.P.A. 1982) (quoting *Luminous Unit Co. v. R. Williamson & Co.*, 241 F. 265, 269 (D. Ill. 1917)) (holding that the shape of a spray bottle is not functional). Aesthetic functionality, on the other hand, occurs when a feature “would significantly hinder competitors by limiting the range of adequate alternative designs.” *See Wallace Int’l Silversmiths, Inc. v. Godinger Silver Art Co.*, 916 F.2d 76, 82 (2d Cir. 1990) (holding that ornate Baroque patterning on silverware is aesthetically functional).

<sup>90</sup> *Morton*, 671 F.2d at 1343. *See supra* note 41 (explaining patent law protecting “functional” inventions).

<sup>91</sup> *See Traffix Devices, Inc. v. Mktg. Displays, Inc.*, 532 U.S. 23, 32 (2001) (quoting *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 165 (1995)).

<sup>92</sup> Chafin e-mail on 8 Jan. 2009, *supra* note 13.

However, when the Army Cadets used the digital pattern on their helmets at the 2008 Army/Navy football game, it was decorative and capable of trademark protection to connect the mark with the U.S. Army.<sup>93</sup>

#### D. Establishment of Rights: Use it or Lose it

A company must use the distinctive, non-functional mark in commerce to acquire trademark rights.<sup>94</sup> For example, the U.S. Army spent millions of dollars developing its current motto: “Army Strong.”<sup>95</sup> Additionally, use in commerce determines priority if two similar marks conflict.<sup>96</sup>

Actual use<sup>97</sup> establishes trademark rights and provides a priority date<sup>98</sup> under the Lanham Act.<sup>99</sup> Actual use provides a fixed date that

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<sup>93</sup> In fact, the digital pattern provided little *function* for Army in its loss to Navy with a score of 38 to 0. U.S. Naval Academy, Army-Navy Scores, <http://www.usna.edu/Lib/Exhibits/Archives/Armynavy/Scores.htm> (last visited Feb. 22, 2009).

<sup>94</sup> Lanham Act, 15 U.S.C. § 1127 (2006).

<sup>95</sup> Telephone Interview with J. Scott Chafin, Trademark and Copyright Att’y, in Arlington, Va. (Jan. 30, 2010) [hereinafter Chafin Interview]. Prior to “Army Strong,” the U.S. Army’s motto was “Army of One.” U.S. Trademark No. 2536272 (filed Feb. 6, 2001). This mark was later canceled. U.S. Trademark No. 2536272 (canceled Nov. 8, 2008).

<sup>96</sup> *Navistar Int’l Transp. Corp. v. Freightliner Corp.*, 1998 U.S. Dist. LEXIS 20284 (D. Ill. 1998) (citing *Zazu Designs v. L’Oreal, S.A.*, 979 F.2d 499, 503 (7th Cir. 1992)).

<sup>97</sup> Congress added the “use in commerce” language in the Lanham Act to fix the problems with the 1870 and 1876 Trademark Acts.

The term “use in commerce” means the bona fide use of a mark in the ordinary course of trade, and not made merely to reserve a right in a mark. For purposes of this Act, a mark shall be deemed to be in use in commerce—

(1) on goods when—

(A) it is placed in any manner on the goods or their containers or the displays associated therewith or on the tags or labels affixed thereto, or if the nature of the goods makes such placement impracticable, then on documents associated with the goods or their sale, and

(B) the goods are sold or transported in commerce, and

(2) on services when it is used or displayed in the sale or advertising of services and the services are rendered in commerce, or the services are rendered in more than one State or in the United States and a foreign country and the person rendering the services is engaged in commerce in connection with the services.

serves to provide the world with notice of who used a mark first when two companies dispute whose mark came first.<sup>100</sup> The test for actual use is to balance the totality of the circumstances to determine if a mark has crossed the threshold.<sup>101</sup> For example, pre-sale activities using a mark can amount to actual use when the public has an opportunity to associate the mark with the source.<sup>102</sup> When a mark crosses the threshold of actual use, it is finally worthy of trademark protection.

#### E. Registration

After a mark qualifies for trademark protection, the next step is to register the mark with the USPTO. Continuing with the “Army Strong” example, Mr. J. Scott Chafin filed for registration of this mark on 12 October 2006, and the USPTO ultimately registered the mark on 1 July 2008.<sup>103</sup> Registration offers many benefits to the trademark owner.

##### 1. Searches

Prior to registering or developing a new mark, a company should search prior trademark registrations to determine whether any potential conflicts exist.<sup>104</sup> The Trademark Electronic Search System provides free access to registered, pending, and abandoned applications.<sup>105</sup> After conducting a search, a company should check the Trademark Applications and Registrations Retrieval database to determine if the

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Lanham Act, 15 U.S.C. § 1127.

<sup>98</sup> The Lanham Act, section 44 allows registration of marks in the United States without actual use in the United States, as long as the mark is registered in a foreign country and a company has a bona fide intent to use the mark in the United States. *Id.* § 1126. This foreign registration date also gives the company a priority date in conflict situations. *Id.*

<sup>99</sup> *Id.* § 1127.

<sup>100</sup> *Id.* § 1126.

<sup>101</sup> *See Chance v. Pac-Tel Teletrac Inc.*, 242 F.3d 1151, *passim* (9th Cir. 2001) (holding that a public relations campaign using the mark, sending brochures with the mark in them, engaging in interviews discussing the mark, and marketing the product to potential large purchasers through slide presentations were enough pre-sale activities to establish actual use).

<sup>102</sup> *Id.* at 1159.

<sup>103</sup> U.S. Trademark No. 3458664 (filed Oct. 12, 2006).

<sup>104</sup> 37 C.F.R. § 2.83 (2009).

<sup>105</sup> U.S. PATENT AND TRADEMARK OFFICE, TRADEMARK MANUAL OF EXAMINING PROCEDURE 104 (5th ed. 2007) [hereinafter TMEP].

mark is still an active mark.<sup>106</sup> For example, if a company wanted to name a new soda product with the term “cola” in it, the company should conduct a search to identify other existing similar marks and active registrations.<sup>107</sup> A search for “Army Strong” revealed no conflicts.<sup>108</sup> A thorough search may prevent costly litigation expenses in an infringement suit and save money in developing a mark similar to an existing mark.<sup>109</sup>

## 2. Registration and Application

Once a company has identified a mark ready for registration, the next step is to select a single or combined application.<sup>110</sup> If a company applies for registration of its mark in only one class, the application is a single-class application.<sup>111</sup> However, if the company applies for more than one class, the application is a combined or multiple-class application.<sup>112</sup> The Trademark Manual of Examining Procedure includes over forty-five classes of marks.<sup>113</sup> Mr. Chafin registered “Army Strong” in five classes.<sup>114</sup> Nike also registers its marks in multiple classes, to include its swoosh mark in class 25, clothes, and class 28, sporting goods, among other classes.<sup>115</sup>

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<sup>106</sup> *Id.* at 102.

<sup>107</sup> U.S. Patent and Trademark Office, Trademark Electronic Search System (TESS), <http://tess2.uspto.gov/bin/gate.exe?f=searchss&state=91ukce.1.1> (search for “cola”) (last visited Jan. 14, 2009). A search of “cola” produced 878 records containing names such as Crazy Cola and Kiddie Health Cola. *Id.*

<sup>108</sup> The author inquired with Mr. Chafin whether any conflict issues existed in creating “Army Strong” vis-à-vis “Livestrong,” Lance Armstrong’s mark. First, Lance Armstrong’s company color is yellow (also one of the colors of the U.S. Army logo), as evidenced by its ubiquitous yellow wristbands. Wristbands, <http://www.store-laf.org/wristbands.html> (last visited Jan. 31, 2010). Second, both marks were developed around the same time frame. U.S. Trademark No. 3360223 (filed Sept. 20, 2006). Finally, if you merge Army with Strong and delete the “y,” you are left with ArmStrong. In Mr. Chafin’s view, these factors did not amount to a conflict.

<sup>109</sup> 1-3 GILSON, *supra* note 63, at 3.01(2).

<sup>110</sup> TMEP, *supra* note 105, at 801.01(a).

<sup>111</sup> *Id.* at 801.01(a).

<sup>112</sup> *Id.* at 801.01(b).

<sup>113</sup> *Id.* at 1401.02(a).

<sup>114</sup> Chafin Interview, *supra* note 95.

<sup>115</sup> Nike, Nike Help, [http://nike-eu.custhelp.com/cgi-bin/nike\\_ed.cfg/php/enduser/std\\_adp.php?p\\_faqid=6](http://nike-eu.custhelp.com/cgi-bin/nike_ed.cfg/php/enduser/std_adp.php?p_faqid=6) (last visited Jan. 19, 2009).

The USPTO's website offers an easy-to-use, web-based application to register a mark.<sup>116</sup> The Trademark Electronic Application System allows users to file an application for as little as \$275.<sup>117</sup>

### 3. Examination

Once an applicant files for registration, an examining attorney with the USPTO examines the application to determine whether it meets the criteria for federal registration.<sup>118</sup> The examining attorney searches registered, pending, and abandoned marks that may conflict with the applicant's mark.<sup>119</sup> If the application conflicts with an existing mark or has other problems, the examiner issues a letter to the applicant explaining the deficiency.<sup>120</sup> Otherwise, the examining attorney will continue the examination and evaluate the application on its merits.<sup>121</sup> After all objections are resolved, the USPTO will publish the mark in the Official Gazette.<sup>122</sup> If the application is based on actual use, the USPTO will issue a notice of allowance, registering the mark.<sup>123</sup> Once a mark is registered through the USPTO, the mark owner can use the ® symbol with the mark, providing notice to others that the mark is officially registered.<sup>124</sup>

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<sup>116</sup> TMEP, *supra* note 105, at 301.

<sup>117</sup> 37 C.F.R. § 2.207 (2009).

<sup>118</sup> *Id.* § 2.61(a).

<sup>119</sup> TMEP, *supra* note 105, at 104. "A complete examination includes a search for conflicting marks and an examination of the written application, the drawing and any specimen(s), to determine whether the mark is eligible for the type of registration requested, whether amendment is necessary, and whether all required fees have been paid." 37 C.F.R. § 2.61 (a) (2008).

<sup>120</sup> TMEP, *supra* note 105, at 705. An example of a problem would be not having enough information to conduct the search properly.

<sup>121</sup> *Id.*

<sup>122</sup> 37 C.F.R. § 2.80. *The Official Gazette* is the USPTO's weekly publication. U.S. Patent and Trademark Office, What Happens After I File My Application?, <http://www.uspto.gov/web/offices/tac/doc/basic/afterapp.htm#legal> (last visited 14 Jan. 2009).

<sup>123</sup> Lanham Act, 15 U.S.C. § 1063(b)(2) (2006). "The notice of allowance will list the serial number of the application, the name of the applicant, the correspondence address, the mark, the identification of goods/services, and the date of issuance of the notice of allowance." 37 C.F.R. § 2.81(b).

<sup>124</sup> TMEP, *supra* note 105, at 906.

The registration symbol should be used only on or in connection with the goods or services that are listed in the registration.

This lengthy process involves a great deal of communication between the lawyers seeking registration and the USPTO. However, once the USPTO grants registration, the owner of the trademark benefit greatly under the Lanham Act.

#### 4. *Advantages of Registration*

A registered mark will become part of the principal register, providing many advantages.<sup>125</sup> “[R]egistered trademarks are presumed to be distinctive and [are] afforded the utmost protection.”<sup>126</sup> Registration also allows the mark owner to exclusively use the registered mark in commerce.<sup>127</sup> Use of the ® symbol after a mark provides notice to the rest of the world that the mark belongs to the owner and that the owner has exclusive use rights.<sup>128</sup> Registration also provides the owner a date of constructive use<sup>129</sup> and the right to sue an infringer in federal court.<sup>130</sup> Lastly, unlike copyrights<sup>131</sup> and patents, which can only last for limited times,<sup>132</sup> trademark protection can last forever.<sup>133</sup>

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The federal registration symbol may not be used with marks that are not actually registered in the United States Patent and Trademark Office. Even if an application is pending, the registration symbol may not be used until the mark is registered.

*Id.* However, “[a] party may use terms such as ‘trademark,’ ‘trademark applied for,’ ‘TM’ and ‘SM’ regardless of whether a mark is registered. These are not official or statutory symbols of federal registration.” *Id.*

<sup>125</sup> *Id.* at 801.02(a).

<sup>126</sup> *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, 799 F.2d 867, 871 (2d Cir. 1986) (citing *Vibrant Sales, Inc. v. New Body Boutique, Inc.*, 652 F.2d 299, 304 (2d Cir. 1981)).

<sup>127</sup> Lanham Act, 15 U.S.C. § 1057(b) (2006).

<sup>128</sup> *Id.* § 1072.

<sup>129</sup> *Id.* § 1057(b), (c). The date of constructive use becomes important in determining priority when two marks dispute, which came first. *Id.*

<sup>130</sup> *Id.* § 1121. See *infra* notes 142 and 149 and accompanying text (explaining injunctions and damages).

<sup>131</sup> “Copyright in a work created on or after January 1, 1978, subsists from its creation and, except as provided by the following subsections, endures for a term consisting of the life of the author and 70 years after the author’s death.” 17 U.S.C. § 302 (2006).

<sup>132</sup> “Subject to the payment of fees under this title, such grant shall be for a term beginning on the date on which the patent issues and ending 20 years from the date on which the application for the patent was filed in the United States . . . .” The U.S. Patent Act, 35 U.S.C. § 154 (2006).

<sup>133</sup> Congress has the power “[t]o promote the progress of science and useful arts, by securing for *limited times*, to authors and inventors, the exclusive right to their respective

## F. Protections of Trademark Law

In addition to the advantages mentioned in the previous section, the Lanham Act also provides broad protection against infringing uses. The Lanham Act guards against the likelihood of confusion between similar marks and dilution from one mark to another. These two protections are explained below.

### 1. Likelihood of Confusion

The Lanham Act protects against the likelihood of confusion.<sup>134</sup> Likelihood of confusion occurs when consumers confuse the origin of a mark.<sup>135</sup> The confusion allows the infringer to capitalize on the situation and ultimately steal business and goodwill.<sup>136</sup> Likelihood of confusion with another mark is the test for trademark infringement.<sup>137</sup> In 1973, the Court of Appeals for the Federal Circuit, in the *DuPont* case, established factors to consider in determining the likelihood of confusion.<sup>138</sup> The appellant, DuPont, appealed the Trademark Trial and Appeal Board's<sup>139</sup> refusal to register the mark for its cleaning product, Rally, "a

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writings and discoveries." U.S. CONST. art. I, § 8, cl. 8. Although trademark protection can last forever, the Lanham Act provides as follows:

(a) Each registration shall remain in force for 10 years, except that the registration of any mark shall be canceled by the Director for failure to comply with the provisions of subsection (b) of this section, upon the expiration of the following time periods, as applicable:

(1) For registrations issued pursuant to the provisions of this Act, at the end of 6 years following the date of registration.

(2) For registrations published under the provisions of section 12(c) [15 USCS § 1062(c)], at the end of 6 years following the date of publication under such section.

(3) For all registrations, at the end of each successive 10-year period following the date of registration.

15 U.S.C. § 1058 (2006). Coke and Nike are long-standing trademarks.

<sup>134</sup> *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, 799 F.2d 867, 871 (2d Cir. 1986).

<sup>135</sup> 15 U.S.C. § 1125(a)(1).

<sup>136</sup> *Id.* (preventing a "false designation of origin").

<sup>137</sup> *Tisch Hotels, Inc. v. Americana Inn, Inc.*, 350 F.2d 609, 611 (7th Cir. 1965).

<sup>138</sup> *In re E. I. Du Pont de Nemours & Co.*, 476 F.2d 1357 (C.C.P.A. 1973).

<sup>139</sup> Companies appeal final denial decisions of examiners to the Trademark Trial and Appeal Board. 15 U.S.C. § 1070. State and federal courts handle infringement disputes. 2-7 GILSON, *supra* note 63, at 704 (federal trademark law does not pre-empt state trademark law).

combination polishing, glazing and cleaning agent for use on automobiles” because of the “likelihood of confusion under section 2(d) of the Lanham Act.”<sup>140</sup> To decide the case, the Court utilized the factors, now known as the “*Du Pont* factors,” in determining if a likelihood of confusion exists with another mark.<sup>141</sup> Courts have also used various combinations of the thirteen factors in their decisions.<sup>142</sup>

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<sup>140</sup> *Du Pont*, 476 F.2d at 1359.

<sup>141</sup> The thirteen *Du Pont* factors are:

- (1) The similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression.
- (2) The similarity or dissimilarity and nature of the goods or services as described in an application or registration or in connection with which a prior mark is in use.
- (3) The similarity or dissimilarity of established, likely-to-continue trade channels.
- (4) The conditions under which and buyers to whom sales are made, i.e. “impulse” vs. careful, sophisticated purchasing.
- (5) The fame of the prior mark (sales, advertising, length of use).
- (6) The number and nature of similar marks in use on similar goods.
- (7) The nature and extent of any actual confusion.
- (8) The length of time during and conditions under which there has been concurrent use without evidence of actual confusion.
- (9) The variety of goods on which a mark is or is not used (house mark, “family” mark, product mark).
- (10) The market interface between applicant and the owner of a prior mark:
  - (a) a mere “consent” to register or use.
  - (b) agreement provisions designed to preclude confusion, i.e. limitations on continued use of the marks by each party.
  - (c) assignment of mark, application, registration and good will of the related business.
  - (d) laches and estoppel attributable to owner of prior mark and indicative of lack of confusion.
- (11) The extent to which applicant has a right to exclude others from use of its mark on its goods.
- (12) The extent of potential confusion, i.e., whether de minimis or substantial.
- (13) Any other established fact probative of the effect of use.

*Id.* at 1361.

<sup>142</sup> *In re Dixie Rests.*, 105 F.3d 1405, 1406–07 (Fed. Cir. 1997) (quoting *Opryland USA Inc. v. Great Am. Music Show*, 970 F.2d 847, 850 (Fed. Cir. 1992)). See *infra* Appendix A (listing of the various tests other jurisdictions use to determine likelihood of confusion).

## 2. Dilution

Dilution is a second cause of action, often unrelated to infringement by likelihood of confusion.<sup>143</sup> Unlike trademark infringement, dilution does not require confusion or economic injury, rather the two forms of dilution require the mark to have once been famous.<sup>144</sup> Generally, dilution occurs when a third-party uses a mark in such a way that it weakens the connection between that mark and the mark's owner.<sup>145</sup> Specifically, dilution occurs by blurring or tarnishment, but both have the same weakening effect on a mark.<sup>146</sup>

Dilution has a significant role vis-à-vis U.S. Army trademarks in that the Army could lose the rights to its marks through the doctrine of dilution. This article will discuss later how this doctrine applies to U.S. Army marks.<sup>147</sup> Dilution by blurring impairs or reduces the distinctiveness of a famous mark.<sup>148</sup> For example, in *McNeil Consumer Brands v. United States Dentek Corp.*, the maker of Tylenol sued the maker of Tempanol.<sup>149</sup> The *McNeil* court found that Tylenol was a

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<sup>143</sup> *Autozone, Inc. v. Strick*, 466 F. Supp. 2d 1034, 1045 (N.D. Ill. 2006). The Trademark Dilution Revision Act of 2006 adds a likelihood of dilution cause of action to actual dilution. *Id.* at 1044–45.

<sup>144</sup> Lanham Act, 15 U.S.C. § 1125(c)(1) (2006). Famous, under this section, means that the mark has inherent distinctiveness. *N.Y. Stock Exch., Inc. v. N.Y., N.Y. Hotel, LLC*, 293 F.3d 550, 556 (2d Cir. 2002).

<sup>145</sup> *Mattel, Inc. v. MCA Records*, 296 F.3d 894, 903 (9th Cir. 2002) (quoting *Lund Trading ApS v. Kohler Co.*, 163 F.3d 27, 50 (1st Cir. 1998)).

<sup>146</sup> *Deborah Heart & Lung Ctr. v. Children of the World Found., Ltd.*, 99 F. Supp. 2d 481, 492 (D. N.J. 2000).

<sup>147</sup> See *infra* Part V.D.2 and accompanying text.

<sup>148</sup> 15 U.S.C. § 1125(c)(2)(B). In determining dilution by blurring, courts consider the following factors:

- (i) The degree of similarity between the mark or trade name and the famous mark.
- (ii) The degree of inherent or acquired distinctiveness of the famous mark.
- (iii) The extent to which the owner of the famous mark is engaging in substantially exclusive use of the mark.
- (iv) The degree of recognition of the famous mark.
- (v) Whether the user of the mark or trade name intended to create an association with the famous mark.
- (vi) Any actual association between the mark or trade name and the famous mark.

*Id.*

<sup>149</sup> *McNeil Consumer Brands v. United States Dentek Corp.*, 116 F. Supp. 2d 604, 605

famous mark known across the United States for decades.<sup>150</sup> The court analyzed all the dilution factors, but focused mainly on the degree of similarity between the two marks, finding that both Tylenol and Tempanol sounded alike, started with the letter “T,” had three syllables, and ended in “-ol.”<sup>151</sup> Additionally, both products were over-the-counter pain relievers, Tempanol for dental pain and Tylenol for general pain.<sup>152</sup> The court held that the use of the Tempanol name blurred the Tylenol mark by making it “vague and less distinctive.”<sup>153</sup> Other examples of dilution by blurring include the use of “DuPont [for] shoes, Buick [for] aspirin, Kodak [for] pianos, and Bulova [for] dresses.”<sup>154</sup>

By contrast, dilution by tarnishment is when a third party uses a mark, similar to a famous mark, that results in harm to “the reputation of the famous mark.”<sup>155</sup> In *Grey v. Campbell Soup Co.*,<sup>156</sup> Cynthia Grey sold dog biscuits under the name “Dogiva.” Upon learning of this, Campbell Soup, owner of Godiva chocolates, sued Grey based on dilution of the name Godiva.<sup>157</sup> The Ninth Circuit found Godiva to be inherently distinctive and worthy of dilution protection.<sup>158</sup> The Ninth Circuit also found that the use of Dogiva would “whittl[e] away the distinctiveness” of Godiva and held that the use of Dogiva would likely dilute Godiva’s mark as being inherently distinctive.<sup>159</sup>

Thus far, the two forms of infringement and examples of each have been identified—likelihood of confusion and dilution. Once an infringer violates the Lanham Act, the owner has several options to address the infringer.

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(E.D. Pa. 2000).

<sup>150</sup> *Id.* at 606–07.

<sup>151</sup> *Id.* at 607–08.

<sup>152</sup> *Id.* at 608.

<sup>153</sup> *Id.* at 609. *But see* *Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC*, 507 F.3d 252, 268–69 (4th Cir. 2007) (holding that Chewy Vuiton, a line of dog toys, was a parody of and did not dilute Louis Vuitton, a line of expensive handbags).

<sup>154</sup> *Trademark Law Advisory: Ending the Confusion about Dilution*, Husch Blackwell Sanders LLP, Jan. 1, 2007, <http://www.welshkatz.com/?t=11&1a=42&format=xml&p=822>.

<sup>155</sup> Lanham Act, 15 U.S.C. § 1125(c)(2)(C) (2006).

<sup>156</sup> 650 F. Supp. 1166, 1168 (C.D. Cal. 1986).

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 1175.

<sup>159</sup> *Id.*

### G. Remedies for Infringement

Inevitably, companies often find themselves victims of infringement by likelihood of confusion or dilution. In such situations, the Lanham Act provides two major remedies. The first major remedy utilized is an injunction to immediately cease the infringing use. In the second major remedy, a company sues for monetary recovery from loss of goodwill.

#### 1. Injunction

The Lanham Act allows courts to grant injunctions to protect marks registered with the USPTO against any violation of the Act.<sup>160</sup> The Fifth Circuit Court of Appeals, in *Vision Ctr. v. Opticks, Inc.*, outlined the criteria, used by the majority of courts today, to determine whether an injunction is necessary in a trademark dispute.<sup>161</sup> The criteria include:

- (1) a substantial likelihood that the movant will ultimately prevail on the merits;
- (2) a showing that the movant will suffer irreparable injury unless the injunction issues;
- (3) proof that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party;
- and (4) a showing that the injunction, if issued, would not be adverse to the public interest.<sup>162</sup>

The criteria do not require actual injury, only a likelihood of injury.<sup>163</sup> Even if an infringer has ceased infringing, an injunction is appropriate when the future acts of the infringer are uncertain.<sup>164</sup> However, threat of infringement alone is enough to satisfy injunction requirements.<sup>165</sup> If a court finds actual trademark infringement under the criteria, the intent of

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<sup>160</sup> 15 U.S.C. § 1116(a). *See id.* § 1125 (outlining the various civil actions).

<sup>161</sup> *Vision Ctr. v. Opticks, Inc.*, 596 F.2d 111, 114 (5th Cir. 1979) (quoting *State of Texas v. Seatrain Int'l, S.A.*, 518 F.2d 175, 179 (5th Cir. 1975)).

<sup>162</sup> *Id.* A minority of circuits have similar criteria in issuing an injunction. *See I.P. Lund Trading ApS v. Kohler Co.*, 163 F.3d 27, 33 (1st Cir. 1998) (citing *TEC Eng'g Corp. v. Budget Molders Supply*, 82 F.3d 542, 544 (1st Cir. 1996)) (outlining the four elements for the First Circuit); *see also TCPIP Holding Co. v. Haar Communs.*, 244 F.3d 88, 92 (2d Cir. 2001) (citing *Fed. Express Corp. v. Fed. Espresso, Inc.*, 201 F.3d 168, 173 (2d Cir. 2000)) (outlining the two elements for the Second Circuit).

<sup>163</sup> *Pure Foods, Inc. v. Minute Maid Corp.*, 214 F.2d 792, 797 (5th Cir. 1954).

<sup>164</sup> *Heaton Distrib. Co. v. Union Tank Car Co.*, 387 F.2d 477, 486 (8th Cir. 1967).

<sup>165</sup> *Chemical Corp. of Am. v. Anheuser-Busch, Inc.*, 306 F.2d 433, 439 (5th Cir. 1962).

the infringer is irrelevant and an injunction is appropriate.<sup>166</sup> The U.S. Army would be capable of requesting such relief and has obtained such orders in at least two instances.<sup>167</sup>

Recently, the Department of Justice filed an injunction against a company infringing the AFIP mark.<sup>168</sup> AFIP stands for the Armed Forces Institute of Pathology and provides “[w]orld-class, life-saving diagnostic consultations on pathologic specimens from military, veterans, and civilian medical, dental and veterinary sources.”<sup>169</sup> “Ask AFIP” is a registered service mark providing Internet support to the field of medicine.<sup>170</sup> In 2005, the Defense Base Closure and Realignment and Closure (BRAC) Commission recommended “disestablish[ing] all elements of the Armed Forces Institute of Pathology . . . .”<sup>171</sup> As a result, “the Department [of Defense] will rely on the civilian market for second opinion pathology consults and initial diagnosis when the local pathology labs capabilities are exceeded.”<sup>172</sup> Subsequent to this announcement, AFIP Laboratories, a private company, emerged looking to capitalize on this new opportunity.<sup>173</sup> The Department of Justice sought an injunction against AFIP Laboratories citing that the company attempted to use the fame and goodwill of the Armed Forces Institute of Pathology.<sup>174</sup> Although ultimately successful, the injunction came at great time and expense.<sup>175</sup>

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<sup>166</sup> *Coty, Inc. v. Parfums De Grande Luxe, Inc.*, 298 F. 865, 869 (2d Cir. 1924).

<sup>167</sup> Chafin Interview, *supra* note 95. Conversely, no company has ever received an injunction against the U.S. Army. *Id.* The primary reason is that if a U.S. Army use ever amounted to infringement, the U.S. Army would cease the use prior to a company filing for an injunction. *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> Armed Forces Institute of Pathology Home Page, <http://www.afip.org/> (last visited Jan. 30, 2010).

<sup>170</sup> U.S. Trademark No. 3206308 (filed May 30, 2006).

<sup>171</sup> U.S. DEP’T OF DEF., 2005 DEFENSE BASE CLOSURE AND REALIGNMENT COMM’N, FINAL REP. 257 (Sept. 2005), available at <http://www.brac.gov/docs/final/Volume1BRACReport.pdf>.

<sup>172</sup> *Id.* at 258.

<sup>173</sup> *Newly-Formed AFIP Laboratories Fills Critical Void Left by Scheduled Closure of Walter Reed Army Medical Center*, EARTH TIMES, Aug. 7, 2009, <http://www.eathtimes.org/articles/show/newly-formed-afip-laboratories-fills-critical,920449.shtml>.

<sup>174</sup> Chafin Interview, *supra* note 95.

<sup>175</sup> *Id.* The URL cited in the AFIP Laboratories article, <http://www.afiplaboratories.com>, no longer links to the company. See <http://www.afiplaboratories.com> (last visited Jan. 31, 2010).

## 2. Monetary Recovery

The Lanham Act also allows a plaintiff to recover damages, the defendant's profits, and the costs of the suit.<sup>176</sup> Courts award damages to compensate the trademark owner for violations by the infringer.<sup>177</sup> The Lanham Act, though, does not provide for punitive damages.<sup>178</sup> It does provide, however, for recovery of a defendant's profits.<sup>179</sup> Such recovery compensates the trademark owner for lost sales, prevents unjust enrichment, and deters infringement.<sup>180</sup> Additionally, courts may also award attorney fees in "exceptional cases."<sup>181</sup>

An injunction and monetary recovery provide deterrence and recourse for an aggrieved party.<sup>182</sup> However, just because a likelihood of confusion or dilution exists, defenses often provide shelter to companies that use others' marks.

## H. Defenses

An alleged infringer is not left helpless under the Lanham Act. Registration of a mark under the Lanham Act provides conclusive evidence that the registrant owns the valid mark and that the registrant has the "exclusive right to use the mark in commerce . . . ."<sup>183</sup> The Lanham Act enumerates nine defenses to this conclusive evidence.<sup>184</sup> Of

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<sup>176</sup> Lanham Act, 15 U.S.C. § 1117(a) (2006). *See id.* § 1125 (outlining the violations under the Lanham Act).

<sup>177</sup> *Caesars World, Inc. v. Venus Lounge, Inc.*, 520 F.2d 269, 274 (3d Cir. 1975) (quoting *Elecs. Corp. of Am. v. Honeywell, Inc.*, 358 F. Supp. 1230, 1232 (D. Mass. 1973)).

<sup>178</sup> *Dial One of the Mid-South, Inc. v. BellSouth Telcomms., Inc.*, 269 F.3d 523, 527 (5th Cir. 2001).

<sup>179</sup> 15 U.S.C. § 1117(a).

<sup>180</sup> *Maltina Corp. v. Cawy Bottling Co.*, 613 F.2d 582, 584–85 (5th Cir. 1980).

<sup>181</sup> 15 U.S.C. § 1117(a). *See Taco Cabana Int'l, Inc. v. Two Pesos, Inc.*, 932 F.2d 1113, 1117 (5th Cir. 1991) (awarding \$937,550 in attorney's fees).

<sup>182</sup> The U.S. Army is primarily concerned with ceasing any unauthorized uses, not making money from damages. Chafin Interview, *supra* note 95. To date, the U.S. Army has not received damages from any infringing use. *Id.* Ultimately, if a company has infringed on a U.S. Army mark, the company has either ceased the infringing activity or become a licensee of the U.S. Army. *Id.*

<sup>183</sup> 15 U.S.C. § 1115(b).

<sup>184</sup> *Id.* The defenses include the following:

- (1) That the registration or the incontestable right to use the mark was obtained fraudulently; or

the nine, the most relevant to the U.S. Army is the defense of abandonment.<sup>185</sup>

The defenses for patents and copyrights are very similar to trademarks.<sup>186</sup> Under the Lanham Act, a mark is abandoned when the owner stops using its mark and intends to discontinue the use of its mark or when the mark becomes generic.<sup>187</sup> Courts have created other similar doctrines that operate in the same manner as abandonment. For example,

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- (2) That the mark has been abandoned by the registrant; or
  - (3) That the registered mark is being used, by or with the permission of the registrant or a person in privity with the registrant, so as to misrepresent the source of the goods or services on or in connection with which the mark is used; or
  - (4) That the use of the name, term, or device charged to be an infringement is a use, otherwise than as a mark, of the party's individual name in his own business, or of the individual name of anyone in privity with such party, or of a term or device which is descriptive of and used fairly and in good faith only to describe the goods or services of such party, or their geographic origin; or
  - (5) That the mark whose use by a party is charged as an infringement was adopted without knowledge of the registrant's prior use and has been continuously used by such party or those in privity with him from a date prior to (A) the date of constructive use of the mark established pursuant to section 7(c) [15 USCS § 1057(c)], (B) the registration of the mark under this Act if the application for registration is filed before the effective date of the Trademark Law Revision Act of 1988, or (C) publication of the registered mark under subsection (c) of section 12 of this Act [15 USCS § 1062(c)]: *Provided, however,* That this defense or defect shall apply only for the area in which such continuous prior use is proved; or
  - (6) That the mark whose use is charged as an infringement was registered and used prior to the registration under this Act or publication under subsection (c) of section 12 of this Act [15 USCS § 1062(c)] of the registered mark of the registrant, and not abandoned: *Provided, however,* That this defense or defect shall apply only for the area in which the mark was used prior to such registration or such publication of the registrant's mark; or
  - (7) That the mark has been or is being used to violate the antitrust laws of the United States; or
  - (8) That the mark is functional; or
  - (9) That equitable principles, including laches, estoppel, and acquiescence, are applicable.

*Id.*

<sup>185</sup> Chafin Interview, *supra* note 22.

<sup>186</sup> The Copyright Act, 17 U.S.C. §§ 107–112 (2006); The U.S. Patent Act, 35 U.S.C. §§ 273, 282 (2006).

<sup>187</sup> 15 U.S.C. § 1127.

naked licensing of a mark, in which a mark owner fails to provide quality control of its product, results in abandonment.<sup>188</sup> Failing to police a mark also results in abandonment.<sup>189</sup> Both of these doctrines and examples will be discussed below.<sup>190</sup>

Keeping in mind the background of basic trademarks, how they function in the commercial world, and defenses to trademark infringement claims, the following sections will explore the current state of trademarks in the U.S. Army.

#### IV. Current State of Trademarks in the U.S. Army

Primarily because of the unique nature of the U.S. Army, its marks are quite different from those in the commercial world. After all, the U.S. Army is in the business of providing for the nation's defense.<sup>191</sup>

To build the nation's defense, the U.S. Army must recruit individuals.<sup>192</sup> In its mission, the U.S. Army uses its phrases and symbols to attract recruits and retain Soldiers.<sup>193</sup> "The many symbols, names, insignia and logos of the Army represent the time-honored qualities of the Army and its service to the Nation. They operate as legally-recognized marks and are invested with goodwill deserving of protection."<sup>194</sup> The U.S. Army recruits Soldiers and protects its goodwill by licensing its phrases and symbols.<sup>195</sup> A goal of the licensing program is to "[e]nhanc[e] the name, reputation and public goodwill of the DoD Components through a broad brand promotion and licensing program that provides quality branded products and services at reasonable

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<sup>188</sup> *Westco Group, Inc. v. K.B. & Assocs.*, 128 F. Supp. 2d 1082, 1088 (N.D. Ohio 2001) (citing *Gorenstein Enters. v. Quality Care-USA*, 874 F.2d 431, 435 (7th Cir. 1989)). See *infra* note 250 and accompanying text (explaining naked licenses).

<sup>189</sup> *Margaret Wendt Found. Holdings, Inc. v. Roycroft Assocs.*, 2007 U.S. Dist. LEXIS 76429 (W.D.N.Y. Oct. 11, 2007) (quoting *Hermes Int'l v. Lederer de Paris Fifth Ave., Inc.*, 219 F.3d 104, 110 (2d Cir. 2000)). See *infra* Part V.D.1 and accompanying text (explaining failure to police).

<sup>190</sup> See *infra* note 250 and accompanying text (explaining naked licenses). See *infra* Part V.D.1 and accompanying text (explaining failure to police).

<sup>191</sup> U.S. Army, *GoArmy.com*, About the Army, Overview, <http://www.goarmy.com/about/index.jsp> (last visited Jan. 25, 2009).

<sup>192</sup> See generally U.S. Army Recruiting Command Home Page, <http://www.usarec.army.mil/> (last visited Jan. 25, 2009) (providing a background in U.S. Army recruiting).

<sup>193</sup> DoDD 5535.09, *supra* note 22, at 3.

<sup>194</sup> James Memo, *supra* note 8.

<sup>195</sup> DoDD 5535.09, *supra* note 22, at 3.

prices.”<sup>196</sup> The licensing program also “[s]trengthen[s] the marks of the DoD Components through licensing and by expanding the number of registered trademarks they own both in the United States and abroad.”<sup>197</sup> Recent legislation permits the military to retain income from licensing.<sup>198</sup> This licensing produced over \$2 million in retained income for fiscal year 2008.<sup>199</sup> It also led senior U.S. Army leaders to inquire into the protections afforded to U.S. Army’s phrases and symbols.<sup>200</sup> Although there is great potential for further income, the following part will explore a number of limitations affecting the Army.

#### V. Why Trademark Law Does Not Protect all of the U.S. Army’s Marks

Increased scrutiny of U.S. Army trademark protections has revealed that trademark law is too cumbersome a process to protect all U.S. Army marks. Gaining protection under the Lanham Act requires using a mark in commerce, registering the mark with the USPTO, paying fees, and enforcing any infringement.<sup>201</sup> However, the Lanham Act adequately protects at least some well-known U.S. Army marks.<sup>202</sup> Less famous phrases and symbols require additional protection as discussed below.

##### A. Use in Commerce

The Lanham Act protects U.S. Army phrases and symbols<sup>203</sup> used “in commerce.”<sup>204</sup> “The term ‘use in commerce’ means the bona fide use of a mark in the ordinary course of trade . . . .”<sup>205</sup> Widely-known phrases

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<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> Disbursements Out of Available Advances for Obligations Chargeable to Appropriations of Other Departments/Agencies, 10 U.S.C. § 2206 (2006).

<sup>199</sup> Chafin Interview, *supra* note 22. See generally Marine Corps Licensing, <https://author.marines.mil/unit/divpa/tmlo/Pages/welcome.aspx> (last visited Feb. 1, 2010).

<sup>200</sup> *Id.* See also James Memo, *supra* note 8.

<sup>201</sup> 15 U.S.C. §§ 1113, 1114, 1115, 1127.

<sup>202</sup> James Memo, *supra* note 8 (noting specifically the U.S. Army’s symbol (black and gold star)).

<sup>203</sup> From this point on, this article uses the terms “phrases” and “symbols” instead of marks to signify that not all U.S. Army phrases and symbols are marks afforded protection under the Lanham Act.

<sup>204</sup> Strasser, *supra* note 51, at 427.

<sup>205</sup> 15 U.S.C. § 1127.

protected by the Lanham Act include “BE ALL YOU CAN BE”<sup>206</sup> and “ARMY STRONG.”<sup>207</sup> Other widely-known U.S. Army symbols receiving protection include the U.S. Army logo<sup>208</sup> and the U.S. Army Reserve logo.<sup>209</sup> Used in television commercials, on recruiting t-shirts, and even on bumper stickers, the Lanham Act adequately protects these famous phrases and symbols because the U.S. Army uses them as traditional trademarks.

Now imagine if the well-known motto “BE ALL YOU CAN BE” identified laundry starch or if West Point’s mascot, the Army Mule, identified an Alabama sporting goods and military surplus store.<sup>210</sup> Despite the protections offered to some of the U.S. Army’s famous phrases and symbols by the Lanham Act, many lesser-known phrases and symbols have never been on television, on recruiting t-shirts, or on bumper stickers. For example, very few unit crests, badges,<sup>211</sup> and tabs<sup>212</sup> have been on television or advertised in outlets such as Wal-Mart.<sup>213</sup> Consequently, if these symbols are not considered used in the traditional sense of commerce, the Lanham Act does not attach protections. Something more is needed to fill this gap in protection.

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<sup>206</sup> U.S. Trademark No. 78888832 (filed May 22, 2006). *See supra* note 11 (explaining the origin of the phrase).

<sup>207</sup> U.S. Trademark No. 3458664 (filed Oct. 12, 2006). *See infra* note 352 and accompanying text.

<sup>208</sup> U.S. Trademark No. 2908608 (filed Oct. 24, 2003).

<sup>209</sup> U.S. Trademark No. 2676969 (filed Sept. 27, 2001).

<sup>210</sup> Altherr, *supra* note 20, at 52.

<sup>211</sup> Examples include: Airborne, Air Assault, and Diver.

<sup>212</sup> Examples include: Ranger, Sapper, Airborne, Mountain, and Special Forces.

<sup>213</sup> *See Sears Announces Launch of All American Army Brand First Infantry Collection*, REUTERS, Sept. 2, 2008, available at <http://www.reuters.com/article/pressRelease/idUS162201+02-Sep-2008+PRN20080902>. For the first time, the U.S. Army licensed one of its division patches for use on commercial clothes. *Id.* *See also* Sears, US Army 1st Infantry Division Quilted Fleece—Model M0551 at Sears.com, [http://www.sears.com/shc/s/p\\_10153\\_12605\\_041M0551000P?yNames=Clothing&cName=Men%27s&sName=Shirts](http://www.sears.com/shc/s/p_10153_12605_041M0551000P?yNames=Clothing&cName=Men%27s&sName=Shirts) (last visited Feb. 26, 2009) (displaying one of the jackets with the First Infantry patch).

## B. Ownership

In addition to the U.S. Army's unconventional use of phrases and symbols in commerce, many issues arise as to actual ownership of those phrases and symbols.<sup>214</sup>

The Army has numerous symbols such as unit patches (e.g., Screaming Eagles patch as popularized in *Band of Brothers*),<sup>215</sup> special skill badges (e.g., Airborne wings),<sup>216</sup> and rank (e.g., officer rank insignia),<sup>217</sup> and the collection continues to grow.<sup>218</sup> In fact, with the new BRAC recommendations, the need arises for new symbols.<sup>219</sup> Under BRAC, many Armor units from Fort Knox, Kentucky, will relocate and join the Infantry units at Fort Benning, Georgia, becoming the Maneuver Center of Excellence.<sup>220</sup> By necessity, a new installation patch for Fort Benning was created to unite the branches.<sup>221</sup> The increase in U.S. Army symbols results in additional registrations, fees, and time to gain protection under the Lanham Act.<sup>222</sup>

The U.S. Army also has ownership problems with its existing, famous marks.<sup>223</sup> In 1998, the U.S. Army filed and received two registrations for the term "Hooah!"<sup>224</sup> for energy bars included in U.S.

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<sup>214</sup> Telephone Interview with J. Scott Chafin, Trademark and Copyright Att'y, in Arlington, Va. (Sept. 12, 2008) [hereinafter Chafin Interview].

<sup>215</sup> See HBO: Band of Brothers: Homepage, <http://www.hbo.com/band-of-brothers/index.html> (last visited Jan. 29, 2010) (providing an image of a squad wearing the 101st Airborne Division's Screaming Eagles patch).

<sup>216</sup> See U.S. DEP'T OF ARMY, REG. 670-1, WEAR AND APPEARANCE OF ARMY UNIFORMS AND INSIGNIA para. 29-17 (3 Feb. 2005) (depicting special skill badges).

<sup>217</sup> *Id.* para. 28-6 (depicting rank insignias).

<sup>218</sup> Chafin Interview, *supra* note 214.

<sup>219</sup> Global Security, Fort Benning, <http://www.globalsecurity.org/military/facility/fortbenning.htm> (last visited Jan. 14, 2009).

<sup>220</sup> *Id.*

<sup>221</sup> Cheryl Rodewig, *MCOE Patch Represents Both Armor and Infantry*, BAYONET, Mar. 14, 2008, available at [http://www.thebayonet.com/articles/2008/03/14/news/top\\_stories/top03.txt](http://www.thebayonet.com/articles/2008/03/14/news/top_stories/top03.txt). See *infra* Appendix B for the patches of the Armor School, Infantry School, and Maneuver Center of Excellence.

<sup>222</sup> Using a mark in commerce while building its fame takes time.

<sup>223</sup> Chafin Interview, *supra* note 214.

<sup>224</sup> E-mail from J. Scott Chafin, Trademark and Copyright Att'y, USALSA, to author (27 Aug. 2008, 14:22 EST) [hereinafter Chafin e-mail] (on file with author). The design included Hooah! in a camouflage pattern. U.S. Trademark No. 2139165 (filed 14 Mar. 1997). The second design included only Hooah!. U.S. Trademark No. 2139166 (filed 14 Mar. 1997).

Army meal packages.<sup>225</sup> The energy bars enjoyed initial success in early 2004, and as a result, the U.S. Army entered into an agreement with D'Andrea Brothers LLC to license "Hooah!" for a commercial version of the energy bar.<sup>226</sup> Based on its initial license for energy bars, D'Andrea Brothers LLC, attempted to expand the scope of its license by registering the phrase with the USPTO in the clothing class.<sup>227</sup> Prior to this registration, the U.S. Army already licensed the phrase "Hooah!" to Lone Star Special Tees for clothing.<sup>228</sup> Due to the conflicting use, Lone Star Special Tees filed a civil action against D'Andrea Brothers LLC challenging their "Hooah!" registration.<sup>229</sup> The U.S. Army may have caused this ownership problem by not previously using "Hooah!" in commerce. This example typifies how the U.S. Army's lack of exclusive ownership of military-centric phrases provides other companies with the opportunity to use and exploit these phrases. Moreover, the lack of a clear mark owner in U.S. Army phrases demonstrates the gaps in traditional trademark protection.

Yet another example of an ownership problem is when a contractor received a trademark registration for the name of a local military installation's newspaper.<sup>230</sup> Many military installations have newspapers that serve the local interests and have a name that references the installation.<sup>231</sup> For example, the U.S. Army Infantry Center's local military newspaper is *The Bayonet*.<sup>232</sup> This references the bayonet contained in the former SSI for Fort Benning and depicted below.

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<sup>225</sup> Chafin e-mail, *supra* note 224.

<sup>226</sup> *Id.* The commercial version of the energy bar is still available. Amazon.com, Amazon.com: hooah energy – Health & Personal Care: Health & Personal Care, <http://www.amazon.com/s?ie=UTF8&keywords=hooah%20energy&search-type=best&tag=coffeeresearch33746-20&index=hpc-index&link%5Fcode=qs> (last visited Mar. 11, 2009). From 1998 to 2004, the U.S. Army did not use the phrase "Hooah!" in commerce and consequently other companies attempted to register the very similar, "Hooah!," in classes other than food. Chafin e-mail, *supra* note 224. One class included duffel bags, t-shirts and baseball caps. U.S. Trademark No. 2704976 (filed Sept. 30, 1999). Another class included sports drinks. U.S. Trademark No. 78440017 (filed June 23, 2004).

<sup>227</sup> Chafin e-mail, *supra* note 224. D'Andrea Brothers LLC also registered "Hooah!" for computer services. U.S. Trademark No. 3222600 (filed May 23, 2006).

<sup>228</sup> Chafin e-mail, *supra* note 224.

<sup>229</sup> *Id.*

<sup>230</sup> Altherr, *supra* note 20, at 53.

<sup>231</sup> *Id.*

<sup>232</sup> The Bayonet.com, <http://www.ledger-enquirer.com/bayonet/> (last visited Jan. 30, 2010). U.S. Trademark No. 1727534 (filed Oct. 27, 1992).



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Normally, there are no issues with a private company owning a newspaper bearing the name that has significance in the community. However, in one such instance, the newspaper company registered the name of the newspaper with the USPTO.<sup>234</sup> This proved problematic when the installation decided to award the newspaper contract to another company.<sup>235</sup> The federal registration prevented the new contract awardee from using the registered name.<sup>236</sup>

Supplemental protection will fill those gaps and prevent ownership issues such as the likelihood of confusion and endorsement. Private companies attempt to use phrases and symbols similar to those of the U.S. Army for gain. As mentioned previously, the USSOCOM's mission is to "[p]rovide fully capable Special Operations Forces to defend the United States and its interests."<sup>237</sup> To accomplish this mission, members of USSOCOM use a variety of weapons and equipment, but do not endorse the companies supplying their weapons and equipment. SOCOM GEAR<sup>238</sup> is an online company that sells tactical gear and weapons. SOCOM GEAR's website includes a logo (included earlier in the article<sup>239</sup>) displaying a tip of a spear with three rings around the shaft;

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<sup>233</sup> US Military Stuff, <http://www.usmilitarystuff.com/images/Infantry%20School%20Color.jpg> (last visited Jan. 14, 2009).

<sup>234</sup> Altherr, *supra* note 20, at 53.

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> Headquarters, U.S. Special Operations Command Home Page, <http://www.socom.mil/> (last visited Jan. 16, 2009).

<sup>238</sup> SOCOM GEAR, *supra* note 16.

<sup>239</sup> *See infra*.

two concentric ovals surround the spear; the next outer layer displays SOCOM GEAR; and another concentric oval surrounds that layer.<sup>240</sup> Similarly, USSOCOM's combatant command patch displays a tip of a spear with three rings around the shaft; two concentric ovals also surround the spear; "United States Special Operations Command" fills the next outer layer; and another concentric oval surrounds that layer.<sup>241</sup> In addition to the symbols' similarity in appearance, the name SOCOM GEAR sounds like USSOCOM.<sup>242</sup> Together, SOCOM GEAR's name and symbol may cause confusion with USSOCOM's name and symbol. Moreover, the total package appearance of SOCOM GEAR's name, symbol, and display of specialty military gear displayed on its website could lead a reasonable person to believe that USSOCOM endorses it.<sup>243</sup> This could be a reason why the SOCOM GEAR has changed its logo to the following:



In this example, a simple license from the U.S. Army to SOCOM GEAR would allow the use of USSOCOM's marks.

### C. Licensing

The Lanham Act allows an owner of a trademark to license its mark to another company, which presents another problem for the U.S. Army.<sup>245</sup> In licensing, an owner contracts with a related company<sup>246</sup> to

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<sup>240</sup> *Id.*

<sup>241</sup> *Id.*

<sup>242</sup> See *supra* notes 15 and 17 for a comparison.

<sup>243</sup> SOCOM GEAR, *supra* note 16.

<sup>244</sup> When I visited the SOCOM GEAR website on January 30, 2009, I found a different logo. SOCOM GEAR still displayed the other logo with the spear in different sections. SOCOM GEAR, *supra* note 16.

<sup>245</sup> Lanham Act, 15 U.S.C. § 1055 (2006).

use the mark without infringing on the owner's trademark rights.<sup>247</sup> However, one of the goals of the Lanham Act is to protect a company's investment in goodwill and a consumer's investment in an authentic product.<sup>248</sup> When allowing another company to use its marks, the trademark owner must still exercise control over the mark to ensure the quality of the good.<sup>249</sup>

Losing control of a mark in a licensing agreement can lead to naked licensing, a type of abandonment.<sup>250</sup> The Lanham Act maintains protection while still providing for licenses by requiring an owner to control the quality of its mark.<sup>251</sup> Maintaining control may mean quality checks of the products that bear its marks.<sup>252</sup> Without quality control measures in a license, the owner of a trademark creates a naked license, which does not comply with the intent of trademark law resulting in abandonment.<sup>253</sup>

Naked licensing examples may already exist in the U.S. Army. "Department of Army (DA) policy restricts the use of military designs

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<sup>246</sup> The term "related company" means any person whose use of a mark is controlled by the owner of the mark with respect to the nature and quality of the goods or services on or in connection with which the mark is used. *Id.* § 1127.

<sup>247</sup> 1-2 GILSON, *supra* note 63, at 6.01(2).

<sup>248</sup> *In re E. I. Du Pont de Nemours & Co.*, 476 F.2d 1357, 1360 (C.C.P.A. 1973) (quoting S. REP. NO. 1333, 79th Cong., 2d Sess. (1946), *in* U.S.C.C.A.N., 79th Cong., 2d Sess. at 1274-8 (1946)).

<sup>249</sup> 1-2 GILSON, *supra* note 63, at 6.01(2).

<sup>250</sup> *Westco Group, Inc. v. K.B. & Assocs.*, 128 F. Supp. 2d 1082, 1088 (N.D. Ohio 2001) (citing *Gorenstein Enters. v. Quality Care-USA*, 874 F.2d 431, 435 (7th Cir. 1989)).

A completely uncontrolled or "naked" trademark license constitutes an abandonment of the licensor's rights in the mark. Naked licenses deceive customers, who are entitled to rely on the mark as signifying consistency and predictability. If the licensor does not hold its licensees to a certain standard, the public will be misled by the use of the mark, whether or not the products are in fact of good quality.

2-6 GILSON, *supra* note 63, at 6.01(6)(e).

<sup>251</sup> 15 U.S.C. § 1055 (2006). *Westco*, 128 F. Supp. 2d at 1088 (quoting J. MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 18:42 (4th ed. 1997)).

<sup>252</sup> The U.S. Department of Agriculture maintains rigorous standards when licensing the Smokey Bear symbol. *See* Smokey Bear Style Guide, [http://www.smokeybear.com/resources/Style\\_Guide.pdf](http://www.smokeybear.com/resources/Style_Guide.pdf) (last visited Jan. 30, 2010).

<sup>253</sup> *Id.* (quoting *Exxon Corp. v. Oxxford Clothes, Inc.*, 109 F.3d 1070, 1074 (5th Cir. 1997)). *Id.* (quoting *Gorenstein Enters. v. Quality Care-USA*, 874 F.2d 431, 435 (7th Cir. Ill. 1989)).

for the needs or the benefit of Army personnel.”<sup>254</sup> However, DA policy allows certain U.S. Army symbols to be incorporated into products.<sup>255</sup>

The Institute of Heraldry (TIOH) is responsible for granting permission for the incorporation of certain Army designs in articles manufactured for sale. Commanders of units authorized a shoulder sleeve insignia (SSI) or a distinctive unit insignia (DUI) may authorize the reproduction of the SSI or DUI on commercial articles such as shirts, tie tacks, cups, or plaques . . . .<sup>256</sup>

With these relaxed rules, many commanders<sup>257</sup> have their unit’s SSI and DUI printed on car magnets, t-shirts, hats, coffee mugs, and almost anything else one can imagine.<sup>258</sup> Often, when commanders tell the staff to make unit coins, bumper stickers, or flags with their unit’s SSI or DUI, they do not create a license for their symbols.<sup>259</sup> Further, the commanders often do not check on the quality of the products.<sup>260</sup> Moreover, TIOH rarely learns of the authorizations, because AR 672-8 does not require notification.<sup>261</sup> As most commanders are not attorneys specializing in trademark law, they tend to overlook the full impact their actions have on U.S. Army symbols. Consequently, the authorization afforded by AR 672-8 could amount to a naked license and result in abandonment of the symbols used under the Lanham Act.

Larger problems also exist outside of the U.S. Army where companies try to capitalize on U.S. Army marks.

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<sup>254</sup> AR 672-8, *supra* note 9, para. 2-5.

<sup>255</sup> *Id.* para. 2-5(a).

<sup>256</sup> *Id.* para. 2-5(b).

<sup>257</sup> Commanders authorized a SSI or DUI usually command a brigade or larger organization. However, many brigade’s SSI and DUI appear on merchandise without proper authority under AR 672-8. Zazzle.com, 793rd Military Police Battalion – DUI – Mug from Zazzle.com, [http://www.zazzle.com/793rd\\_military\\_police\\_battalion\\_dui\\_mug-168968789331478008](http://www.zazzle.com/793rd_military_police_battalion_dui_mug-168968789331478008) (last visited May 16, 2009).

<sup>258</sup> See Military Magnets Home Page, <http://www.militarymagnets.com/> (last visited May 16, 2009).

<sup>259</sup> From the author’s experience, commanders do not consider trademark law when using their unit’s SSI or DUI.

<sup>260</sup> From the author’s experience, commanders do not perform quality checks on the items they order.

<sup>261</sup> AR 672-8, *supra* note 9. Without notification and some quality control measures, this regulation invites commanders to create naked licenses.

#### D. Enforcement

The mere act of registering a mark hardly absolves a mark owner of further responsibilities.<sup>262</sup> For example, in order to maintain trademark rights, owners must continuously, but not absolutely, monitor use of its marks.<sup>263</sup> Owners police their marks by preventing the unauthorized use of its marks by others.<sup>264</sup> Dilution can weaken the strength of a particular mark.<sup>265</sup> However, genericide, which occurs when a mark no longer identifies its source, can take a symbol outside the reaches of trademark protection.<sup>266</sup> Collectively and independently, doctrines such as failure to police, dilution, and genericide can all lead to loss of any rights in a mark.

##### 1. Failure to Police

The following example, from the U.S. Military Academy, reveals the necessity to police marks and the dangers of continued unauthorized use.

During the first Saturday of every year, the U.S. Military Academy plays the U.S. Naval Academy in football.<sup>267</sup> This game, referred to as the “Army/Navy Game,” attracts thousands of people every year, providing vendors opportunities to sell Army and Navy merchandise.<sup>268</sup>

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<sup>262</sup> Lanham Act, 15 U.S.C. § 1127 (2006) (citing the responsibility to use the mark in commerce). *See also* U.S. CONST. art. I, § 8, cl. 3.

<sup>263</sup> *Engineered Mech. Serv., Inc. v. Applied Mech. Tech., Inc.*, 584 F.Supp. 1149, 1160 (1984).

<sup>264</sup> Janet M. Garetto, *Preventing Loss of Federal Trademark and Service Mark Rights*, INTELL. PROP. TODAY, Sept. 2002, available at <http://library.findlaw.com/2002/Nov/14/132391.pdf>.

<sup>265</sup> *Autozone, Inc. v. Strick*, 466 F. Supp. 2d 1034, 1045 (N.D. Ill. 2006). The Trademark Dilution Revision Act of 2006 adds a likelihood of dilution cause of action to actual dilution. *Id.* at 1044–45.

<sup>266</sup> 1-2 GILSON, *supra* note 63, at 2.02.

<sup>267</sup> *See generally* John Fischer, *Philadelphia Offers Free Public Events to Celebrate the Army/Navy Game*, About.com, [http://philadelphia.about.com/cs/collegesports/a/army\\_navy\\_game\\_2.htm](http://philadelphia.about.com/cs/collegesports/a/army_navy_game_2.htm) (last visited Jan. 15, 2009) (providing history and facts about the rivalry game).

<sup>268</sup> *Id.* In 2006, there were over 50,000 visitors. *Id.* *See* Go Army Sports, 2008 Army/Navy Game Day Replica Jersey, [https://www.nmnathletics.com/sellnew/ViewItem.dbml?\\_IN\\_STORE\\_=YES&DB\\_OEM\\_ID=11100&ITMID=48138](https://www.nmnathletics.com/sellnew/ViewItem.dbml?_IN_STORE_=YES&DB_OEM_ID=11100&ITMID=48138) (last visited May 16, 2009); *see also* Hat Junkies, Undefeated “Army vs Navy” New Era Fitted Hat, <http://www.hatjunkies.com/820/undefeated-army-vs-navy-new-era-fitted-hat/> (last visited May 16, 2009).

Each year, a few unauthorized vendors attempt to sell clothing and memorabilia bearing unlicensed versions of West Point's symbols in the parking lot of the football stadium.<sup>269</sup> In response, Jim Flowers, licensing director for West Point, attends the game with Philadelphia Police Department (Licensing and Trademark Division) agents to police the infringers.<sup>270</sup> Repeatedly since 1990, three groups with three to five people in each group have sold unlicensed merchandise bearing West Point's symbols.<sup>271</sup> Mr. Flowers and the Philadelphia Police Department have confiscated between \$75,000 to \$100,000 worth of unlicensed merchandise from these repeat offenders.<sup>272</sup> The Collegiate Licensing Company has then used the merchandise as evidence to take the vendors to court.<sup>273</sup> Without the efforts of Mr. Flowers and the Philadelphia Police Department, the continued unauthorized use of West Point's symbols at the Army/Navy game and other locations<sup>274</sup> could deteriorate the link between West Point's symbol and West Point. Consequently, West Point's policing actions prevent abandonment of its marks.<sup>275</sup>

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<sup>269</sup> The U.S. Military Academy is located at West Point, New York and is often referred to as West Point. See U.S. Military Acad. Home Page, <http://www.westpoint.edu/> (last visited Mar. 2, 2009). See *infra* Appendix C for a listing of West Point's symbols and marks. Telephone Interview with Jim Flowers, West Point Licensing Agent, in West Point, N.Y. (Sept. 25, 2008). Jim Flowers holds the position as licensing director for the U.S. Military Academy (USMA). Mr. Flowers is responsible for licensing USMA's collegiate marks.

<sup>270</sup> *Id.*; see also MU Release, *MU To Patrol For Unlicensed Merchandise*, WSAZ, Sept. 6, 2007, <http://www.wsaz.com/news/headlines/9620482.html> (explaining a similar situation with Marshall University at the Friends of Coal Bowl).

<sup>271</sup> Telephone Interview with Jim Flowers, West Point Licensing Agent, in West Point, N.Y. (Mar. 1, 2009).

<sup>272</sup> *Id.*

<sup>273</sup> Telephone Interview with Jim Flowers, West Point Licensing Agent, in West Point, N.Y. (Oct. 27, 2008). The Collegiate Licensing Company licenses West Point merchandise and prosecutes infringers. *Id.*

<sup>274</sup> Military Creations, L.L.C. licenses the Army mule (West Point's mascot) without the permission of the U.S. Army or the U.S. Military Academy. Chafin Interview, *supra* note 214 (notifying this company of its infringement). Military Creations no longer has a functioning webpage. See My Military Creations, L.L.C. Home Page, <http://www.militarycreationsllc.com/> (last visited Feb. 28, 2009).

<sup>275</sup> Garetto, *supra* note 264. However, policing actions like this are not practical at the U.S. Army level as only one intellectual property attorney works there. Chafin Interview, *supra* note 22.

## 2. Dilution by Tarnishment

Dilution by tarnishment occurs when the use of a mark similar to a famous mark “harms the reputation of its famous mark.”<sup>276</sup> The U.S. Army, like many trademark owners, has a stake in protecting the reputation of its marks.<sup>277</sup> The Assistant Secretary of the Army, the Honorable Ronald James, stated that the licensing of U.S. Army phrases and symbols helps recruit and retain Soldiers by “enhancing the Army’s image.”<sup>278</sup> Accordingly, countless unauthorized uses of the U.S. Army’s symbols and phrases may detract from the U.S. Army’s humanitarian image. For instance, many T-shirts display a grim reaper with the U.S. Army paratrooper badge and a motto stating “death from above.”<sup>279</sup> Another example includes a T-shirt with the U.S. Army Master Parachutist wings on the front and the following definition of a paratrooper on the back: “Highly trained [S]oldier who jumps from perfectly good airplanes, visits exotic places[,] meets interesting people and kills them.”<sup>280</sup> Some may believe that these portrayals of paratroopers as ruthless killers conflicts with the U.S. Army’s development of professional Soldiers capable of operating across a diverse spectrum of operations.<sup>281</sup> However, popular businesses operating outside installations like Fort Bragg, North Carolina, sell these types of T-shirts.<sup>282</sup> Use of U.S. Army phrases and symbols on these T-shirts harms the reputation of the U.S. Army.<sup>283</sup> This dilution by tarnishment may weaken the strength of the U.S. Army’s symbols and may ultimately lead to abandonment.<sup>284</sup>

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<sup>276</sup> Lanham Act, 15 U.S.C. § 1125(c)(2)(C) (2006); *supra* Part III.F.2 (describing dilution by tarnishment and contrasting it with dilution by blurring).

<sup>277</sup> James Memo, *supra* note 8.

<sup>278</sup> *Id.*

<sup>279</sup> See *infra* Appendix D for pictures of these types of shirts.

<sup>280</sup> The Trophy House, Inc., Definition of a Paratrooper, <http://thetrophyhouseinc.com/definition-of-a-paratrooper-p-593.html> (last visited 28 Feb. 2009).

<sup>281</sup> Having served as a U.S. Army Jumpmaster at the home of Special Operations Forces at Fort Bragg, N.C. and as a judge advocate at the home of Infantry at Fort Benning, Georgia, I do not necessarily share this view.

<sup>282</sup> See *id.*

<sup>283</sup> This is probably one of the reasons the War Department changed its name to the Department of Defense. Globally, the U.S. Army wants a reputation of helping countries, not indiscriminately killing people. See DoD 101 An Introductory Overview of the Department of Defense, <http://www.defenselink.mil/pubs/dod101/> (last visited Oct.12, 2009).

<sup>284</sup> *Hormel Foods Corp. v. Jim Henson Prods.*, 73 F.3d 497, 507 (2d Cir. 1996) (quoting *Deere & Co. v. MTD Prods.*, 41 F.3d 39, 42 (2d Cir. 1994)).

### 3. *Genericide*

Trademark law does not protect generic marks.<sup>285</sup> A mark that once enjoyed trademark protection as an inherently distinctive mark or a potentially distinctive mark can eventually become generic.<sup>286</sup> Genericide<sup>287</sup> occurs when consumers relate a mark to the product rather than the source of the product.<sup>288</sup>

In *Colt Def. LLC v. Bushmaster Firearms, Inc.*, the weapons manufacturer Colt owned the M4 mark.<sup>289</sup> Colt first used the term “M4” in commerce on May 28, 1993.<sup>290</sup> In 1997, Bushmaster began to use the term M4 in advertising.<sup>291</sup> Four years later, on 7 November 2001, Colt filed an application with the USPTO for the term M4; the USPTO later approved the application.<sup>292</sup> In 2004, Colt sued Bushmaster for infringing Colt’s M4 mark by using M4 to refer to Bushmaster’s rifles.<sup>293</sup> Bushmaster counterclaimed to cancel Colt’s M4 mark registration.<sup>294</sup> At issue in the case was whether the term M4 was generic.<sup>295</sup> The court found that many publications referred to the M4 as a type of carbine, not as the source of the producer.<sup>296</sup> Survey evidence demonstrated that

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<sup>285</sup> *Filipino Yellow Pages, Inc. v. Asian Journal Publ’ns, Inc.* 198 F.3d 1143, 1147 (9th Cir. 1999)

<sup>286</sup> *King-Seeley Thermos Co. v. Aladdin Indus., Inc.*, 321 F.2d 577, 579 (2d Cir. 1963). A mark is generic and thus non-distinctive “if the primary significance of the trademark is to describe the type of product rather than the producer . . . .” *Filipino*, 198 F.3d at 1147 (quoting *Anti-Monopoly, Inc. v. Gen. Mills Fun Group*, 611 F.2d 296, 304 (9th Cir. 1979) (emphases added)).

<sup>287</sup> Genericide is “the deterioration of a trademark into a generic name . . . .” 1-2 GILSON, *supra* note 63, at 2.02. Examples include “[y]o-yo, thermos, aspirin, cellophane, [and] escalator . . . .” *Id.*

<sup>288</sup> *King-Seeley*, 321 F.2d at 578.

<sup>289</sup> *Colt Def. LLC v. Bushmaster Firearms, Inc.*, 486 F.3d 701, 704 (1st Cir. 2007). “The M4 is a lightweight, gas-operated, air-cooled, magazine-fed, selective-rate-of-fire carbine with a collapsible stock.” *Id.*

<sup>290</sup> U.S. Patent and Trademark Office, Trademark Electronic Search System (TESS), <http://tess2.uspto.gov/bin/showfield?f=doc&state=4009:6a7li5.2.21> (last visited Feb. 28, 2009).

<sup>291</sup> *Colt*, 486 F.3d at 704.

<sup>292</sup> U.S. Patent and Trademark Office, Trademark Electronic Search System (TESS), <http://tess2.uspto.gov/bin/showfield?f=doc&state=4009:6a7li5.2.21> (last visited Feb. 28, 2009).

<sup>293</sup> *Colt*, 486 F.3d at 704.

<sup>294</sup> *Id.*

<sup>295</sup> *Id.* at 706.

<sup>296</sup> *Id.*

consumers saw the M4 in a similar way.<sup>297</sup> The court found evidence of competitors using M4 in a generic manner.<sup>298</sup> Colt even used the term M4 to refer to its weapons as opposed to source information.<sup>299</sup> The court found that these long-term uses of the term M4 gradually deteriorated the link between M4 and Colt.<sup>300</sup> The public, over time, associated the term M4 with the product rather than the producer.<sup>301</sup> Accordingly, the court affirmed the district court's ruling that the term M4 was generic.<sup>302</sup> The *Colt* case demonstrates that the Lanham Act protects nomenclature given to U.S. Army equipment when that nomenclature becomes linked to a producer. It also demonstrates that when long-term use of a nomenclature mark represents the equipment rather than the producer, that mark becomes generic and loses protection. Consequently, the M16, AT4, E-Tool, K-Bar, Jeep, and a host of other military marks may have already attained a generic status.

The previous scenarios highlight the shortcomings of the Lanham Act in protecting U.S. Army phrases and symbols. A more comprehensive solution is necessary to fill the gaps in protection and supplement the Lanham Act.

#### VI. Solution: Special Statute

With the goal of protecting U.S. Army phrases and symbols and recognizing the inadequacies of the Lanham Act in meeting that goal, the U.S. Army would certainly benefit from a special statutory enactment that provides complementary protection to the Lanham Act. This solution would provide the Department of Defense (DoD) and the U.S. Army with all ownership rights in U.S. Army phrases and symbols. Additionally, the statute would prevent the operation of many common law methods of losing trademark rights.

Many organizations have faced the same challenges as the U.S. Army when trying to protect their marks under the Lanham Act.<sup>303</sup>

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<sup>297</sup> *Id.* at 706–07.

<sup>298</sup> *Id.* at 706.

<sup>299</sup> *Id.* at 707.

<sup>300</sup> *Id.* at 710.

<sup>301</sup> *Id.*

<sup>302</sup> *Id.* at 703. *See supra* note 81.

<sup>303</sup> *See Smokey Bear*, 16 U.S.C. § 580p (2006) (providing the Department of Agriculture with exclusive rights in its name and the symbols of Smokey Bear and Woodsy Owl, and

These organizations have assisted in passing several laws that take protection of their marks outside the contours of traditional trademark protection.<sup>304</sup>

Congress has previously demonstrated a willingness to provide comprehensive protection to some governmental symbols.<sup>305</sup> The Department of Agriculture's statute protects Smokey Bear and Woodsy Owl symbols by providing a comprehensive and enhanced package of trademark rights.<sup>306</sup> The statute provides the definitions of Woodsy Owl and Smokey Bear.<sup>307</sup> The statute also provides the most important right, the right to presumptive ownership in the names Woodsy Owl and

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providing a cause of action for infringement and licensing rights); *see also* Marine Corps, 10 U.S.C. § 7881 (2006) (providing the U.S. Marine Corps with exclusive rights in its name and symbols and provides a civil action for infringement); Coast Guard [and other names], 14 U.S.C. § 639 (2006) (providing the U.S. Coast Guard with exclusive rights in its name and symbols); Boy Scouts of America, 36 U.S.C. § 30905 (2006) (providing the Boy Scouts of America with exclusive rights in its symbols); Girl Scouts of America, 36 U.S.C. § 80305 (2006) (providing the Girl Scouts of America with exclusive rights in its symbols); Little League; Little Leaguer, 36 U.S.C. § 130506 (2006) (providing the Little League with exclusive rights in its name and symbols); Olympic [and other names], 36 U.S.C. § 220506 (2006) (providing the U.S. Olympic Committee with exclusive rights in its name and symbols and provides a civil action for infringement).

<sup>304</sup> TMEP, *supra* note 105, app. C (providing an exhaustive list of all special statutes that protect symbols).

<sup>305</sup> *See* Central Intelligence Agency, 50 U.S.C. § 403m (2000) (CIA); *see also* Central Liquidity Facility, 18 U.S.C. § 709 (2006) (Dep't of Housing & Urban Dev., DEA, FBI, Secret Serv.); National Aeronautics and Space Administration [also flags, logo, seal], 42 U.S.C. § 2459b (2000) (NASA); Social Security [and other names, symbols and emblems], 42 U.S.C. § 1320b-10 (Social Security Admin.).

<sup>306</sup> Smokey Bear, 16 U.S.C. § 580p (2006). “[T]he Smokey Bear trademark was removed from the public domain in 1952.” Pub. L. No. 82-359.

<sup>307</sup> The statute defines Woodsy Owl and Smokey Bear as the following:

As used in this Act—

(1) the term “Woodsy Owl” means the name and representation of a fanciful owl, who wears slacks (forest green when colored), a belt (brown when colored), and a Robin Hood style hat (forest green when colored) with a feather (red when colored), and who furthers the slogan, “Give a Hoot, Don’t Pollute”, originated by the Forest Service of the United States Department of Agriculture;

(2) the term “Smokey Bear” means the name and character “Smokey Bear” originated by the Forest Service of the United States Department of Agriculture in cooperation with the Association of State Foresters and the Advertising Council.

*Id.*

Smokey Bear and the motto “Give a Hoot, Don’t Pollute.”<sup>308</sup> The statute allows for an injunction for infringement upon the Department of Agriculture’s symbols or motto.<sup>309</sup> Providing for more than the civil remedies available under the Lanham Act,<sup>310</sup> this statute also allows for criminal sanctions against infringers.<sup>311</sup> Finally, the statute allows the Chief of Forest Services to license Smokey Bear products.<sup>312</sup>

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<sup>308</sup> 16 U.S.C. § 580p-1. “The following are hereby declared the property of the United States: (1) The name and character ‘Smokey Bear.’ (2) The name and character ‘Woodsy Owl’ and the associated slogan, ‘Give a Hoot, Don’t Pollute.’” *Id.*

<sup>309</sup> Both sections include the following:

(a) Whoever, except as provided by rules and regulations issued by the Secretary, manufactures, uses, or reproduces the character “Smokey Bear” or the name “Smokey Bear”, or a facsimile or simulation of such character or name in such a manner as suggests “Smokey Bear” may be enjoined from such manufacture, use, or reproduction at the suit of the Attorney General upon complaint by the Secretary.

(b) Whoever, except as provided by rules and regulations issued by the Secretary, manufactures, uses, or reproduces the character “Woodsy Owl”, the name “Woodsy Owl”, or the slogan “Give a Hoot, Don’t Pollute”, or a facsimile or simulation of such character, name, or slogan in such a manner as suggest “Woodsy Owl” may be enjoined from such manufacture, use, or reproduction at the suit of the Attorney General upon complaint by the Secretary.

*Id.* § 580p-4.

<sup>310</sup> 15 U.S.C. § 1117.

<sup>311</sup> Criminal punishment includes:

Whoever, except as authorized under rules and regulations issued by the Secretary, knowingly and for profit manufactures, reproduces, or uses the character “Woodsy Owl”, the name “Woodsy Owl”, or the associated slogan, “Give a Hoot, Don’t Pollute” shall be fined under this title or imprisoned not more than six months, or both.

18 U.S.C. § 711a.

<sup>312</sup> 36 C.F.R. § 271.4 (2010). The Chief of Forestry Services may authorize a license in Smokey Bear if the following conditions are met:

- (1) That the use to which the article or published material involving Smokey Bear is to be put shall contribute to public information concerning the prevention of forest fires.
- (2) That the proposed use is consistent with the status of Smokey Bear as the symbol of forest fire prevention and does not in any way detract from such status.
- (3) That a use or royalty charge which is reasonably related to the

Enacted in 1984, the special statute protecting U.S. Marine Corps symbols demonstrate Congress's willingness to provide supplementary protection to military symbols.<sup>313</sup> Similar to the Department of Agriculture's special statute, the U.S. Marine Corps's special statute provides exclusive ownership rights in the "seal, emblem, and initials of the United States Marine Corps."<sup>314</sup> Like the Department of Agriculture's special statute, this special statute also allows for licensing agreements.<sup>315</sup> Although, the statute allows for enforcement through a civil action or injunction, it does not allow criminal sanctions like the Department of Agriculture's statute.<sup>316</sup>

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commercial enterprise has been established.

(b) Such other conditions shall be included as the Chief deems necessary in particular cases.

*Id.*

<sup>313</sup> See Marine Corps, 10 U.S.C. § 7881 (2006); see also Coast Guard [and other names], 14 U.S.C. § 639 (2006) (providing protection to the U.S. Coast Guard's symbols). Enacted second in time, the Marine Corps statute was not based on the Coast Guard's 1950 statute. Chafin Interview, *supra* note 95.

<sup>314</sup> 16 U.S.C. § 580p-1; 10 U.S.C. § 7881(a).

<sup>315</sup> The statute states

No person may, except with the written permission of the Secretary of the Navy, use or imitate the seal, emblem, name, or initials of the United States Marine Corps in connection with any promotion, goods, services, or commercial activity in a manner reasonably tending to suggest that such use is approved, endorsed, or authorized by the Marine Corps or any other component of the Department of Defense.

*Id.* § 7881(b).

<sup>316</sup> *Id.* § 7881(c); 18 U.S.C. § 711a. The two remedies for infringement include

Whenever it appears to the Attorney General of the United States that any person is engaged or is about to engage in an act or practice which constitutes or will constitute conduct prohibited by subsection (b), the Attorney General may initiate a civil proceeding in a district court of the United States to enjoin such act or practice. Such court may, at any time before final determination, enter such restraining orders or prohibitions, or take such other action as is warranted, to prevent injury to the United States or to any person or class of persons for whose protection the action is brought.

10 U.S.C. § 7881(c). *But cf.* Coast Guard [and other names], 14 U.S.C. § 639 (2006) (providing for imprisonment).

With a 1950 special statute for the U.S. Coast Guard<sup>317</sup> and a 1984 special statute for the U.S. Marine Corps, one may wonder why Congress never extended these significant protections to the U.S. Army, U.S. Navy, and U.S. Air Force.<sup>318</sup> Clearly, the U.S. Army is as deserving as the U.S. Marine Corps in terms of protection. First, with over one million active, guard, and reserve Soldiers, the U.S. Army's force over triples the number of active and reserve Marines.<sup>319</sup> Second, the U.S. Marine Corps's statute provides protection for merely four marks: the "seal, emblem, name, [and] initials of the United States Marine Corps."<sup>320</sup> However, the U.S. Army's SSIs and DUIs number in the hundreds.<sup>321</sup> Finally, the U.S. Army has more Soldiers in more locations around the world than the U.S. Marine Corps.<sup>322</sup>

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<sup>317</sup> Compare the Marine Corp's special statute, 10 U.S.C. § 7881, with the Coast Guard's:

No individual, association, partnership, or corporation shall, without authority of the Commandant, use the combination of letters "USCG" or "USCGR", the words "Coast Guard," "United States Coast Guard," "Coast Guard Reserve," "United States Coast Guard Reserve," "Coast Guard Auxiliary," "United States Coast Guard Auxiliary," "Lighthouse Service," "Life Saving Service," or any combination or variation of such letters or words alone or with other letters or words, as the name under which he or it shall do business, for the purpose of trade, or by way of advertisement to induce the effect of leading the public to believe that any such individual, association, partnership, or corporation has any connection with the Coast Guard. No individual, association, partnership, or corporation shall falsely advertise, or otherwise represent falsely by any device whatsoever, that any project or business in which he or it is engaged, or product which he or it manufactures, deals in, or sells, has been in any way endorsed, authorized, or approved by the Coast Guard. Every person violating this section shall be fined not more than \$1,000, or imprisoned not more than one year, or both.

Coast Guard [and other names], 14 U.S.C. § 639 (2006).

<sup>318</sup> Mr. Chafin believes that U.S. Army trademarks were not a high-visibility issue to Army leadership at the times Congress enacted the other special statutes. Chafin Interview, *supra* note 95.

<sup>319</sup> Compare the U.S. Army's demographics, Army G-1 Human Resources, <http://www.armyg1.army.mil/hr/docs/demographics/FY08%20Army%20Profile.pdf> (last visited Jan. 31, 2010) (reporting 1,097,050 Soldiers as of September, 2008), with the U.S. Marine Corps' demographics, USMC Demographic Update, [http://www.usmc-mccs.org/display\\_files/USMC\\_Demographics\\_Report\\_Dec2008.pdf](http://www.usmc-mccs.org/display_files/USMC_Demographics_Report_Dec2008.pdf) (last visited Jan. 31, 2010) (reporting about 300,000 active and reserve Marines as of December, 2008).

<sup>320</sup> Marine Corps, 10 U.S.C. § 7881(b).

<sup>321</sup> Chafin Interview, *supra* note 95.

<sup>322</sup> See generally Army Command Structure, <http://www.army.mil/info/organization/unitsandcommands/commandstructure/> (last visited Jan. 31, 2010).

The U.S. Army's needs a comprehensive special statute that protects its symbols with the same supplementary protections as those in existing special statutes. As demonstrated by the U.S. Marine Corps's and Department of Agriculture's statutes, Congress is willing to provide comprehensive protection to symbols of a governmental agency outside traditional trademark law as well as to branches of the U.S. Department of Defense. Mr. J. Scott Chafin, Trademark Attorney for the U.S. Army, proposes such a statute that protects all symbols of the U.S. Army concurrently with traditional trademark protection.<sup>323</sup>

#### A. Problems Alleviated by the Special Statute

Trademark law, under the Lanham Act, is too burdensome to protect all U.S. Army phrases and symbols. Protection requires that the mark be used in commerce, that the mark be registered with the USPTO that the fees be paid, and that enforcement actions have been taken.<sup>324</sup> The proposed special statute would provide protection at a cheaper rate and enforce rights faster than trademark law. Furthermore, none of the common law pitfalls of trademark law would apply in protecting U.S. Army symbols.

Congress must pass a special statute that provides DoD and the U.S. Army exclusive ownership of all U.S. Army symbols.<sup>325</sup> Mr. Chafin proposes the following amendment:

SEC. \_\_\_\_\_. Protection of Official Symbols, Unit Heraldry, Names, and Phrases Used by the Department of Defense and the Military Departments

(a) Subchapter II, Chapter 134, Part IV, Subtitle A, Title 10, United States Code is amended by adding the following section:

Sec. \_\_\_\_\_. Protection of Official Symbols, Unit Heraldry, Names, and Phrases.

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<sup>323</sup> 10 U.S.C. subch. II, ch. 134, pt. IV., subtit. A (2006) (proposed amendment).

<sup>324</sup> 15 U.S.C. §§ 1113, 1114, 1115, 1127.

<sup>325</sup> 10 U.S.C. subch. II, ch. 134, pt. IV., subtit. A (2006) (proposed amendment).

(a) Insignia.—The seals, emblems, official symbols, and unit heraldry prescribed by the Secretary of Defense or a Secretary of a Military Department are deemed to be insignia of the United States.

(b) Exclusive Rights.—

(1) The Department of Defense and the Military Departments shall have the exclusive rights to use:

(A) the official symbols and unit heraldry under their respective governance and control;

(B) the name “Department of Defense,” the names of all its components, and the names of all components of the Military Departments, including, but not limited to, “United States Army,” “U.S. Army,” “United States Navy,” “U.S. Navy,” “United States Marine Corps,” “U.S. Marine Corps,” “United States Air Force,” and “U.S. Air Force”;

(C) the names of the national military academies, preparatory schools, and other academic institutions governed by the Department of Defense or the Military Departments;

(D) the names of all active, reserve, or inactive military units and other components under the governance and control of the Military Departments, including the names of ships and other vessels when used in conjunction with the designation “United States Ship,” “U.S.S.,” or any variant thereof;

(E) the names historically used to identify special components under the governance and control of the Department of Defense and the Military Departments, including, but not limited to, “Green Berets,” “Special Forces,” “Delta Force,” and “Navy Seals”;

(F) recruiting and other slogans or phrases that were originated by or within the Department of Defense or the Military Departments, and have, by historical use, acquired special meaning to military personnel,

including, but not limited to, “Be All You Can Be,” “An Army of One,” “Army Strong,” “The Few, the Proud, the Marines,” and any phonetically-similar spelling of “HOOAH” and “OORAH”; and,

(G) the official and popular names of military equipment first designated by the Department of Defense or by a Military Department according to that department’s internal conventions, policies, or procedures.

(2) The exclusive rights granted under subsection (b)(1) of this section do not include the use of any of the seals, emblems, official symbols, unit heraldry, names, or phrases enumerated in subsection (a) for the purpose of:

(A) factual news reporting;

(B) other uses of a purely informational or factual nature when such uses do not suggest endorsement or approval of the Department of Defense or of a Military Department; or,

(C) a use within the performance of a theatrical or motion-picture production in a manner that does not suggest endorsement or approval of the Department of Defense or of a Military Department.

(3) All of the seals, emblems, official symbols, unit heraldry, names, and phrases described by subsection (b) may be licensed under the provisions of Section 2260 of this Title [10 U.S.C. § 2260].

(4) Nothing in this section shall be construed as a limitation upon the registration of any emblem, official symbol, unit heraldry, name, or phrase under the provisions of the Chapter 22, Title 15, United States Code (the “Trademark Act of 1946,” as amended) [15 U.S.C. §§ 1051-1141n].

(c) Protections.—(1) No person may, except with the written permission of the Secretary of Defense, the Secretary of the Military Department concerned, or their

designees, use or imitate any seal, emblem, official symbol, unit heraldry, name or phrase as described in subsection (a) and (b)(1) of this section in connection with any promotion, goods, services, domain name, or other activity, commercial or otherwise, in a manner tending to suggest that such use or imitation is approved, endorsed, or authorized by the Department of Defense or any of the Military Departments or their components.

(d) Enforcement.

(1) Whenever it appears to the Attorney General of the United States that any person is engaged in, or is about to engage in, an act or practice that constitutes or may constitute conduct prohibited by this section, the Attorney General may institute a civil proceeding in a district court in the United States to enjoin such act or practice. Such court may, at the time before final determination, enter such restraining orders or prohibitions, or take such other action as is warranted, to prevent the act, practice, or conduct.

(2) The Attorney General may impose a fine, not to exceed \$10,000 per offense, for any violation of this section.

(e) Prohibited importation.—The Secretary of Defense, the Secretary of a Military Department, or their authorized designees may register any seal, emblem, official symbol, unit heraldry, name or phrase with U.S. Customs and Border Protection for the purpose of prohibiting the importation of articles that infringe upon the exclusive rights granted under subsection (b).

(f) Definitions.—In this section: (1) “official symbol” means any flag, emblem, coat of arms, crest, logo, or other graphic device adopted by the Secretary of Defense or the Secretary of a Military Department and used to identify the Department of Defense, a Military Department, or any component under their governance; (2) “person” means any natural or juristic person; and (3) “unit heraldry” means any flag, emblem, coat of arms,

crest, insignia, or other graphic device, including any name or phrase associated therewith, as identifying any component or military unit under the governance of the Department of Defense or of a Military Department.”<sup>326</sup>

This special statute would provide supplementary protection to that offered by the Lanham Act.<sup>327</sup> It would give the Attorney General of the United States authority to enforce the statute with a \$10,000 fine per offense.<sup>328</sup> These additional protections would provide solutions to many of the U.S. Army’s problems in safeguarding its marks.

In gaining rights to a symbol, the U.S. Army would no longer have to conduct a search, work with the USPTO to register a symbol, wait for examination, or pay any fees.<sup>329</sup> Although gaining rights in a single symbol can cost a few hundred dollars and can take a short as a few months, in the aggregate, hundreds of symbols can cost millions of dollars and take years to register.<sup>330</sup> For example, “Arlington National Cemetery” only took a couple of hours to register, and the USPTO registered the mark a mere five months after filing.<sup>331</sup> Contrastingly, when the examining attorney raises a refusal or when a company files a notice to opposition, costs can skyrocket as both require considerable work.<sup>332</sup> The U.S. All-American Bowl, an annual all-star football game of high school seniors, provides an example where a company filed a notice to opposition.<sup>333</sup> Mr. Chafin filed the following U.S. All-American Bowl symbol for registration:

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<sup>326</sup> *Id.*

<sup>327</sup> *Id.* para. (c).

<sup>328</sup> *Id.* para. (d).

<sup>329</sup> For example, Woodsy Owl and Smokey Bear are trademarks registered with the USPTO, since the U.S. Code protects the symbols. 16 U.S.C. § 580p (2006).

<sup>330</sup> Chafin Interview, *supra* note 95.

<sup>331</sup> *Id.* U.S. Trademark No. 3705316 (filed June 5, 2009).

<sup>332</sup> Chafin Interview, *supra* note 95.

<sup>333</sup> U.S. Army All-American Bowl, [http://www.usarmyallamericanbowl.com/view\\_press\\_releases.php?pressreleasesid=1852](http://www.usarmyallamericanbowl.com/view_press_releases.php?pressreleasesid=1852) (last visited Jan. 31, 2010).



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During opposition, the stars in the helmets garnered the attention of a certain professional football team, the Dallas Cowboys, as a potential problem.<sup>335</sup> For those who do not follow professional football, the following is a photo of the Dallas Cowboys' helmet:



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The U.S. Army All-American Bowl symbol ultimately achieved registration status, but due to the opposition, it came at an additional expense.<sup>337</sup>

Because the special statute would not be based on the Commerce Clause, use of the symbol in commerce is no longer necessary to establish protection.<sup>338</sup> Without the use in commerce requirement, the U.S. Army would never have to establish that it has priority in its hundreds of symbols.<sup>339</sup> The U.S. Army would no longer have to

<sup>334</sup> U.S. Trademark No. 3589919 (filed Jan. 15, 2008).

<sup>335</sup> Chafin Interview, *supra* note 95.

<sup>336</sup> Dallas Cowboys Riddell Pro Line Authentic NFL Helmet-Five Star Memorabilia, <http://www.fivestarmemorabilia.com/commerce/ccp16037-dallas-cowboys-riddell-pro-line-authentic-nfl-hel-riddadal.htm> (last visited Jan. 31, 2010).

<sup>337</sup> Chafin Interview, *supra* note 95.

<sup>338</sup> 15 U.S.C. § 1127 (2006).

<sup>339</sup> To date, nobody has compiled an exhaustive list of U.S. Army symbols. Chafin Interview, *supra* note 95. However, as a conservative estimate, the Institute of Heraldry's website contains hundreds of U.S. Army symbols. *See generally* The Institute of Heraldry Home Page, [http://www.tioh.hqda.pentagon.mil/DUI\\_SSI\\_](http://www.tioh.hqda.pentagon.mil/DUI_SSI_)

conduct the onerous steps above for every symbol. Lastly, if a new use for a symbol ever arose, the U.S. Army would not have to worry about protection, as presumptive ownership rights would cover every traditional classification.<sup>340</sup>

By having exclusive ownership rights in all of its symbols, the U.S. Army would not have the challenges like the “SOCOM” case. Unlike the “Hooah!” case, where issues arose when a mark changed classification,<sup>341</sup> under the special statute, this type of issue would never arise. The U.S. Army would own exclusive rights in the name no matter what the classification. Further, by supplementing traditional trademark law, a special statute would prevent the U.S. Army from having to prove likelihood of confusion as demonstrated in the “SOCOM” case. The U.S. Army would own all of its symbols and could immediately prevent infringing use by a third party.

Another benefit of the special statute is that it would prevent the many pitfalls of trademark law in common law doctrine. As demonstrated in the SSI and DUI examples, naked licensing could lead to abandonment of the U.S. Army’s symbols.<sup>342</sup> In the Army/Navy game example, failure to police infringement could weaken a symbol and cause abandonment.<sup>343</sup> Dilution by tarnishment could reduce the strength of a symbol and could cause loss of ownership.<sup>344</sup> Genericide could also result in loss of rights in a symbol as evidenced by the M4 case.<sup>345</sup> None of these common law doctrines would apply to U.S. Army symbols as the doctrines only apply under traditional trademark law. Because the U.S. Army would never have to prove ownership or have to worry about losing the rights to its symbols, the special statute would reduce the expense and time of litigation.

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COA\_page.htm (last visited Jan. 30, 2010) (displaying hundreds of SSI, DUI, and other symbols).

<sup>340</sup> For example, if the U.S. Army used “Army Strong” only as a motto, it could later use it on t-shirts without registering in another classification. The U.S. Army would own the motto and every conceivable use for the motto.

<sup>341</sup> In that case, the classification changed from an energy bar to apparel.

<sup>342</sup> *Westco Group, Inc. v. K.B. & Assocs.*, 128 F. Supp. 2d 1082, 1088 (D. Ohio 2001) (quoting *Gorenstein Enters. v. Quality Care-USA*, 874 F.2d 431, 435 (7th Cir. 1989)).

<sup>343</sup> *Garetto*, *supra* note 264.

<sup>344</sup> *Hormel Foods Corp. v. Jim Henson Prods.*, 73 F.3d 497, 507 (2d Cir. 1996) (quoting *Deere & Co. v. MTD Prods.*, 41 F.3d 39, 42 (2d Cir. 1994)).

<sup>345</sup> *Colt Def. LLC v. Bushmaster Firearms, Inc.*, 486 F.3d 701, 703 (1st Cir. Me. 2007).

Along with the ownership provision, the special statute would allow for licensing<sup>346</sup> and prevent unauthorized use.<sup>347</sup> The special statute would also include an enforcement paragraph similar to the other U.S. Government special statutes.<sup>348</sup> The special statute would allow fair use<sup>349</sup> of the U.S. Army's symbols.<sup>350</sup> The special statute would also provide concurrent protection to the U.S. Army's symbols with traditional trademark law by providing baseline protection to all U.S. Army phrases and symbols.<sup>351</sup> Then, trademark law would provide an additional layer of protection to well-known phrases and symbols that the U.S. Army uses in commerce, such as the "ARMY STRONG" motto.<sup>352</sup>

Ms. Christine Piper, intellectual property attorney for the U.S. Air Force, asserts that the proposed special statute, as applied across the whole Department of Defense, will make enforcement of rights easier.<sup>353</sup>

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<sup>346</sup> 10 U.S.C. subch. II, ch. 134, pt. IV., subtit. A (2006) (proposed amendment). "All of the seals, emblems, official symbols, unit heraldry, names, and phrases described by subsection (b) may be licensed under the provisions of Section 2260 of this Title [10 U.S.C. § 2260]" *Id.* The U.S. Army already uses a licensing agency, The Beanstalk Group. *See* Beanstalk Group, Beanstalk, Clients, Brand Licensing Case Studies, <http://www.beanstalk.com/ourclients/index.html> (last visited Jan. 19, 2009) (providing a list of clients).

<sup>347</sup> 10 U.S.C. subch. II, ch. 134, pt. IV., subtit. A (proposed amendment).

<sup>348</sup> *Id.*

<sup>349</sup> Fair use is a defense under the Lanham Act that allows one to use another's mark without infringement. Lanham Act, 15 U.S.C. § 1115(b)(4) (2006).

<sup>350</sup> 10 U.S.C. subch. II, ch. 134, pt. IV., subtit. A (2006) (proposed amendment).

<sup>351</sup> *Id.* "Nothing in this section shall be construed as a limitation upon the registration of any emblem, official symbol, unit heraldry, name, or phrase under the provisions of the Chapter 22, Title 15, United States Code (the "Trademark Act of 1946," as amended) [15 U.S.C. §§ 1051–1141n]." *Id.*

<sup>352</sup> The U.S. Army has five live registrations in the "Army Strong" motto ranging from apparel to wrist bands. U.S. Patent and Trademark Office, Trademark Electronic Search System (TESS), <http://tess2.uspto.gov/bin/gate.exe?f=searchss&state=91ukce.1.1> (search for "army strong," follow hyperlink) (last visited Jan. 17, 2009).

<sup>353</sup> Telephone Interview with Christine Piper, Assoc. Gen. Counsel Att'y, in Chantilly, Va. (Feb. 22, 2009) [hereinafter Piper Interview on Feb. 22, 2009, in Chantilly, Va.]. Christine Piper holds the position of Associate General Counsel in the Acquisition Division, Air Force General Counsel's Office. Ms. Piper is primarily responsible for providing legal advice to Secretariat, Air Staff, Program Executive Officer and Major Command level clients concerning intellectual property and satellite system acquisition matters. She is responsible for trademark and patent licensing for the United States Air Force. Ms. Piper received a Bachelor of Arts degree from the University of Colorado, Boulder, Colorado, in 1993, a Juris Doctor degree from the University of Colorado School of Law, Boulder, Colorado, in 1996, and an Master of Laws degree from the George Washington University, Washington, D.C. in 2004. Ms. Piper previously served as an Air Force Judge Advocate from 1997 to 2008. After conferring with attorneys at the Intellectual Property Divisions of the U.S. Navy and U.S. Marine Corps, they were

Department of Defense agencies are not commercial entities focused on producing revenue.<sup>354</sup> Therefore, when hundreds of companies use U.S. Air Force symbols without a license or authority, the U.S. Air Force has difficulty enforcing its rights.<sup>355</sup> In enforcing its rights, U.S. Air Force intellectual property attorneys issue cease and desist letters to the infringing companies.<sup>356</sup> Often, the letters do not deter the infringers, so the attorneys turn to the Department of Justice to seek an injunction against the infringing use.<sup>357</sup> To date, the Department of Justice has not sought any injunctions against infringers primarily because the infringement causes no economic harm to the U.S. Air Force.<sup>358</sup> However, Ms. Piper firmly believes that if a special statute protects U.S. Air Force symbols, the Department of Justice would be more enthusiastic in seeking injunctions.<sup>359</sup>

Ms. Piper also believes that the special statute will help U.S. Air Force attorneys police infringing uses.<sup>360</sup> Without the need to register symbols, pay maintenance fees, and worry about ownership, U.S. Air Force attorneys have more time to police infringing uses of U.S. Air Force symbols.<sup>361</sup> When commencing a civil action, the special statute would no longer force attorneys to litigate ownership in symbols, saving time and money.<sup>362</sup> In the end, a special statute would complement common law and Lanham Act protections of Department of Defense symbols.

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hesitant to make a comment on the success or make a specific opinion on the effectiveness of existing or proposed statutes. Telephone Interview with United States Navy Att’y, in Washington Navy Yard, D.C. (Feb. 22, 2009) [hereinafter Piper Interview on Feb. 22, 2009, in Wash. Navy Yard, D.C. on Feb. 22, 2009].

<sup>354</sup> Piper Interview on Feb. 22, 2009, in Chantilly, Va.; Piper Interview on Feb. 22, 2009, in Wash. Navy Yard, D.C.

<sup>355</sup> *Id.*

<sup>356</sup> *Id.*

<sup>357</sup> *Id.*

<sup>358</sup> *Id.* The U.S. Air Force is primarily concerned with protecting the integrity of the U.S. Air Force’s symbols. *Id.* *But cf.* Chafin Interview, *supra* note 95 (stating that the Department of Justice has pursued two injunctions for the U.S. Army, but is weary of being inundated with countless injunctions by the DoD).

<sup>359</sup> Piper Interview on Feb. 22, 2009, in Chantilly, Va., *supra* note 353; Piper Interview on Feb. 22, 2009, in Wash. Navy Yard, D.C. Piper Interview, *supra* note 353.

<sup>360</sup> *Id.* The U.S. Air Force only has two intellectual property attorneys. *Id.*

<sup>361</sup> *Id.*

<sup>362</sup> *Id.*

## B. Problems Not Alleviated by the Special Statute

The special statute would provide many solutions to the problems of trademark law; however, it is not a panacea and some challenges would still exist. The special statute would give the U.S. Army exclusive ownership rights in all of its symbols and streamline an infringement case, but would not totally eliminate litigation. No ownership issues or common law doctrines would arise, but an infringement suit that could not be settled, would still require litigation.

Along with streamlined litigation and a tougher posture from the Department of Justice towards infringers, the special statute would deter infringers. Inevitably, a determined infringer will ignore this special statute just as he would traditional trademark laws. In order to prevent unauthorized use, the U.S. Army would still have to conduct searches of infringing uses. The special statute would not prevent others from attempted infringement or innocent infringement. The U.S. Army would have to police the uses of its symbols, not to prevent loss of rights, but to enforce its rights given by the special statute. This would still require notification to cease the infringement use as well as involvement from the Department of Justice to litigate if the infringement did not cease.

Two other items need to be highlighted. Because the special statute would supplement traditional trademark law, famous U.S. Army marks would still operate under the Lanham Act. This means registration, fees, and time. Also, the special statute needs to clarify the fair use defense. It should mirror those fair use defenses already enumerated in copyright law.<sup>363</sup> Particularly, it should allow the use for educational purposes. More importantly, for the U.S. Army, it should address use by Soldiers, especially in command briefs.<sup>364</sup>

## VII. Conclusion

Phrases and symbols are as important to the U.S. Army as to any other corporation in America. In fact, symbols are especially important in the U.S. Army because they often communicate important

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<sup>363</sup> The Copyright Act, 17 U.S.C. §§ 107 (2006).

<sup>364</sup> Many PowerPoint command briefs include unit insignia on one of the corners of the slides. From the author's experience, almost every PowerPoint command brief contains the unit's insignia.

information. On the ACU alone, a patch signifies to others what unit a Soldier deployed with; another patch signifies her current unit; another patch displays her military rank; and various badges highlight her special military skills. These symbols, combined with military-centric phrases such as “Hooah!,” shape the U.S. Army’s image to the public and heritage to the Soldiers. The phrases and symbols represent generations of time-honored traditions and values.<sup>365</sup> These traditions and values are of such high importance that they require absolute protection and preservation.

Part V of this article illustrated many of the deficiencies in protecting U.S. Army phrases and symbols under the Lanham Act.<sup>366</sup> While the Lanham Act provides adequate protection for marks of traditional companies, it falls woefully short of providing adequate protection to the U.S. Army’s phrases and symbols.<sup>367</sup> The disparity arises from the use of the U.S. Army’s symbols as well as the goals of the U.S. Army. Although the U.S. Army is not in the business to generate profits from its phrases and symbols, it is interested in preserving its history and values through its phrases and symbols.<sup>368</sup>

Various cases demonstrate the problems of trying to use the Lanham Act to protect U.S. Army phrases and symbols. Most importantly, ownership problems like the ones in the “Hooah!” case demonstrate how companies have tried to claim ownership in a clearly military phrase, and, in the process, upset existing licenses.<sup>369</sup> Other companies have tried to manipulate U.S. Army phrases and symbols to make the company appear to be endorsed by the U.S. Army such as SOCOM GEAR.<sup>370</sup> At the most extreme end, many untested common law doctrines such as naked licensing, failure to police, dilution, and genericide could result in the U.S. Army losing control and ownership of many of its phrases and symbols all together.<sup>371</sup>

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<sup>365</sup> James Memo, *supra* note 8.

<sup>366</sup> *See supra* Part V and accompanying text.

<sup>367</sup> *In re E. I. Du Pont de Nemours & Co.*, 476 F.2d 1357, 1360 (C.C.P.A. 1973) (quoting S. REP. NO. 1333, 79th Cong., 2d Sess. (1946), *in* U.S.C.C.A.N., 79th Cong., 2d Sess. at 1274-8 (1946)).

<sup>368</sup> Chafin Interview, *supra* note 214.

<sup>369</sup> *See supra* Part IV and accompanying text.

<sup>370</sup> *See supra* notes 239–44 and accompanying text.

<sup>371</sup> *See supra* Part V.C–D and accompanying text.

The U.S. Army's interest in protecting and preserving its phrases and symbols coupled with the inadequate protection under the Lanham Act require immediate supplemental protection. With the advent of computer technology, the U.S. Army needs this protection now more than ever. Digital morphing technology, for example, allows users to change military symbols. The Internet also allows businesses to mass market unlicensed products bearing U.S. Army phrases and symbols. Finally, Internet blogs allow users to improperly use U.S. Army phrases and symbols.

The obvious solution to the shortage of protection is a special statute that supplements Lanham Act protection of U.S. Army phrases and symbols. Congress has already provided supplemental protection for many governmental departments' phrases and symbols. However, nobody to date has had the opportunity, time, or support to compel Congress to pass a special statute for the U.S. Army. Now that the need for additional protection is imminent and Mr. J. Scott Chafin has proposed a special statute, Congress must pass it.

The U.S. Army does not need this protection to generate revenue; it needs this protection to preserve the U.S. Army's rich history and control its national image. A special statute will not only stop current infringers, but it will also deter future infringers. It will give total control of all past, present, or future marks to the U.S. Army and DoD. The statute may also provide an impetus for the Department of Justice to prosecute those who infringe upon the U.S. Army's exclusive rights to its phrases and symbols. Although the U.S. Army has never lost ownership in one of its phrases or symbols to a common law doctrine, the special statute will ensure that these untested doctrines never become tested. In the end, a comprehensive special statute will not only save our service marks, it will also ensure that patriotic support by Americans, in the form of yellow ribbon magnets, unit T-shirts, and military hats, will never endanger the protection of the U.S. Army's phrases and symbols.

### Appendix A

This appendix reprints legal summaries from Gilson's noted trademarks, which are useful for illustrating the various common law factors used by circuits to evaluate whether one mark may be confused with another. Without a statute in place, the Army could be forced to address any one of these tests in establishing its intellectual property interests. Materials reproduced from *Gilson on Trademarks* with the permission of Matthew Bender & Company, Inc., a member of the LexisNexis group of companies.

[a] First Circuit. This court has identified eight factors to be weighed in determining likelihood of confusion:

- (1) the similarity of the marks;
- (2) the similarity of the goods;
- (3) the relationship between the parties' channels of trade;
- (4) the relationship between the parties' advertising;
- (5) the classes of prospective purchasers;
- (6) evidence of actual confusion;
- (7) the defendant's intent in adopting its mark; and
- (8) the strength of the plaintiff's mark . . . .

. . . .

. . . [b] Second Circuit — The *Polaroid* Factors. In a landmark decision, *Polaroid Corporation v. Polarad Electronics Corporation*, the Second Circuit set forth the following factors to determine whether there is trademark infringement:

- (1) the strength of [plaintiff's] mark,
- (2) the degree of similarity between the two marks,
- (3) the proximity of the products,
- (4) the likelihood that the prior owner will bridge the gap,
- (5) actual confusion,
- (6) the reciprocal of defendant's good faith in adopting its own mark,
- (7) the quality of defendant's product,
- (8) and the sophistication of the buyers . . . .

....

... [c] Third Circuit — The *Lapp* or *Scott Paper* Factors. The likelihood of confusion analysis in the Third Circuit may include the evaluation of a number of factors, derived from the *Lapp* and *Scott Paper* decisions:

- (1) the degree of similarity between the owner's mark and the alleged infringing mark;
- (2) the strength of the owner's mark;
- (3) the price of the goods and other factors indicative of the care and attention expected of consumers when making a purchase;
- (4) the length of time defendant has used the mark without evidence of actual confusion arising;
- (5) the intent of the defendant in adopting the mark;
- (6) the evidence of actual confusion;
- (7) whether the goods, though not competing, are marketed through the same channels of trade and advertised through the same media;
- (8) the extent to which the targets of the parties' sales efforts are the same;
- (9) the relationship of the goods in the minds of the public because of the similarity of function;
- (10) other facts suggesting that the consuming public might expect the prior owner to expand into the defendant's market . . . .

....

... [d] Fourth Circuit — The *Pizzeria Uno* Factors. To determine whether there is a likelihood of confusion, the Fourth Circuit generally considers a number of factors:

- (1) the strength or distinctiveness of the mark;
- (2) the similarity of the two marks;
- (3) the similarity of the goods/services the marks identify;
- (4) the similarity of the facilities the two parties use in their businesses;
- (5) the similarity of the advertising used by the two parties;

(6) the defendant's intent;

(7) actual confusion.

Two later cases added the following factors:

(8) the proximity of the products as they are actually sold;

(9) the probability that the senior mark owner will "bridge the gap" by entering the defendant's market;

(10) the quality of the defendant's product in relationship to the quality of the senior mark owner's product; and

(11) the sophistication of the buyers . . . .

. . . .

. . . [e] Fifth Circuit. In determining whether a likelihood of confusion exists, the Fifth Circuit considers the following list of factors:

(1) the type of mark allegedly infringed,

(2) the similarity between the two marks,

(3) the similarity of the products or services,

(4) the identity of the retail outlets and purchasers,

(5) the identity of the advertising media used,

(6) the defendant's intent, and

(7) any evidence of actual confusion . . . .

. . . .

. . . [f] Sixth Circuit — The *Frisch* Factors. The Sixth Circuit has identified eight factors as informing the likelihood of confusion inquiry:

(1) strength of the plaintiff's mark,

(2) relatedness of the goods,

(3) similarity of the marks,

(4) evidence of actual confusion,

(5) marketing channels used,

(6) likely degree of purchaser care,

(7) defendant's intent in selecting the mark, and

(8) likelihood of expansion of the product lines . . . .

. . . .

. . . [g] Seventh Circuit. Seven factors comprise the likelihood of confusion analysis in the Seventh Circuit:

- (1) similarity between the marks in appearance and suggestion;
- (2) similarity of the products;
- (3) the area and manner of concurrent use;
- (4) the degree of care likely to be exercised by consumers;
- (5) the strength of the plaintiff's mark;
- (6) whether actual confusion exists; and
- (7) whether the defendant intended to "pass off" his product as that of the plaintiff . . . .

. . . .

. . . [h] Eighth Circuit — The *Squirtco* Factors. The Eighth Circuit examines factors including:

- (1) the strength of the owner's mark;
- (2) the similarity of the owner's mark to the alleged infringer's mark;
- (3) the degree to which the products compete with each other;
- (4) the alleged infringer's intent to "pass off" its goods as those of the trademark owner;
- (5) incidents of actual confusion; and
- (6) the type of product, its costs and conditions of purchase . . . .

. . . .

. . . [i] Ninth Circuit — The *Sleekcraft* Factors. In determining whether confusion between goods is likely, the Ninth Circuit currently looks to the following factors:

- (1) strength of the mark;
- (2) proximity of the goods;
- (3) similarity of the marks;
- (4) evidence of actual confusion;
- (5) marketing channels used;
- (6) type of goods and the degree of care likely to be exercised by the purchaser;

- (7) defendant's intent in selecting the mark; and
- (8) likelihood of expansion of the product lines . . . .

. . . .

. . . [j] Tenth Circuit. When determining whether there is a likelihood of confusion between two trademarks, the Tenth Circuit considers the following factors:

- (1) the degree of similarity between the marks;
- (2) the intent of the alleged infringer in adopting its mark;
- (3) the relation in use and the manner of marketing between the goods or services marketed by the competing parties;
- (4) the degree of care likely to be exercised by purchasers;
- (5) evidence of actual confusion; and
- (6) the strength or weakness of the marks . . . .

. . . .

. . . [k] Eleventh Circuit. Courts in this circuit may consider the following factors in assessing the likelihood of consumer confusion in Lanham Act trademark claims:

- (1) the strength of the plaintiff's mark;
- (2) the similarity between the plaintiff's mark and the allegedly infringing mark;
- (3) the similarity between the products and services offered by the plaintiff and defendant;
- (4) the similarity of the sales method;
- (5) the similarity of advertising methods;
- (6) the defendant's intent, *e.g.*, does the defendant hope to gain competitive advantage by associating his product with the plaintiff's established mark; and
- (7) actual confusion . . . .

. . . .

. . . [l] Federal Circuit — The *du Pont* Factors. When the Federal Circuit reviews a decision of the Trademark Trial and Appeal Board that involves likelihood of

confusion, it follows the *du Pont* factors laid out by its predecessor, the Court of Customs and Patent Appeals:

- (1) The similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression.
- (2) The similarity or dissimilarity and nature of the goods or services as described in an application or registration or in connection with which a prior mark is in use.
- (3) The similarity or dissimilarity of established, likely to continue trade channels.
- (4) The conditions under which and buyers to whom sales are made, i.e. "impulse" vs. careful, sophisticated purchasing.
- (5) The fame of the prior mark (sales, advertising, length of use).
- (6) The number and nature of similar marks in use on similar goods.
- (7) The nature and extent of any actual confusion.
- (8) The length of time during and conditions under which there has been concurrent use without evidence of actual confusion.
- (9) The variety of goods on which a mark is or is not used (house mark, "family" mark, product mark).
- (10) The market interface between applicant and the owner of a prior mark:
  - (a) a mere "consent" to register or use.
  - (b) agreement provisions designed to preclude confusion, i.e. limitations on continued use of the marks by each party.
  - (c) assignment of mark, application, registration and good will of the related business.
  - (d) laches and estoppel attributable to owner of prior mark and indicative of lack of confusion.
- (11) The extent to which applicant has a right to exclude others from use of its mark on its goods.
- (12) The extent of potential confusion, i.e., whether de minimis or substantial.
- (13) Any other established fact probative of the effect of use . . . .

....

... [m] District of Columbia Circuit. In a 1990 opinion, the District of Columbia Circuit noted that the Second Circuit's list of factors in the *Polaroid* case was "the standard test for mark infringement under the [Lanham] Act." Lower courts in the D.C. Circuit have followed this brief mention and use the *Polaroid* factors in analyzing likelihood of confusion. One district court has noted that "not all of these factors need be present in every case."

[n] Trademark Trial and Appeal Board. The T.T.A.B. and the USPTO's examining attorneys follow Federal Circuit precedent and consider the *du Pont* factors in determining likelihood of confusion.<sup>372</sup>

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<sup>372</sup> 5-5 GILSON, *supra* note 63, at 5.02 (citations omitted). Materials reproduced from Gilson on Trademarks with the permission of Matthew Bender & Company, Inc., a member of the LexisNexis Group of companies.

## Appendix B



The Armor School patch<sup>373</sup>



The Infantry School patch<sup>374</sup>

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<sup>373</sup> US Military Stuff, <http://www.usmilitarystuff.com/images/Armor%20School%20with%20tab%20Color.jpg> (last visited Jan. 14, 2009).

<sup>374</sup> US Military Stuff, <http://www.usmilitarystuff.com/images/Infantry%20School20Color.jpg> (last visited Jan. 14, 2009).



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The shape . . . is an inversion of the Follow Me shield. It represents a spearhead and is reminiscent of the triangular shape of the Armor patch . . . .

. . . .

. . . The lightning bolt, symbolizing the power and speed of the Armor branch, and the Infantry bayonet are crossed in the center of the patch . . . .

. . . .

. . . The five-sided section at the bottom of the patch signifies the Pentagon, from which the two branches project. It is red to symbolize sacrifice. A star at the top was added by The Institute of Heraldry to designate Fort Benning as a center of excellence.<sup>376</sup>

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<sup>375</sup> Rodewig, *supra* note 221.

<sup>376</sup> *Id.*

## Appendix C

West Point TM table<sup>377</sup>

United States Military Academy  
at West Point, New York  
Trademark Management Program

The Institutional Names and Identifying Marks of the United States Military Academy (USMA) at West Point, which are registered with the United States Patent & Trademark Office and/or protected under common law, are the exclusive property of the United States Army. The logos, marks, and verbiage identified in this Appendix cannot be used without express, written permission from the Licensing Director and/or a licensing agreement with the Collegiate Licensing Company.

*Institutional Names*

- West Point®
- United States Military Academy®
- U.S. Military Academy™
- USMA®
- Army®
- United States Military Academy Preparatory School™
- West Point Association of Graduates™

*Institutional Verbiage*

- Duty, Honor, Country™
- Long Gray Line™
- All for the Corps™
- Black Knights®
- Army Black Knights®
- West Point Prep Black Knights™



"West Point Crest"



"Athena Helmet"



"Black Knight - Cape Man"



"Black Knight - Horseman"



"Black Knight - Helmets"



"Army Sword"



"Swiss A"



"Kicking Mule"

*Intercollegiate Athletics*

- Army/West Point Baseball™
- Army Basketball®
- West Point Basketball™
- Army/West Point Cross Country™
- Army Football®
- West Point Football™
- Army/West Point Golf™
- Army/West Point Gymnastics™
- Army/West Point Hockey™
- Army/West Point Lacrosse™
- Army/West Point Rifle™
- Army/West Point Rabble Rousers™
- Army/West Point Soccer™
- Army/West Point Softball™
- Army/West Point Sprint Football™
- Army/West Point Swimming™
- Army/West Point Tennis™
- Army/West Point Track & Field™
- Army/West Point Volleyball™
- Army/West Point Wrestling™

*Colors*

- Army Black (Pantone Process Black)
- Army Gold (Pantone 465)
- Army Gray (Pantone Cool Gray 5)

<sup>377</sup> United States Military Academy, [http://www.westpoint.edu/trademark/TM\\_Inst\\_Names\\_Marks.ppt](http://www.westpoint.edu/trademark/TM_Inst_Names_Marks.ppt) (last visited Jan. 16, 2009).

Appendix D



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<sup>378</sup> Sporty's Home Page, [http://www.sportys-catalogs.com/acb/showdet1.cfm?&DID=99&CATID=1&Product\\_ID=2210&count=12&Pcount=36&DETAIL=1](http://www.sportys-catalogs.com/acb/showdet1.cfm?&DID=99&CATID=1&Product_ID=2210&count=12&Pcount=36&DETAIL=1) (last visited Jan. 14, 2009).



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<sup>379</sup> Army Surplus World, [http://www.armysurplusworld.com/customs/photos/airborne\\_tshirtdeathfromabovebi.JPG](http://www.armysurplusworld.com/customs/photos/airborne_tshirtdeathfromabovebi.JPG) (last visited Jan. 14, 2009).

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**TRYING UNLAWFUL COMBATANTS AT GENERAL COURTS-  
MARTIAL: AMENDING THE UCMJ IN LIGHT OF THE  
MILITARY COMMISSIONS EXPERIENCE**

MAJOR E. JOHN GREGORY\*

I. Introduction

On 17 December 2002, one U.S. servicemember drove a Soviet-style jeep in Kabul, Afghanistan while another U.S. servicemember sat in the passenger seat and an Afghan interpreter sat in the back. Suddenly, someone threw a hand grenade into the vehicle, seriously injuring the three occupants.<sup>1</sup> Witnesses identified and Afghan police arrested Mr. Mohammed Jawad, an Afghan present at the time of the attack.<sup>2</sup> No readily apparent clothing, insignia, or markings distinguished Mr. Jawad from other civilians milling about at the time of the attack. Over the next seven years, the United States unsuccessfully sought to try Mr. Jawad by military commission.<sup>3</sup> More broadly, the United States in recent years

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<sup>1</sup> *Afghan Suspect’s Gitmo Tribunal to Begin*, CBS NEWS, Mar. 12, 2008, [http://www.cbsnews.com/stories/2008/03/12/national/main3928194.shtml?source=related\\_story](http://www.cbsnews.com/stories/2008/03/12/national/main3928194.shtml?source=related_story).

<sup>2</sup> The facts for this scenario come from the DoD Commissions website, as well as directly from persons familiar with the case. U.S. Dep’t of Def. Military Commissions Website, <http://www.defenselink.mil/news/commissions.html> [hereinafter DoD Commissions Website] (last visited Dec. 20, 2009). This website contains numerous documents relating to commissions’ litigation, including charge sheets, referral documents, motions, responses, and rulings from the commissions’ trial judges and appellate judges. Since the time that the author started this article, the U.S. Government has released Mr. Jawad from custody. See *Guantanamo Detainee Released*, N.Y. TIMES, Aug. 25, 2009, at A8.

<sup>3</sup> The recently passed Military Commissions Act of 2009 now provides the statutory basis and procedural rules for the military commissions. See Military Commissions Act of 2009, Pub. L. No. 111–84, §§ 1801–07, 123 Stat. 2190 [hereinafter MCA 2009]. The *Jawad* Commission was preferred under the previous statutory regime. See Military

has struggled with the prosecution of persons like Mr. Jawad, persons sometimes referred to as “unlawful combatants.”<sup>4</sup> Domestically, three potential fora exist to try such persons: federal civilian trials, military commissions, and courts-martial.<sup>5</sup> As for the court-martial option, this article demonstrates that the current framework for jurisdiction over unlawful combatants, in relying on the law of war (LOW), presents substantial impediments to the prosecution of someone like Mr. Jawad. Congress could overcome these shortcomings by making unlawful

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Commissions Act of 2006, Pub. L. No. 109–366, 120 Stat. 2522 [hereinafter MCA 2006]; *see also* DoD Military Commissions Website, *supra* note 2.

<sup>4</sup> Questions exist whether the term “unlawful combatant” constitutes a proper term under the law of war at all. *See generally* CA 6659/06A & B v. State of Israel [2007] IsrSC, available at [http://elyon1.court.gov.il/Files\\_ENG/06/590/066/n04/06066590.n04.pdf](http://elyon1.court.gov.il/Files_ENG/06/590/066/n04/06066590.n04.pdf). The author uses the term “unlawful combatant” throughout this article to define the class of persons subject to the proposed jurisdictional framework. The recent change from the use of the term “unlawful enemy combatant” in the MCA 2006 to the use of the term “unprivileged enemy belligerent” in the MCA 2009 demonstrates the fungible nature of labels. *Compare* MCA 2006, *supra* note 3, § 948a(1), with MCA 2009, *supra* note 3, § 948a(7).

<sup>5</sup> Recent history demonstrates the use of different fora in prosecuting suspected terrorists and unlawful combatants. Prior to the 9/11 Attacks, such prosecutions exclusively followed the so-called Civilian Law Enforcement (CLE) model. *See* Ryan Goodman, *The Detention of Civilians in Armed Conflict*, 103 AM. J. INT’L L. 48 (2009); Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079, 1080–82 (2008). Under the CLE model, suspected terrorists are detained by CLE agencies and tried in civilian courts. *See* Chesney & Goldsmith, *supra*, at 1080–82. The prosecution and conviction of those responsible for the 1993 World Trade Center bombing is a well-known example of pre-9/11 Prosecution of Terrorist under the CLE model. *See* Benjamin Weiser, *Two Men Convicted in Bombing at World Trade Center*, N.Y. TIMES, Nov. 16, 1997, at A1. Following the 9/11 attacks, however, the U.S. Government began to emphasize a law of war (LOW) model for detaining and prosecuting suspected terrorists. Despite the shift from the CLE to the LOW model, some prosecutions, such as the well-publicized trial and conviction of Zacarias Moussaoui, continued under the CLE model even after 9/11. *See* Neil A. Lewis, *Last Appearance, and Outburst, from Moussaoui*, N.Y. TIMES, May 5, 2006, at A1; Philip Shenon, *Threats and Responses: The 9/11 Defendant; Early Warnings on Moussaoui Are Detailed*, N.Y. TIMES, Oct. 18, 2002, at A1; *see also* THE OFFICE OF THE PRESIDENT OF THE UNITED STATES, NATIONAL STRATEGY FOR COMBATING TERRORISM 1 (2006) (“We have broken old orthodoxies that once confined our counterterrorism efforts primarily to the criminal justice domain.”). At present, it appears that the prosecution of at least some detainees will continue in the military commissions system. William Glaberson, *Vowing More Rights for Accused, Obama Retains Tribunal System*, N.Y. TIMES, May 16, 2009, at A1. While no unlawful combatant has ever been court-martialed, some have suggested using courts-martial as an alternative to military commissions under the LOW model. For example, on 4 March 2009, a resolution was introduced in Congress that would mandate trial of detainees by district court or court-martial. *See* Terrorist Detainee Procedures Act of 2009, H.R. 1315, 111th Cong. (1st Sess. 2009).

combatants expressly subject to the Uniform Code of Military Justice (UCMJ) under Article 2, UCMJ.<sup>6</sup>

This article narrowly focuses on court-martial jurisdiction over someone like Mr. Jawad, a classic “battlefield detainee,” detained for hostile acts committed on or near the field of battle against U.S. or coalition forces. By contrast, it does not address court-martial jurisdiction over persons who provide support to terrorism or whose actions are more remote than the direct participation in hostilities standard.<sup>7</sup> For example, the proposal suggested in this article would likely not pertain to the defendant in the well-known *Hamdan* decision because his actions appear too remote.<sup>8</sup> Further, this article focuses on the technical improvement of one aspect of jurisdiction already extant under the UCMJ, not the expansion of jurisdiction. It does not propose a replacement for military commissions or civilian trials and retains a neutral position on the wisdom of using courts-martial, civilian trials, or military commissions to try unlawful combatants.

To demonstrate the value of amending Article 2 to include unlawful combatants, this article first relies on the LOW to examine the current framework for court-martial jurisdiction over unlawful combatants. Next, this article reveals the superfluous nature of the current requirement for practitioners before courts-martial convened under the current Clause 2 to make a finding under the LOW to establish *in personam jurisdiction*,<sup>9</sup> an analysis that is mandated by neither the LOW nor the Constitution. Third, this article applies lessons from *Jawad* and *Hamdan*, two recent military commissions cases, one of which reached the Supreme Court. These cases reveal the impediments to achieving court-martial subject matter jurisdiction over unlawful combatants. Primarily, these difficulties arise from the distinction between general

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<sup>6</sup> Except where otherwise stated, all references to the *Manual for Courts-Martial (MCM)* and the Uniform Code of Military Justice (UCMJ) are to the *MCM, United States* (2008). See MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008) [hereinafter MCM].

<sup>7</sup> As demonstrated in Part V.C, “direct participation in hostilities,” as used in this article, is a term of art. See *infra* Part V.C.

<sup>8</sup> In addition to conspiracy, Mr. Hamdan was charged with four “overt acts,” none of which would meet the “direct participation in hostilities” test suggested in Part V.C. See *Hamdan v. Rumsfeld*, 548 U.S. 557, 570 (2006).

<sup>9</sup> *Black’s Law Dictionary* defines “jurisdiction in personam” as “[p]ower which a court has over the defendant’s person and which is required before a court can enter a personal or in personam judgment” and “subject matter jurisdiction” as “[p]ower of a particular court to hear the type of case that is then before it.” BLACK’S LAW DICTIONARY 854 (6th ed. 1990).

criminal activity and LOW violations. Finally, this article provides a narrow definition for the term “unlawful combatant” under the UCMJ, which focuses on an accused’s direct participation in hostilities.

The appendices to this article compare the *Jawad* facts under the different fora and jurisdictional frameworks, discussed. While Appendix A provides the relevant charges from the *Jawad* Commission, Appendix B offers hypothetical court-martial charges based on *Jawad*’s same factual scenario, but under the current framework for court-martial jurisdiction. After providing language to amend the *Manual for Courts Martial* (MCM) to implement the proposed jurisdictional framework, Appendix C articulates new charges under the proposed jurisdictional framework.

## II. Identifying and Addressing Shortcomings in the Current Jurisdictional Framework

### A. Current Framework for Jurisdiction over Unlawful Combatants

On its face, Article 18, UCMJ, already provides a wide grant of jurisdiction to try persons who violate the LOW by general court-martial. This article does not propose to narrow or expand this jurisdiction, but rather to clarify it and facilitate its use. There are two clauses contained in Article 18, referred to throughout this article as “Clause 1” and “Clause 2”: “[Clause 1] [G]eneral courts-martial have jurisdiction to try persons subject to this chapter for any offense made punishable by this chapter . . . . [Clause 2] General courts-martial also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war.”<sup>10</sup> Clause 1 derives its meaning from Article 2, UCMJ, which defines “persons subject to this chapter.” Cases charged under Clause 1

<sup>10</sup> UCMJ art. 18 (2008). Various provisions of the *MCM* support Clause 2. For instance, Rule for Courts-Martial (RCM) 202(b) states that “Nothing in this rule limits the power of general courts-martial to try persons under the law of war.” Likewise, RCM 201(f)(1)(B) provides that general courts-martial may try cases under the law of war for offenses which are (1) against the law of war or (2) against the law of an occupied territory. *MCM*, *supra* note 6, R.C.M. 201, 202. Current policy calls for unlawful combatants to be tried by military commission, not court-martial. See U.S. DEP’T OF ARMY, FIELD MANUAL 27-10, LAW OF LAND WARFARE app. A-5, para. 13 (18 July 1956) (C1, 14 July 1956) [hereinafter FM 27-10]. Even with the changes proposed in this article, the Army would have to change this policy in order to try unlawful combatants by court-martial.

rely on the punitive articles of the UCMJ<sup>11</sup> as well as federal and state offenses under Article 134.<sup>12</sup> Article 2 does not currently define unlawful combatants as “persons subject” to the UCMJ.<sup>13</sup>

Whereas Clause 1 relies on those persons subject to the UCMJ under Article 2 for *in personam* jurisdiction (trial of this particular individual by military tribunal), Clause 2 sets forth plenary jurisdiction for “any person” (not just persons subject to “this chapter”) whom the LOW would otherwise subject to trial by a military tribunal.<sup>14</sup> Two conditions must exist for a court-martial to assert jurisdiction over an unlawful combatant: first, the LOW must permit *in personam* jurisdiction and second, the LOW must recognize the particular offense as an actionable violation (subject-matter jurisdiction).<sup>15</sup>

#### B. Charging and Predictability under the Proposed Framework

The proposed framework would greatly simplify prosecuting unlawful combatants at court-martial because the practitioner would be on the familiar ground of domestic law under Clause 1, rather than trying to discern the applicability of the LOW to a particular prosecution. If the UCMJ made unlawful combatants subject to the UCMJ, as this article argues it should, then the punitive articles and certain federal crimes under Article 134, UCMJ, such as the War Crimes Act,<sup>16</sup> would apply. If Mr. Jawad were subject to the UCMJ, trial counsel could charge Article 80 (attempts), UCMJ, and Article 128 (assaults), UCMJ, without additional jurisdictional authority. Appendix C outlines this approach.<sup>17</sup>

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<sup>11</sup> See UCMJ arts. 77–134.

<sup>12</sup> E.g., Major Michael J. Davidson, *Fetal Crime and its Cognizability as a Criminal Offense Under Military Law*, ARMY LAW., July 1998, at 23, 33–36 (discussing considerations related to offenses charged as assimilated crimes).

<sup>13</sup> See UCMJ art. 2.

<sup>14</sup> According to the preamble to the MCM, “[t]he sources of military jurisdiction include the Constitution and international law. International law includes the law of war.” MCM, *supra* note 6, at I-1; see also *id.* R.C.M. 307(c)(2) (“Ordinarily persons subject to the code should be charged with a specific violation of the code rather than a violation of the law of war.”).

<sup>15</sup> In *Hamdan v. Rumsfeld*, the Court reiterated that “law of war” in the context of Article 21, UCMJ (which is similar to Article 18, UCMJ), depends on the law of war. 548 U.S. 557, 628 (2006) (“And compliance with the law of war is the condition upon which the authority set forth in *Article 21* is granted.”) (italics added).

<sup>16</sup> 18 U.S.C.A. § 2441 (Westlaw 2010).

<sup>17</sup> See *infra* Appendix C.

## C. Eliminating the Anomaly between Lawful and Unlawful Combatants

Just as this article proposes amending Article 2 to make unlawful combatants subject to the UCMJ, the Military Commissions Act of 2006 (MCA) amended Article 2 to make “lawful enemy combatants” subject to Clause 2 jurisdiction.<sup>18</sup> This change created the current anomaly between the treatment under the UCMJ of persons who commit similar misconduct based on their status as lawful or unlawful combatants. To be sure, both groups were previously subject to Clause 2 jurisdiction.<sup>19</sup> But, based on the 2006 change, the advantages of prosecution under

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<sup>18</sup> The *MCM, United States* (2008) does not contain this amendment. See *MCM, supra* note 6, at A2-1–A2-2. The MCA 2006 added a paragraph 13 to Article 2: “(13) Lawful enemy combatants (as that term is defined in section 948a(2) of this title) who violate the law of war.” MCA 2006, *supra* note 3, § 4(a)(1). The referenced definition closely tracks GCIII. See GCIII, *infra* note 18, art. 4(A)(1)–(3). Consistent with its wholesale elimination of the term “enemy combatant,” the MCA 2009 further amended Article 2(13) from “lawful enemy combatant” to “Individuals belonging to one of the eight categories enumerated in Article 4 of the Convention Relative to the Treatment of Prisoners of War, done at Geneva August 12, 1949 (6 UST 3316), who violate the law of war.” MCA 2009, *supra* note 3, § 1803(a)(13). For purposes of this article, the more relevant provisions of the Third Geneva Convention defining those who are considered prisoners of war follow:

- (1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.
- (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions:
  - (a) that of being commanded by a person responsible for his subordinates;
  - (b) that of having a fixed distinctive sign recognizable at a distance;
  - (c) that of carrying arms openly;
  - (d) that of conducting their operations in accordance with the laws and customs of war.

Convention Relative to the Treatment of Prisoners of War art. 142, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GCIII]. Several other categories of persons also receive prisoner of war status. See *id.*

<sup>19</sup> Arguably, lawful combatants are still concurrently subject to Clause 2 jurisdiction as Clause 2 was not amended to exclude them when Congress made lawful combatants explicitly subject to Clause 1.

Clause 1 now accrue to a prosecution of a lawful combatant, but not an unlawful combatant.

For a concrete example, consider the following hypothetical. In a U.S. contingency operation in the fictional country of Ahuristan, U.S. forces within the same operational environment face both lawful combatants, the Ahuristan Army (AA), and unlawful combatants, the Jihad Front (JF). At one point, a U.S. Soldier surrenders to an AA member who promptly and deliberately executes him. At the same time, one mile away, another U.S. Soldier surrenders to a member of the JF, who promptly and deliberately executes him. Later, the U.S. Army detains both the AA and JF members. Because Article 2 includes lawful combatants but not unlawful combatants, the AA member is subject to Clause 1 jurisdiction. The JF member, however, is only subject to Clause 2 jurisdiction. This article argues for amending Article 2 to include unlawful combatants, thus making both persons subject to Clause 1. The ease with which Congress amended Article 2 to include lawful enemy combatants also underscores the facility of adding unlawful combatants to Article 2's scope.

### III. *In Personam* Jurisdiction

#### A. Overview

This part justifies eliminating the the requirement to find *in personam jurisdiction* under the LOW as currently required by Clause 2. As explained in greater detail below, a practitioner seeking to charge an unlawful combatant under Clause 2 has to determine first whether the LOW would sanction the trial of the individual by “military tribunal.”<sup>20</sup> This approach may have made sense at a time when the LOW arguably focused more on the class of individuals subject to trial by military tribunal rather than the underlying procedures of the tribunals themselves. Whatever its previous focus, the LOW now focuses on the underlying tribunal itself and requires a regularly constituted court respecting certain judicial guarantees.<sup>21</sup> Over the course of fifty years, the United States has witnessed great changes in military justice and

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<sup>20</sup> UCMJ art. 18 (2008).

<sup>21</sup> See, e.g., GCIII, *supra* note 18, art. 3(1)(3) (requiring a “regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized people”).

court-martial procedure. As a result, courts-martial today always meet the “regularly constituted” and “judicial guarantees” requirements under the LOW. Thus, with the types of combatants at issue in this article, there no longer exists a need to test whether a court-martial, under the LOW, properly has jurisdiction over any particular individual. This article thus proposes substituting a domestic definition of unlawful combatant under Rule for Courts-Martial (RCM) 109 for purposes of determining court-martial *in personam* jurisdiction. One potential objection to this proposal is that removing the LOW analysis from the individual case risks violating international law by subjecting someone not otherwise amenable to military trial to a court-martial. In response, the proposal does not remove the LOW from the jurisdictional analysis, but rather transfers it from the individual case to a systemic level by building it into the definition of unlawful combatant under the UCMJ.<sup>22</sup>

## B. Compatibility with the Law of War of the Proposed Framework

### 1. *The Law of War’s Previous Focus on the Class of Persons*

Prior to the 1949 Geneva Conventions, the LOW, at least as the U.S. Supreme Court interpreted it during World War II, appears to have focused less on the underlying procedures of a military tribunal and more on the class of persons subject to trial by military tribunal. Procedurally, pre-1949 military tribunals appear to have spanned from those that were indistinguishable from courts-martial to *ad hoc* and more expedient variants.<sup>23</sup> This history formed part of the intellectual background

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<sup>22</sup> See *infra* Part V.

<sup>23</sup> In *Ex parte Quirin*, the Supreme Court provided an extensive catalog of military tribunals from the Revolutionary War, the Mexican-American War, the U.S. Civil War, and various other pre-UCMJ military tribunals. See *Ex parte Quirin v. Cox*, 371 U.S. 1, 31–33 (1942). By no means were all military tribunals summary. For instance, the subject tribunal in *In re Yamashita* lasted more than a month and heard “two hundred and eighty-six witnesses, who gave over three thousand pages of testimony.” *In re Yamashita v. Styer*, 327 U.S. 1, 5 (1946). Even such an elaborate tribunal may have lacked indispensable due process protections as suggested by Yamashita’s contentions before the Supreme Court:

[T]he commission was without authority and jurisdiction to try and convict petitioner because the order governing the procedure of the commission permitted the admission in evidence of depositions, affidavits and hearsay and opinion evidence, and because the commission’s rulings admitting such evidence were in violation of the 25th and 38th Articles of War . . . and the Geneva Convention . . .

behind the current language in Clause 2, originally found in Article 12 of the 1916 Articles of War.<sup>24</sup> Clause 2 thus permitted trial by court-martial (more due process) when the LOW already permitted a military tribunal (less due process) in the same case.<sup>25</sup> As such, the LOW acted as a safety valve to ensure that military tribunals would have jurisdiction only over a limited number of persons; contrariwise, the LOW appears to have focused little on the actual underlying procedures of the tribunal itself.

*Ex parte Quirin*, decided in 1942 prior to the enactment of the UCMJ or the United States' ratification of the 1949 Geneva Conventions, demonstrates the LOW's previous focus on the class of persons rather than the underlying procedural distinctions of the particular tribunal.

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. . . and deprived petitioner of a fair trial in violation of the due process clause of the Fifth Amendment. . . .

*Id.* One must keep in mind that under the pre-UCMJ Articles of War, even servicemembers facing courts-martial had far less due process protections than under current law.

<sup>24</sup> See Articles of War of 1916, ch. 418, 3, art. 12, 39 Stat. 619, 652 (1917); see also Tara Lee, *American Courts-Martial for Enemy War Crimes*, 33 U. BALT. L. REV. 49, 53 (2003). The language contained today in Article 18, UCMJ, first appeared in Article 12 of the 1916 Articles of War, which stated, "General courts-martial shall have power to try any person subject to military law for any crime or offense made punishable by these articles, and any other person who by the law of war is subject to trial by military tribunals." Post-UCMJ, this authority has only been exercised one time, and that was under "occupational jurisdiction" in the case of an American civilian in occupied Japan, and never in the case of an alleged unlawful combatant for a violation of the LOW. See *United States v. Schultz*, 4 C.M.R. 104, 113 (C.M.A. 1952) ("We hold that this general court-martial had jurisdiction over the accused as a person subject to the law of war – not as a person subject to military law."). This article does not address occupational jurisdiction which is that jurisdiction which an occupying army exercises within the territory it controls. This is a traditionally recognized type of jurisdiction, having been explicitly recognized as part of Article 18 "law of war" jurisdiction. See *id.* Finding support in Winthrop's *Military Law and Precedents*, the U.S. Supreme Court has also recognized occupational jurisdiction. See *Hamdan v. Rumsfeld*, 548 U.S. 557, 595–96 (2006). Describing this type of military tribunal, the Court stated, "[C]ommissions have been established to try civilians 'as part of a temporary military government over occupied enemy territory.'" *Id.* at 595 (citing *Duncan v. Kahanamoku*, 327 U.S. 304, 314 (1946)); see also *Madsen v. Kinsella*, 343 U.S. 341 (1952) (illustrating the use of this type of commission to try civilians in occupied Germany); COLONEL WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 837 (2d ed. 1920).

<sup>25</sup> When Congress re-enacted the language from the 1916 Article of War into Clause 2 of Article 18, UCMJ, for the first time it placed some statutory limits on the procedures used in tribunals requiring uniformity to the maximum extent possible except when impracticable. See UCMJ art. 36 (2008); see also *Hamdan*, 548 U.S. at 623, 632–33. Even prior to Article 16, common law provided a general idea of the composition and procedures of tribunals. See WINTHROP, *supra* note 24, at 835–40.

*Quirin* involved several members of the German Armed Forces during World War II who had infiltrated the United States via submarine to commit acts of sabotage.<sup>26</sup> After they landed on shore, they buried their uniforms and proceeded in civilian clothes. Once captured, the *Quirin* defendants, in a petition to the Supreme Court, challenged their trial by military tribunal.<sup>27</sup>

Without delving into the procedures of the tribunal itself, the Supreme Court agreed that a military tribunal legally had jurisdiction over the defendants because they were “unlawful belligerents.”<sup>28</sup> Other than references to the Fourth Hague Convention of 1907 from which the Supreme Court culled the meaning of unlawful belligerent, the Court cited only domestic law and customary international law in its decision.<sup>29</sup> The Court considered the language now found in Article 21, UCMJ, which states that the existence of courts-martial does not “deprive . . . military tribunals of . . . jurisdiction with respect to offenders or offenses that by . . . the law of war may be tried by . . . military tribunals.”<sup>30</sup> The Court interpreted this language to mean that, *in the absence of a statute*, Congress intended that the “Law of War” provide jurisdiction.<sup>31</sup> The Court further explained:

By universal agreement and practice the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war. . . . Unlawful combatants . . . are

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<sup>26</sup> *Quirin*, 317 U.S. at 20–21.

<sup>27</sup> The President had ordered the tribunal into existence and promulgated procedures for the tribunal only after the capture, thus the tribunal was *ad hoc*. *Id.* at 23, 31–38.

<sup>28</sup> The Court used the term “unlawful belligerents,” however, to refer to belligerents who would not otherwise be entitled to prisoner of war status, if captured. *Id.* at 30–31.

<sup>29</sup> *Id.* at 34; Convention (IV) Respecting the Laws and Customs of War on Land, October 18, 1907, 36 Stat. 2277, 2295. Interestingly, only a couple years later in 1946, the Supreme Court extensively cited the 1929 Geneva Conventions in deciding *Yamashita*. *In re Yamashita v. Styer*, 327 U.S. 1 (1946).

<sup>30</sup> *Quirin*, 317 U.S. at 29. The Supreme Court was considering Article 15 of the Articles of War, which is the direct predecessor of Article 21, UCMJ. The identical language appears in both. *See id.* at 27. “Article 15 was first adopted as part of the Articles of War in 1916. . . . When the Articles of War were codified and reenacted as the UCMJ in 1950, Congress determined to retain Article 15 because it had been ‘construed by the Supreme Court [*Ex Parte Quirin*].’” *Hamdan*, 548 U.S. at 593 n.22.

<sup>31</sup> This italicized language supports this article’s position that Article 2, UCMJ, a statute, should include “unlawful combatants.”

[additionally] subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.<sup>32</sup>

Accordingly, under *Quirin*, an accused alleged to have engaged in hostilities with no distinctive insignia<sup>33</sup> would have satisfied the *in personam* requirements of Clause 2 because the LOW subjected such a person to trial by military tribunal.<sup>34</sup> The Supreme Court's near complete omission of any discussion of the underlying procedures proposed in the *Quirin* tribunals demonstrates the LOW's previous focus on the offender, not the tribunal. Similarly, in *Yamashita*, a 1946 case involving the military tribunal of a Japanese World War II commander, the Supreme Court did not consider the underlying procedures of the tribunal itself.<sup>35</sup> Whether *Quirin* and *Yamashita* accurately reflected international law or were mere domestic aberrations,<sup>36</sup> this lack of focus on the underlying procedures of the tribunal changed dramatically in *Hamdan*, discussed below.

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<sup>32</sup> *Quirin*, 317 U.S. at 30–31. Likewise, the Court stated:

Our Government, by thus defining lawful belligerents entitled to be treated as prisoners of war, has recognized that there is a class of unlawful belligerents not entitled to that privilege, including those who though combatants do not wear "fixed and distinctive emblems." And by Article 15 of the Articles of War Congress has made provision for their trial and punishment by military commission, according to "the law of war."

*Id.* at 35.

<sup>33</sup> The lack of distinctive insignia relates to the LOW principle of distinction. *See supra* note 18; *infra* note 86.

<sup>34</sup> The Supreme Court's position here disagrees with the military judge's finding in the *Jawad* commission that unlawful combatant status does not *ipso facto* convert criminal activity into a violation of the LOW. *See infra* Part IV.B.2.

<sup>35</sup> *In re Yamashita v. Styer*, 327 U.S. 1 (1946); *see also Hamdan*, 548 U.S. at 618 (discussing the limited precedential value of *Yamashita*).

<sup>36</sup> Indeed, prior to the World War II cases, American military tribunals, for the most part, appear to have followed court-martial procedure. *See, e.g.*, David Glazier, *A Self-Inflicted Wound: A Half-Dozen Years of Turmoil over the Guantanamo Military Commissions*, 12 LEWIS & CLARK L. REV. 131, 138–47 (2008). Because pre-UCMJ court-martial procedures provided far less due process protection than the current UCMJ, whether such commissions generally followed court-martial procedure prior to the World War II cases does not significantly affect the instant analysis.

## 2. *The Current Requirement for Regularly Constituted Courts*

Whereas the LOW previously appeared to focus more on the status of the accused than the underlying procedures of the tribunal, it now clearly focuses on the tribunal. By the terms of current, positive international law, the determination of whether a given tribunal has jurisdiction over a given actor under the LOW turns on whether the tribunal is both (1) “regularly constituted” and (2) affords the accused certain “judicial guarantees.” This holds true in both international and non-international armed conflicts.

Turning first to non-international armed conflict (NIAC) under Common Article 3 (CA3) of the Geneva Conventions of 1949,<sup>37</sup> the article requires trial “by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized people.”<sup>38</sup> Additional Protocol II to the 1949 Geneva Conventions does not expressly require a regularly constituted court, but it does require “essential guarantees of independence and impartiality” in any court and incorporates the regularly constituted requirement of CA3 which it develops and modifies.<sup>39</sup>

Turning next to international armed conflict (IAC) under Common Article 2 (CA2),<sup>40</sup> the regularly constituted requirement similarly applies. For instance, Additional Protocol I to the Geneva Conventions requires trial by a “regularly constituted court respecting the generally recognized principles of regular judicial procedure.”<sup>41</sup> Under the Fourth Geneva

<sup>37</sup> Article 3, commonly referred to as “Common Article 3” (CA3), is identical in all four 1949 Geneva Conventions. *See, e.g.*, GCIII, *supra* note 18, art. 3(1).

<sup>38</sup> The 1949 Geneva Conventions do not define these “guarantees.” *E.g., id.* art. 3(1)(d).

<sup>39</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, Relating to the Protection of Victims of Non-International Armed Conflicts art. 6, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter APII]. The United States has not ratified Additional Protocols II, however, the United States recognizes certain aspects of Protocol II as indicative of customary international law. *See* Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *reported in* 2 AM. U. J. INT’L L. & POL’Y 428 (1988).

<sup>40</sup> Article 2, commonly referred to as “Common Article 2” (CA2), is identical in all four 1949 Geneva Conventions. *See, e.g.*, GCIII, *supra* note 18, art. 2.

<sup>41</sup> 1977 Geneva Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 75(4), Dec. 12, 1977, 1125 U.N.T.S. 3 [hereinafter API]. The United States has not ratified Additional Protocols I, however, the United States recognizes certain aspects of the Protocol I as indicative of customary international law. *See generally* Michael J. Matheson, *The*

Convention, in certain circumstances, an occupying power may try nationals of an occupied country by its “properly constituted, non-political military courts.”<sup>42</sup> The terms “properly” and “regularly” constituted are interchangeable.<sup>43</sup> Even as to prisoners of war, the regularly constituted requirement, while not expressly stated, applies.<sup>44</sup>

The LOW requires a regularly constituted court in both CA2 and CA3 conflicts. Further, the Supreme Court has determined that an armed conflict falls only within CA2 (IAC) or CA3 (NIAC).<sup>45</sup> Thus, in any armed conflict, a regularly constituted court requirement applies.<sup>46</sup> As for the required judicial guarantees, they include at least the following: a right to be present at trial, a right against self-incrimination, a right to be informed of the allegations and to present a defense, a prohibition against

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*United States Position on the Relation of Customary International Law to The 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U.J. INT'L L & POL'Y 419 (1987).

<sup>42</sup> Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 66, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GCIV]. The Convention prefers that the occupied nation's tribunals continue in force. Article 72 guarantees certain fundamental due process rights as well.

<sup>43</sup> “The commentary's assumption that the terms ‘properly constituted’ and ‘regularly constituted’ are interchangeable is beyond reproach; the French version of Article 66, which is equally authoritative, uses the term ‘regulierement constitue’ in place of ‘properly constituted.’” *Hamdan v. Rumsfeld*, 548 U.S. 557, 632 n.64 (2006).

<sup>44</sup> GCIII, *supra* note 18, art. 84. Under the Third Geneva Convention, prisoners of war must generally be tried by the same type of courts as the detaining power's own Armed Forces; moreover, such courts, at a minimum must “offer the essential guarantees of independence and impartiality.” *Id.* Because the courts that try the members of a country's owned armed forces presumably must be “regularly constituted,” it follows that Article 84 implies a “regularly constituted” requirement.

<sup>45</sup> *See Hamdan*, 548 U.S. at 629–31 (“The term ‘conflict not of an international character’ is used here in contradiction to a conflict between nations.”).

<sup>46</sup> In a non-international armed conflict (NIAC), according to CA3, “persons taking no active part in the hostilities” must be tried “by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized people.” One must distinguish the “taking no active part in hostilities” language found in CA3 from the “taking direct part in hostilities” found in Additional Protocols I and II. Additional Protocols I and II state that “Civilians shall enjoy the protections afforded by this section, unless and for such time as they take a direct part in hostilities.” API, *supra* note 41, art. 51(3); APII, *supra* note 39, art. 13(3). The former language merely describes all persons who, for whatever reason—including detention—are no longer in the fight. The latter language describes unprivileged belligerents. Assuming a CA3 conflict, by definition then, anyone under trial must be tried by a regularly constituted court because they are not then taking “active part in hostilities.”

collective guilt, a prohibition against punishment pursuant to *ex post facto* laws, and the presumption of innocence.<sup>47</sup>

*Hamdan v. Rumsfeld*, a 2006 Supreme Court case involving a Yemeni national detained in Afghanistan who challenged his trial by military commission, demonstrates the LOW's current focus on regularly constituted courts.<sup>48</sup> *Hamdan* involved the military commissions convened under President Bush's executive order<sup>49</sup> prior to the enactment of the MCA 2006.<sup>50</sup> Afghan militia forces had captured Mr. Hamdan in November 2001 and turned him over to the U.S. military.<sup>51</sup> Unlike Mr. Jawad, Mr. Hamdan's crimes aligned with support-type activities, such as serving as a driver, a bodyguard, transporting weapons, and attending training.<sup>52</sup> Like the cases of *Plessy*<sup>53</sup> and *Brown*<sup>54</sup> in the field of Civil Rights, *Quirin* and *Hamdan* will go down in history as bookends of constitutional thought regarding military tribunal jurisdiction under the LOW.

The *Hamdan* Court found that the procedures adopted to try Mr. Hamdan violated CA3's "regularly constituted courts" requirement.<sup>55</sup> Article 36 gives the President statutory authority to convene commissions but requires that commission procedures be uniform with court-martial procedures in so far as practicable.<sup>56</sup> The Court based its finding in part on the President's failure to make a practicability determination for each procedure as required by Article 36, UCMJ. Because the President did not constitute the commissions pursuant to Article 36, UCMJ, the Court found the commissions not regularly constituted.<sup>57</sup> As the Court explained, "At a minimum, a military

<sup>47</sup> See APII, *supra* note 39, art. 6(2)(a-f).

<sup>48</sup> *Hamdan*, 548 U.S. at 566-67.

<sup>49</sup> Military Order of November 13, 2001, 66 Fed. Reg. 57,833 (Nov. 16, 2001).

<sup>50</sup> See MCA 2006, *supra* note 3.

<sup>51</sup> *Hamdan*, 548 U.S. at 566.

<sup>52</sup> *Id.* at 569-70.

<sup>53</sup> *Plessy v. Ferguson*, 163 U.S. 537 (1896).

<sup>54</sup> *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954).

<sup>55</sup> See *Hamdan*, 548 U.S. at 634. With the enactment of the MCA, the current military commissions likely meet the "regularly constituted" requirement, however, questions may still remain regarding the "all judicial guarantees" aspect. See MCA 2006, *supra* note 3. The Court also found that the pre-MCA tribunal did not provide "all the judicial guarantees" required by the Geneva Conventions. See *Hamdan*, 548 U.S. at 634; GCIII, *supra* note 18, art. 3(1)(d).

<sup>56</sup> UCMJ art. 36 (2008).

<sup>57</sup> See *Hamdan*, 548 U.S. at 623, 632-33.

commission can be ‘regularly constituted’ by the standards of our military justice system only if some practical need explains deviations from court-martial practice.”<sup>58</sup> If the Court had followed a *Quirin*-type analysis, it never would have considered the regular constitution of the court.<sup>59</sup>

### C. Courts-Martial as Regularly Constituted Courts

United States courts-martial meet both the regularly constituted and judicial guarantees requirements. As a general matter, the LOW appears to recognize that the term “regularly constituted court” includes “ordinary military courts,” such as courts-martial,<sup>60</sup> which are established and organized in accordance with the laws and procedures already in force in a country.<sup>61</sup> Domestically, the Supreme Court raised in *dicta* the possibility of trying detainees by courts-martial<sup>62</sup> and seemingly approved of Hamdan’s concession “that a court-martial constituted in accordance with the . . . (UCMJ) . . . would have authority to try him.”<sup>63</sup>

Not only does a U.S. court-martial meet the regularly constituted requirement, but, as a result of a half-century of developments in the military justice system, it certainly meets the “judicial guarantees” requirement as well. American military justice has undergone a “revolution” in procedure over the last fifty years.<sup>64</sup> This revolution consisted of the passage of the UCMJ in 1950, the passage of the

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<sup>58</sup> *Id.*

<sup>59</sup> See *supra* Part III.B.1.

<sup>60</sup> COMMENTARY IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 340 (Jean S. Pictet et al. eds., Major Ronald Griffen & Mr. C. W. Dumbleton trans., 1958); *Hamdan*, 548 U.S. at 631–32.

<sup>61</sup> See I JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 355 (2005).

<sup>62</sup> *Hamdan*, 548 U.S. at 613 n.41 (“That conspiracy is not a violation of the law of war triable by military commission does not mean the Government may not, for example, prosecute by court-martial or in federal court those caught plotting terrorist atrocities like the bombing of the Khobar Towers.”).

<sup>63</sup> *Id.* at 566. The petitioner in an earlier Supreme Court case had made the same concession with which the Court seemed to agree. In *Madsen v. Kinsella*, a case in which an accused dependent wife of a servicemember was convicted of murder by a military commission in occupied Germany, Mrs. Kinsetta argued that she should have been tried by court-martial and not by military commission, citing Article of War 12 (the language now found in Article 18, UCMJ). 343 U.S. 341, 345–52 (1950).

<sup>64</sup> See FRANCIS A. GILLIGAN & FREDERIC I. LEDERER, COURT-MARTIAL PROCEDURE § 2-23.00 (2d ed. 1999).

Military Justice Acts of 1968 and 1983, as well as the establishment of robust criminal defense organizations.<sup>65</sup> As a result, courts-martial now provide due process-oriented, individualized justice at a level likely unattainable in most countries' civilian courts.<sup>66</sup> To the extent that a consensus exists of what exactly the "judicial guarantees" consist of, American courts-martial meet the requirement.<sup>67</sup>

As shown, by both the standards of contemporary LOW and recognition by the U.S. Supreme Court, a modern court-martial fulfills the "regularly constituted" and "affording all the judicial guarantees" requirements. The proposed change thus complies with the LOW and simplifies the determination of whether *in personam* jurisdiction exists.

#### IV. Subject Matter Jurisdiction

##### A. The Current Framework's Reliance on the Law of War

Turning to subject-matter jurisdiction, the current framework's reliance on the LOW unnecessarily creates uncertainty in the charging process. In Justice Stevens's plurality opinion in *Hamdan*, the Court approved of Colonel William Winthrop's description of the historical jurisdictional limitations on military commissions.<sup>68</sup> These limits likewise apply to general courts-martial convened under Clause 2. According to Winthrop, "[i]ndividuals of the enemy's army who have

<sup>65</sup> Jack Goldsmith & Cass R. Sunstein, Comment, *Military Tribunals and Legal Culture: What a Difference Sixty Years Makes*, 19 CONST. COMMENT. 261, 283–84 (2002).

<sup>66</sup> Note, *Prosecutorial Power and the Legitimacy of the Military Justice System*, 123 HARV. L. REV. 937 (2010).

<sup>67</sup> The following is a list of each of some of the guarantees and some of the corresponding provisions in the *MCM*:

- (a) Right to be present at trial;
- (b) Right against self-incrimination;
- (c) Right to be informed of the allegations;
- (d) Right to present a defense; and
- (e) Presumption of innocence.

See U.S. CONST. amend. V; *MCM*, *supra* note 6, R.C.M. 804(a); R.C.M. 308; 904; R.C.M. 913(c)(1)(B); R.C.M. 920(e)(5)(a); UCMJ, art. 31 (2008).

<sup>68</sup> See *Hamdan*, 548 U.S. at 598 ("All parties agree that Colonel Winthrop's treatise accurately describes the common law government military commissions and that the jurisdictional limitations he identified were incorporated in Article of War 15 and, later, Article 21 of the UCMJ."); see also WINTHROP, *supra* note 24.

been guilty of illegitimate warfare or other offense in violation of the laws of war” may be tried by commission, and the military commission only has jurisdiction to try “violations of the laws and usages of war cognizable by military tribunals.”<sup>69</sup> With two possible exceptions,<sup>70</sup> Clause 2 precludes charging under the punitive articles, which define offenses under domestic law, not the LOW.<sup>71</sup> Moreover, Congress cannot simply create new crimes or expand existing crimes under the LOW. Congress exercises its constitutional authority to “define and punish offenses against the law of nations”<sup>72</sup> by looking to “the rules and precepts of the law of nations, and more particularly the law of war,” but it cannot just make up new LOW violations.<sup>73</sup>

## B. The Military Commissions Experience: *Hamdan* and *Jawad*

### 1. *Distinction Between Domestic Crimes and Law of War Violations*

There exists a distinction between domestic crimes and violations of the LOW. Because of this distinction, an accused could claim that a charged offense does not constitute a LOW violation in order to escape Clause 2 subject-matter jurisdiction. Despite the fact that the charge alleges activity recognized as criminal, such as the unlawful killing of another person, subject-matter jurisdiction might not exist. In the *Jawad* case, the defense made this claim about the charge of attempted murder in violation of the law of war.<sup>74</sup> Similarly, the *Hamdan* defense argued to the Supreme Court that “conspiracy” did not constitute a violation of the LOW.<sup>75</sup> Four members of the *Hamdan* Court agreed:

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<sup>69</sup> WINTHROP, *supra* note 24, at 836–38; *see also Hamdan*, 548 U.S. at 597–98.

<sup>70</sup> The two possible exceptions are article 104, “Aiding the Enemy” and article 106, “Spies.” *See* UCMJ arts. 104, 106 (2008). The text of both of these articles begins with the phrase “Any person . . .” rather than “Any person subject to this chapter” as do the rest of the punitive articles. *Id.* United States Army Field Manual 27-10 also notes this distinction. FM 27-10, *supra* note 10, app. A-5, para. 13. The author lists these as “possible exceptions” because it would appear that these offenses must also constitute LOW violations for a court-martial to have subject matter jurisdiction under Clause 2.

<sup>71</sup> Interestingly enough, in *Quirin* under pre-UCMJ procedures, the Government charged the accused as having violated certain Articles of War. *See Ex parte Quirin v. Cox*, 371 U.S. 1, 22 (1942).

<sup>72</sup> *See* U.S. CONST. art. I, § 8, cl. 10; *see also* Brief of Petitioner at 38, *United States v. Khalid Sheikh Mohammed*, No. 09-1234 (D.C. Cir. Sept. 9, 2009).

<sup>73</sup> *Quirin*, 371 U.S. at 11.

<sup>74</sup> *See infra* Part IV.B.2.

<sup>75</sup> *See Hamdan*, 548 U.S. at 611–12 (“Because the charge does not support the commission’s jurisdiction, the commission lacks authority to try Hamdan.”). The

At a minimum, the Government must make a substantial showing that the crime for which it seeks to try a defendant by military commission is acknowledged to be an offense against the law of war. That burden is far from satisfied here. The crime of “conspiracy” has rarely if ever been tried as such in this country by any law-of-war military commission not exercising some other form of jurisdiction, and does not appear in either the Geneva Conventions or Hague Conventions—the major treaties on the law of war.<sup>76</sup>

The shallow-rootedness of conspiracy under the LOW could preclude the use of Clause 2 courts-martial to try several of the detainees currently facing military commissions.<sup>77</sup> The Supreme Court’s inability to reach a consensus on conspiracy as a law of war violation demonstrates the difficulty for the practitioner attempting to draft charges under Clause 2.

## 2. Unprivileged Belligerency and Law of War Violations

Notwithstanding contrary language from *Quirin*,<sup>78</sup> a mere lack of combatant immunity does not automatically render an accused’s offense a violation of the law of war. The MCA 2006, like Clause 2, relied on the LOW for jurisdiction, again making the *Jawad* commission instructive for the present analysis.<sup>79</sup> The first commission charge

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plurality was composed of Justice Stevens who authored the opinion of the Court, Justice Souter, Justice Ginsburg, and Justice Breyer. *See id.* at 566.

<sup>76</sup> *Id.* at 603–04. The Court went on to approvingly cite Winthrop: “[T]he jurisdiction of the military commission should be restricted to cases of offenses consisting in overt acts, i.e. in unlawful commissions or actual attempts to commit, and not in intentions merely” (emphasis in original). *Id.* at 604 (quoting WINTHROP, *supra* note 24, at 841).

<sup>77</sup> Most of the detainees with pending charges before the commissions face some sort of conspiracy charge. Of these, many are charged with additional offenses and certain “overt” acts which may themselves be independent violations of the law of war, such as “perfidy” or “attacking civilians.” *See infra* notes 93, 94 (summarizing the pending charges).

<sup>78</sup> *See supra* note 32.

<sup>79</sup> The first point of comparison between military commission jurisdiction and Clause 2 jurisdiction comes from the MCA’s statement of jurisdiction: “A military commission under this chapter shall have jurisdiction to try any offense made punishable by this chapter or the law of war when committed by an alien unlawful enemy combatant. . . .” *See* MCA 2006, *supra* note 3, § 948d(a). A second point of comparison is that several offenses under the MCA require that the offenses be committed “in violation of the law of war.” *See id.* § 948v(b)(13), (15), (16).

against Mr. Jawad alleged “Attempted Murder in Violation of the Law of War,” and contained three specifications, each pertaining to a separate occupant of the vehicle.<sup>80</sup> The second charge alleged “Intentionally Causing Serious Bodily Injury.”<sup>81</sup> Appendix A sets forth the specific language of these charges as well as their statutory definitions.

The *Jawad* defense moved to dismiss the charges for failure to state an offense and for lack of subject-matter jurisdiction. For purposes of the motion, the defense conceded Mr. Jawad’s status as an unlawful combatant.<sup>82</sup> The Government took the position that Mr. Jawad’s status as an unlawful combatant rendered his belligerent acts violations of the LOW.<sup>83</sup> The defense then argued that “the act of throwing a hand grenade at two U.S. servicemembers and their Afghan interpreter [did] not constitute a violation of the law of war.”<sup>84</sup> The defense summed up its argument in the phrase, “[W]ar crimes are acts for which even lawful combatants would not receive combatant immunity.”<sup>85</sup> In support of this proposition, the defense provided extensive legal authority and an affidavit from an expert in the LOW.<sup>86</sup> The defense correctly pointed out that the targets of the attack, two American servicemembers, were not protected persons under the Geneva Conventions and that the Afghan interpreter himself was alternatively not a protected person or proportionally acceptable collateral loss.<sup>87</sup> The defense further pointed out that a hand grenade is a lawful weapon.<sup>88</sup>

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<sup>80</sup> See DoD Military Commissions Website, *supra* note 2 (“Charge Sheet”).

<sup>81</sup> See *id.*

<sup>82</sup> See Defense Motion to Dismiss for Failure to State and Offense and Lack of Subject Matter Jurisdiction under R.C.M. 907, *United States v. Jawad*, at 3 (May 28, 2008), available at <http://www.defenselink.mil/news/d20080528Defense%20Motion%20to%20Dismiss%20for%20Failure%20to%20State%20an%20Offense%20-%20Lack%20of%20Subject%20Matter%20Jurisdiction%20D-007.pdf> [hereinafter *Defense Motion to Dismiss*].

<sup>83</sup> See *id.*

<sup>84</sup> *Id.*

<sup>85</sup> See *id.* at 5.

<sup>86</sup> The defense included an affidavit from Ms. Madeline Morris of Duke Law School in which she agreed that “Engaging in combat (including killing)—as a lawful or an unlawful combatant—does not constitute a violation of the law of war unless the combat activity is conducted through an unlawful method or against an unlawful target.” See *id.* attachment 1. Under the principle of “distinction,” one common characteristic cited for deeming someone an “unlawful combatant” is the failure to wear a uniform or carry arms openly.

<sup>87</sup> See *id.* at 7.

<sup>88</sup> See *id.*

The military judge<sup>89</sup> partially agreed with the defense and found that in order to prove the charged offenses, the Government had to prove both that Mr. Jawad was an unlawful combatant and that the “method, manner, or circumstances used violated the law of war.”<sup>90</sup> In other words, the unlawful belligerency itself only negated combatant immunity but did not constitute a standalone violation of the LOW. The military judge specifically found that the phrase “murder in violation of the law of war” was not satisfied by Mr. Jawad’s status, if so proved, as an unlawful combatant.<sup>91</sup> Most instructive for purposes of Clause 2 subject-matter jurisdiction, the military judge found that:

The government has not cited any persuasive authority for the proposition that acting as an unlawful enemy combatant, by itself, is a violation of the laws of war in the context of non-international armed conflict. In other words, that the Accused might fail to qualify as a lawful combatant does not automatically lead to the conclusion

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<sup>89</sup> Colonel Stephen Henley, U.S. Army, is the current Chief Judge of the U.S. Army Trial Judiciary and was the military judge assigned to the *Jawad* commission. In an apparent attempt to avoid tainting courts-martial, Congress expressly precluded the consideration of military commissions decisions at courts-martial. MCA 2009, *supra* note 3, § 1803(a)(2). Although decisions of the military commissions do not constitute *stare decisis* for purposes of future Clause 2 litigation, the fact that the same military judges and court-martial personnel involved in the commissions decisions may one day serve in positions to interpret Clause 2 adds to the commissions’ value as precedent of persuasion. One doubts as well that this congressional restriction could preclude the defense in any Clause 2 court-martial from citing to precedent interpreting the LOW, whether or not it stems from military commissions. *See* U.S. CONST. amend V.

<sup>90</sup> *See* Ruling on Defense Motion to Dismiss—Lack of Subject Matter Jurisdiction at 1, No. D-007, *United States v. Mohammed Jawad*, available at <http://www.defenselink.mil/news/commissionsJawad.html>.

<sup>91</sup> *See id.* In dicta, the military judge also stated in his ruling:

If Congress intended to make any murder committed by an unlawful enemy combatant a law of war violation they could have said so. They did not and for this Military Commission to do so now would contradict the canons of statutory construction which dictate that a court must construe the language of a statute so as to avoid rendering any words superfluous.

*Id.* at 3. In so stating, the military judge indicated his belief that Congress could have given the military commissions’ jurisdiction over common law (not LOW) murder. As a matter of domestic positive law, this may be the case. Under Article 18 as currently drafted, however, it would appear that any murder charged at a Clause 2 court-martial would have to be alleged to be in violation of the law of war, thus requiring the “method, manner, or circumstances used violated the law of war.” *Id.* at 2.

that his conduct violated the law of war and the propriety of the charges in this case must be based on the nature of the act, not simply on the status of the Accused.<sup>92</sup>

Thus, while “murder” constitutes a crime under domestic law for which an unlawful combatant may not have combatant immunity, it does not *ipso facto* make the crime a violation of the LOW. In such a case, a court-martial would lack subject-matter jurisdiction under Clause 2. The MCA 2006 arguably could have defined murder without the LOW element. Once the MCA included the LOW element, however, the prosecution had to prove that the alleged murder actually violated the LOW. The military judge did not indicate that the Government could not prove this element, only that unprivileged belligerency alone would not satisfy it. Thus while *Hamdan* raises questions regarding the viability of “conspiracy” as a violation of the LOW, *Jawad* casts serious doubt over whether an accused’s unlawful belligerency could render criminal activity a violation of the LOW.

### C. Challenges in Defining Offenses Under the Law of War

*Hamdan* and *Jawad* demonstrate the difficulty of discerning what offenses to charge under Clause 2. Neither the *MCM* nor the MCA provides a reliable list of offenses and elements for purposes of LOW subject-matter jurisdiction. Noteworthy for comparison with trial by courts-martial, the most common charges before the commissions are conspiracy and material support to terrorism.<sup>93</sup> Almost all of the alleged

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<sup>92</sup> See *id.* at 3.

<sup>93</sup> According to the charge sheets posted on the DoD Military Commissions website, the following detainees have been charged with the following offenses: Ibrahim Ahmed Mamoud Al Oosi (conspiracy and material support); Omar Ahmed Khadr (murder in violation of the law of war, attempted murder in violation of the law of war, conspiracy, material support, spying); Ali Hamza Ahmad Suliman al Bahlul (conspiracy, solicitation [to commit war crimes], material support); Almed Mohammed Ahmed Haza al Darbi (conspiracy, material support); Mohammed Kamin (material support); Ahmed Khalfan Ghailani (conspiracy, murder in violation of the law of war, material support, attacking protected persons, attacking protected places, terrorism); Mohammed Hashim (material support, spying); Abdal-Rahim Hussein Mohammed Abdu Al-Nashiri (conspiracy, murder in violation of the law of war, perfidy, destruction of property in violation of the law of war, intentionally causing serious bodily injury in violation of the law of war, terrorism, material support, attempted murder in violation of the law of war); Obaiduallah (conspiracy, material support); Fouad Mahmoud Hasan Al Rabia (material support, conspiracy); Faiz Mohammed Ahmed Al Kandari (material support, conspiracy); Tarek Mahmoud El Sawah (conspiracy, material support); Noor Uthman Muhammed (material

“911 Conspirators” are charged with some form of inchoate crime which may have dubious standing before a court-martial convened under Clause 2.<sup>94</sup> This article does not suggest the impossibility of discerning crimes under the LOW, just the difficulty and sometimes ambiguity of doing so. Appendix B sets forth several sources from which to distill substantive offenses against the LOW as well as hypothetical LOW charges in the *Jawad* case that may have withstood legal scrutiny under the current Clause 2 framework.

## V. Defining “Unlawful Combatant” Under the Proposed Framework

### A. The Proposed Definition

The proposed definition of unlawful combatant must act as a failsafe to ensure that neither the LOW nor domestic law violations occur in charging individuals before courts-martial. The definition itself must encompass both U.S. constitutional restrictions and considerations under the LOW. For reasons of policy and law explained below, this article recommends a very narrow definition of unlawful combatant. Under this

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support, conspiracy); Jabran Said Bin Al Qahtani (conspiracy, material support); Sufyan Barhoumi (conspiracy, material support); Ghassan Abdullah al Sharbi (conspiracy, material support). Further, Salim Ahmed Hamdan (convicted of conspiracy and material support); David M. Hicks (convicted of material support and attempted murder in violation of the law of war). See DoD Military Commissions Website, *supra* note 2, Charge Sheets.

<sup>94</sup> According to the DoD Commissions website, the alleged “Sept 11 Co-Conspirators” are Khalid Sheikh Mohammed, Walid Muhammad Salih Mubarek Bin ‘Attash, Ramzi Binalshibh, Ali Abdul Aziz Ali, and Mustafa Ahmed Adam al Hawsawi. They are all accused of the following offenses, all of which except conspiracy involve some form of accomplice liability: conspiracy, attacking civilians, attacking civilian objects, intentionally causing serious bodily harm, murder in violation of the law of war, material support, hijacking or hazarding a vessel, terrorism. See DoD Military Commissions Website, *supra* note 2, “Charge Sheets.” It appears that the “Sept 11 Co-Conspirators” are now to be tried in federal district court. See *Obama Administration Transfers 12 Detainees to Yemen, Afghanistan, Somaliland*, ABC NEWS, Dec. 20, 2009, <http://blogs.abcnews.com/politicalpunch/2009/12/obama-administration-transfers-12-detainees-to-yemen-afghanistan-somaliland.html>. This article does not suggest that the proposed framework would make courts-martial an appropriate forum for those charged with inchoate crimes. In fact, the proposed framework’s focus on direct participation would likely preclude courts-martial for such persons. As a policy matter, the author does not object to this result. Courts-martial should remain limited to military matters, not general matters of national security. Thus, the nexus to the battlefield is appropriate.

definition, court-martial jurisdiction over unlawful combatants would not extend beyond those directly involved in hostilities against U.S. and coalition forces. To this end, this article proposes the following definition of unlawful combatant: “‘Unlawful combatant’ means any person excluding any citizen of the United States who, while not falling into any other category described under Article 2, nevertheless, directly participates in hostilities against U.S. armed forces or coalition partners.”

## B. Narrowing the Definition

### 1. Constitutional Background and Changes in the UCMJ

The Supreme Court has viewed with suspicion attempts to extend court-martial jurisdiction beyond members of the United States armed forces.<sup>95</sup> Typically, the narrow category of civilians subject to the UCMJ consists of persons closely (and mostly voluntarily) associated with military missions. For instance, Article 2 includes persons in the custody of the armed forces serving a sentence imposed by a court-martial,<sup>96</sup> members of certain federal agencies when serving with the armed forces during time of war or contingency operation,<sup>97</sup> and persons serving with or accompanying an armed force in the field.<sup>98</sup> The recent addition to Article 2 of “lawful combatants” likewise encompasses anyone entitled to prisoner of war status.<sup>99</sup> In the 1955 case of *Ex rel. Toth v. Quarles*, the Supreme Court ruled that court-martial jurisdiction should extend only to “the least possible power adequate to the end proposed.”<sup>100</sup> There, the Supreme Court invalidated the conviction of a former servicemember who was court-martialed only after final discharge from the service.<sup>101</sup> The Supreme Court has also held that subjecting civilians to court-martial during peacetime violates the Constitution.<sup>102</sup> While the

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<sup>95</sup> See, e.g., *Reid v. Covert*, 354 U.S. 1 (1957).

<sup>96</sup> UCMJ art. 2(a)(7) (2008).

<sup>97</sup> *Id.* art. 2(a)(10). Congress added the “or contingency operation” language in 2008, presumably to address the Court of Military Appeals’ ruling in *United States v. Averette* that jurisdiction required a declared war. 41 C.M.R. 363 (C.M.A. 1970).

<sup>98</sup> UCMJ art. 2(a)(1). Courts-martial may also have jurisdiction over certain persons in certain territories via treaty. *Id.* art. 2(a)(11)–(12).

<sup>99</sup> See *supra* note 18.

<sup>100</sup> 350 U.S. 11, 23 (1955).

<sup>101</sup> See *id.*

<sup>102</sup> See *Reid v. Covert*, 354 U.S. 1, 64–65 (1957); see also *United States v. Averette*, 41 C.M.R. 363 (C.M.A. 1970); GILLIGAN & LEDERER, *supra* note 64, § 2-23.00.

recent court-martial of a civilian contractor in Iraq may challenge these limits, wisdom still counsels to respect this guidance.<sup>103</sup>

## 2. *Excluding U.S. Citizens from the Proposed Definition*

The *MCM* definition of unlawful combatant should exclude U.S. citizens. For purposes of access to U.S. courts, it seems that the distinction between U.S. citizens and non-U.S. citizens may make little difference.<sup>104</sup> In cases in which the Supreme Court has struck down court-martial jurisdiction over civilians, however, those civilians have universally been U.S. citizens.<sup>105</sup> Even in *Quirin*, the Court distinguished the putative citizen as perhaps having voluntarily relinquished his citizenship by his association with the German Reich.<sup>106</sup> In the remaining instances under Article 2 in which the UCMJ purports to authorize jurisdiction over civilians, the persons (such as contractors, former members of the Armed Forces serving courts-martial sentences, and members of federal agencies) have voluntarily subjected themselves to military jurisdiction by their very close association with the armed forces. Ultimately, in order to ensure the constitutionality of a UCMJ definition of unlawful combatant and to disincline Supreme Court scrutiny, the definition should exclude U.S. citizens.

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<sup>103</sup> Alexandra Zavis, *Army Interpreter Sentenced at Court-Martial; An Iraqi Canadian Involved in a Stabbing Is the First Civilian Contractor Tried by the U.S. Military*, L.A. TIMES, June 24, 2008, at A3.

<sup>104</sup> For example, non-citizen detainees under the military commissions system have had success challenging the notion that their status as foreigners outside the territory of the United States precludes access to U.S. civilian courts. *See, e.g.*, *Boumediene v. Bush*, 128 S. Ct. 2229 (2008).

<sup>105</sup> With few exceptions, the U.S. Supreme Court has looked unfavorably upon courts-martial trying U.S. citizens, except where those citizens were on active duty in the military both at the time of the offense and at the time of trial. *See, e.g.*, *Reid v. Covert*, 354 U.S. 1 (1957); *Ex rel. Toth v. Quarles*, 350 U.S. 11 (1955). *But see Civilian Contractor Convicted at a Court-Martial (Baghdad)*, RELEASE No. 20080623-01, Operation Iraqi Freedom, Official Website of Multi-National Forces-Iraq, June 23, 2008, [http://www.mnf-iraq.com/index.php?option=com\\_content&task=view&id=20671&Itemid=128](http://www.mnf-iraq.com/index.php?option=com_content&task=view&id=20671&Itemid=128) (describing the “first case” of a contractor, Alaa “Alex” Mohammad Ali, convicted at a court-martial).

<sup>106</sup> *Ex parte Quirin v. Cox*, 371 U.S. 1, 21 (1942).

### 3. *Eliminating Distinctions Based on the Type of Conflict*

The *MCM* definition of unlawful combatant should not distinguish between IAC and NIAC. As previously established, under the LOW, both IAC and NIAC require trials by regularly constituted courts.<sup>107</sup> Since the LOW does not require that domestic law distinguish between IAC and NIAC in permitting trial by courts-martial, the definition should jettison the distinction entirely.<sup>108</sup> Eliminating the IAC/NIAC distinction and making unlawful combatants subject to domestic law also makes irrelevant certain questions remaining as to what LOW offenses exist within a NIAC.<sup>109</sup> For instance, one could make the argument that the perfidy charge described in Appendix B exists only in time of an IAC.<sup>110</sup>

## C. Incorporating “Direct Participation” into the Definition

### 1. *Overview*

This section justifies restricting the definition of unlawful combatant to those who directly participate in hostilities (DPH). Under the LOW, the DPH test allows lethal targeting of civilians who directly participate in hostilities for such time that they participate in hostilities.<sup>111</sup> This

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<sup>107</sup> See *supra* Part III.B.2.

<sup>108</sup> Professor Goodman points out that if the LOW permits a particular practice under IAC, it also permits it under NIAC, although the converse does not necessarily hold true:

[International Humanitarian Law] is uniformly less restrictive in internal armed conflicts than in international armed conflicts. Accordingly, if states have authority to engage in particular practices in an international armed conflict (e.g., targeting direct participants in hostilities), they a fortiori possess authority to undertake those practices in noninternational conflict. Simply put, whatever is permitted in international armed conflict is permitted in noninternational armed conflict.

Goodman, *supra* note 5, at 50.

<sup>109</sup> See, e.g., Derek Jinks, *September 11 and the Laws of War*, 20 YALE J. INT’L L. 1, 2 (2003) (“It is clear that humanitarian law governs the conduct of hostilities in non-international conflicts—even when confined to the territory of one state. The central difficulty is how best to define the scope and content of international humanitarian rules applicable in non-international armed conflict.”).

<sup>110</sup> For a contrary view, see John C. Dehn, *Permissible Perfidy? Analysing the Colombian Hostage Rescue, the Capture of Rebel Leaders and the World’s Reaction*, 6 J. INT’L CRIM. JUST. 627 (2008).

<sup>111</sup> See, e.g., API, *supra* note 41, art. 51(4).

article's restrictive notion of DPH purposely conforms closely with the recently published (and some might say controversial) ICRC Interpretive Guidance.<sup>112</sup> Contrasted with the U.S. view, the ICRC view of DPH comprises a much narrower range of activities.<sup>113</sup> According to the ICRC Interpretive Guidance, in order for an act to constitute an act of direct participation, a specific act must meet the following criteria:

1. [T]he act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm);
2. there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation); [and]
3. the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus).<sup>114</sup>

Incorporating a narrow interpretation of DPH into the proposed definition of unlawful combatant serves two purposes. First, the test has well-recognized roots in the contemporary LOW and will provide a rational justification for why some detainees (i.e., those detained in or around the battlefield) face trial by courts-martial while others (those whose actions are entirely more remote from battlefield) do not. Second, the test will limit the class of persons subject to courts-martial to those whose acts revolve around battlefield-type actions thereby allaying potential constitutional concerns over expansive prescriptive jurisdiction.

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<sup>112</sup> See International Committee of the Red Cross, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (2006), available at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/review-872-p991/\\$File/irr-c-872-reports-documents.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/review-872-p991/$File/irr-c-872-reports-documents.pdf) (last visited Mar. 22, 2010) [hereinafter *ICRC Interpretive Guidance*].

<sup>113</sup> "Not only does [the United States] take the position that tasks such as serving as lookouts or guards is direct participation, but the Navy and Air Force seem to disagree with the ICRC Commentary as they have asserted that being an intelligence agent may constitute direct participation." Major Michael E. Guillory, *Civilianizing the Force: Is the United States Crossing the Rubicon*, 51 A.F. L. REV. 111, 117 (2001).

<sup>114</sup> *ICRC Interpretive Guidance*, *supra* note 112, at 1016.

The justifications for the DPH test rest on both legal, as explained below, and policy grounds. As for policy, the author suggests that the United States should limit use of the courts-martial to this narrow category of unlawful combatants in order to preserve the status of courts-martial as uniquely military courts. Without a DPH test, courts-martial jurisdiction risks expansion to include financiers and others thought to materially support terrorism. As such, courts-martial could become general national-security courts. This would simply go too far beyond the traditional purpose of a court-martial.

## 2. *The Direct Participation Test under the Law of War*

Under the LOW, the DPH requirement appears, among other places, in CA3: “Persons taking no active part in hostilities . . .” receive the protection detailed under CA3.<sup>115</sup> The test also appears in Additional Protocol I: “Civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities.”<sup>116</sup> Additional Protocol II further states that “[a]ll persons who do not take a direct part . . . in hostilities. . .” must receive humane treatment.<sup>117</sup> By

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<sup>115</sup> GCIII, *supra* note 18, art. 3(1).

<sup>116</sup> API, *supra* note 41, art. 51(4).

<sup>117</sup> APII, *supra* note 39, art. 4(1). “Loss of protection against attack is clear and uncontested, as evidence by several military manuals, when a civilian uses weapons or other measures to commit acts of violence against human or material enemy forces.” I CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 61, at 22 (2005). Unfortunately, “a precise definition of the term ‘direct participation in hostilities’ does not exist.” *Id.* Generally, under the LOW, “combatants” are defined as members of a country’s armed forces. See 2 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 78–99 (2005). Support exists for the proposition that unlawful combatants are civilians. In a 2005 case, the Supreme Court of Israel had the opportunity to consider what is a “civilian” for purposes of the LOW. See HCJ 769/02 The Public Committee Against Torture in Israel v. The Government of Israel [2005] IsrSC, available at <https://www.mfa.gov.il/MFA/Government/Law/Legal+Issues+and+Rulings/H CJ+judgment+on+preventative+strikes+against+terrorists+11-Dec-2005.htm?DisplayMode=print> (last visited Mar. 22, 2010). In that decision, the Israeli Supreme Court stated, “A civilian who violates the law and commits acts of combat does not lose his status as a civilian, but as long as he is taking a direct part in hostilities he does not enjoy—during that time—the protection granted to a civilian. . . . True, his status is that of a civilian, and he does not lose that status while he is directly participating in hostilities. However, he is a civilian performing the function of a combatant.” *Id.* para. 6.C.31. Furthermore,

Civilians whose activities merely support the adverse party’s war or military effort or otherwise only indirectly participate in hostilities

limiting the definition to strict “direct participation,” only “unprivileged belligerents” would be subject to trial by courts-martial as unlawful combatants.<sup>118</sup> Limiting “unlawful combatant,” a term nowhere defined in the 1949 Geneva Conventions,<sup>119</sup> to the notion of unprivileged belligerency also comports well with current international law understandings of “unlawful combatant.”<sup>120</sup>

While the United States remains free to define terms domestically in a way inconsistent with the LOW, this approach creates confusion. For instance, the MCA 2006’s definition of “unlawful enemy combatant,” to include someone “who has purposefully and materially supported hostilities against the United States or its co-belligerents,” went beyond the LOW’s notion of DPH.<sup>121</sup> The proposed definition encompasses

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cannot on these grounds alone be considered combatants. This is because indirect participation . . . does not involve acts of violence which pose an immediate threat of actual harm to the adverse party.

INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, THIRD REPORT ON HUMAN RIGHTS SITUATION IN COLUMBIA § 811 (Feb. 26, 1999).

<sup>118</sup> Recall that Article 2 already subjects privileged belligerents to trial by court-martial, both for acts committed before and after their capture. *See* UCMJ arts. 2(9) & (13) (2008).

<sup>119</sup> *See, e.g.*, GCIII, *supra* note 18, art. 3(1).

<sup>120</sup> “Combatants” are defined as:

[M]embers of the armed forces. The main feature of their status in international armed conflicts is that they have a right to directly participate in hostilities. . . . Combatants have an obligation to respect [the LOW], which includes distinguishing themselves from the civilian population. If they violate the LOW they must be punished, but they do not lose combatant status and retain, if captured by the enemy, prisoner-of-war status, except if they violated their obligation to distinguish themselves.

MARCO SASSOLI & ANTOINE A. BOUVIER, *HOW DOES LAW PROTECT IN WAR? CASES, DOCUMENTS AND TEACHING MATERIALS ON CONTEMPORARY PRACTICE IN INTERNATIONAL HUMANITARIAN LAW* 121 (1999). “If civilians directly engage in hostilities, they are considered ‘unlawful’ or ‘unprivileged’ combatants or belligerents (the treaties of humanitarian law do not expressly contain these terms). They may be prosecuted under the domestic law of the detaining state for such action.” Official Statement, International Committee of the Red Cross (ICRC), *The Relevance of IHL in the Context of Terrorism*, July 21, 2005, <http://www.icrc.org/web/eng/siteeng0.nsf/html/terrorism-ihl-210705> (last visited May 20, 2009).

<sup>121</sup> An “unlawful enemy combatant” was defined by the MCA 2006 as follows:

(i) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its

*Jawad* but excludes persons who merely “provided material support” to terrorism<sup>122</sup> without any physical involvement or geographic proximity to hostilities (e.g., *Hamdan*). This falls well within a conservative interpretation of the LOW.

### 3. *An Appropriate Limitation on Court-Martial Prescriptive Jurisdiction*

The DPH test provides an appropriate limitation on prescriptive jurisdiction. While not overly restrictive, the U.S. Constitution and international law put some limits on the United States’ exercise of its prescriptive jurisdiction<sup>123</sup> beyond its own territory and citizens.<sup>124</sup> A

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co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces); or (ii) a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense.

MCA 2006, *supra* note 3, § 948a. The President’s Executive Order establishing military tribunals purported to extend jurisdiction over roughly the same category of persons. *See* Military Order of November 13, 2001, *supra* note 49. The Obama Administration subsequently abandoned the term “enemy combatant.” *See* Respondents’ Memorandum Regarding the Government’s Detention Authority Relative to Detainees Held at Guantanamo Bay, *In re* Guantanamo Bay Detainee Litigation, Nos. 05-0763, 05-1646 (D. D.C. Mar. 13, 2009). According to Professor Goodman, speaking in the detention context, “[P]olicymakers and advocates of U.S. practices improperly conflated two classes of individuals subject to detention: civilians who participate in hostilities [‘unlawful combatants’] and civilians who have not directly participated but nevertheless pose a security threat.” *See* Goodman, *supra* note 5, at 48 (bracketed language inserted by author).

<sup>122</sup> The MCA 2006 defined “providing material support for terrorism” as “[providing] material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out, an act of terrorism . . . or who intentionally provides material support or resources [to a terrorist organization with knowledge].” MCA 2006, *supra* note 3, § 950v(b)(25).

<sup>123</sup> RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 401(a) (1987).

<sup>124</sup>

[W]hile the present constitutional landscape prescribes certain structural and due process limits on the United States’ ability to project and apply extraterritorially its anti-terrorism laws, doctrines of international law intersect with the Constitution to avoid these limits, leaving the United States virtually unconstrained to extend the core panoply of its anti-terrorism laws to foreigners abroad.

number of federal statutes have extraterritorial application to foreigners under certain conditions.<sup>125</sup> The punitive articles of the UCMJ likewise apply extraterritorially.<sup>126</sup> From a domestic law standpoint, congressional intent drives whether a criminal statute applies extraterritorially.<sup>127</sup> Several well-established theories of international law also appear to support extraterritorial application of criminal laws to unlawful combatants.<sup>128</sup> Generally, “a territorial or national link, or ‘nexus’” to the “conduct itself, its perpetrators, or its victims” justifies national prescriptive jurisdiction.<sup>129</sup> Requiring DPH against U.S. forces or coalition partners ensures this nexus and thus serves as another means of justifying the proposed prescriptive jurisdiction. This restriction would also take into account the Supreme Court’s guidance to limit court-martial jurisdiction to the “least possible power adequate to the end proposed.”<sup>130</sup>

There is a policy reason why a strict DPH test appropriately serves the ends of a court-martial. A court-martial by its very nature is a military court. It is not a court of general national security. A court-

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Anthony J. Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law*, 48 HARV. INT’L L.J. 121, 122 (2009).

<sup>125</sup> See, e.g., 18 U.S.C.A. § 2340 (Westlaw 2010) (criminalizing the use of torture even committed by a foreign national); *id.* § 1203 (criminalizing hostage taking); *id.* § 2332 (criminalizing the murder or assault of a U.S. national outside the United States).

<sup>126</sup> See, e.g., *Stevens v. Warden*, 536 F.2d 1334 (10th Cir. 1976); *Hemphill v. Moseley*, 443 F.2d 322 (10th Cir. 1971). As for other federal crimes under Article 134, just as at a court-martial of servicepersons, each case will have to individually resolve whether Congress intended a particular criminal statute to have extraterritorial application.

<sup>127</sup> See, e.g., *Small v. United States*, 544 U.S. 385 (2005).

<sup>128</sup> Three principles of international law appear to readily support extraterritorial application of federal law under the circumstances contemplated in this article. First, the “territorial principle” confers jurisdiction in situations where the “alleged act has actual or intended consequences in the United States.” Brian L. Porto, *Extraterritorial Criminal Jurisdiction of Federal Courts*, 1 ALR Fed. 2d 415 (2005). Second, the “protective principle . . . confers jurisdiction based on a nation’s need to protect its security and the integrity of its governmental functions.” *Id.* Third, under the “passive personality principle,” courts in the United States have jurisdiction “when the victim of the offenses(s) charged is an American citizen.” *Id.*

<sup>129</sup> Colangelo, *supra* note 124, at 129. Colangelo goes on to note that in *Johnson v. Eisentrager*, the Supreme Court held that “the Constitution does not confer a [Fifth Amendment] right of personal security or an immunity from military trial and punishment upon an alien enemy engaged in hostile service of a government at war with the United States.” *Id.* (citing *Johnson v. Eisentrager*, 339 U.S. 763, 785 (1949)).

<sup>130</sup> *Ex rel. Toth v. Quarles*, 350 U.S. 11, 23 (1955).

martial, except for the rare instances of serving as courts of occupation<sup>131</sup> (not at issue in this article), exists to serve purposes of good order and discipline in a military force.<sup>132</sup> If jurisdiction is going to encompass persons other than members of the armed forces, that jurisdiction should remain strictly tied to the concept of actual military operations, not to broader notions of intelligence or national security. By requiring DPH, the proposed framework would simply put the unlawful combatant on the same footing with the lawful combatant/prisoner of war. Now, both could be tried by court-martial without any substantial difficulty or parsing of Article 18 and international law. Such a “hostilities connection” test analogizes logically to the now-defunct “service connection” test, which briefly controlled subject-matter jurisdiction over offenses committed by servicemembers.<sup>133</sup> The proposed restriction would limit jurisdiction to offenders whose alleged offenses occurred, for the most part, in or around the operational environment of a contingency operation.

## VI. Conclusion

This article focused on a narrow subset of potential detainees who may face trial in the course of contemporary contingency operations. It argued for adding a new category to Article 2, unlawful combatants, to facilitate the exercise of jurisdiction already available under Article 18, while leaving Article 18 itself intact for whatever residual jurisdiction may remain under Clause 2. In particular, it focused on people like Mr. Jawad, detained for directly participating in hostilities against U.S. and coalition forces. This article referred to this class of persons as unlawful combatants. Under the current Clause 2 framework for court-martial jurisdiction over unlawful combatants, a practitioner must satisfy two LOW requirements to achieve *in personam* and subject matter jurisdiction. The LOW no longer requires the *in personam* requirement

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<sup>131</sup> See *supra* note 24.

<sup>132</sup> See generally Lieutenant W.G. “Scotch” Perdue, *Weighing the Scales of Discipline: A Perspective on the Naval Officer’s Prosecutorial Discretion*, 46 NAVAL L. REV. 69 (1999) (describing various ways in which command discretion in the military owes itself to the primary objective of supporting good order and discipline).

<sup>133</sup> *United States v. O’Callahan*, the 1969 Supreme Court case which added a “service-connection” requirement for court-martial of servicemembers, represents the high water mark in the restriction of court-martial jurisdiction. 395 U.S. 258 (1969). In *United States v. Solorio*, the Court overruled *O’Callahan* and did away with the “service-connection” test. See *United States v. Solorio*, 483 U.S. 43 (1987).

because a modern court-martial is a regularly constituted court providing necessary judicial guarantees. Requiring that substantive offenses independently exist under the LOW creates uncertainty due to a lack of consensus over what offenses actually exist under the LOW. Unlawful belligerency alone does not necessarily convert a criminal offense into a violation of the LOW. *Hamdan* and *Jawad* demonstrate that some offenses currently charged at the commissions may not actually constitute LOW violations. Making unlawful combatants subject to the UCMJ and defining unlawful combatants for *MCM* purposes as non-U.S. citizens who directly participate in hostilities facilitates prosecuting someone like Mr. Jawad at court-martial. It would also eliminate the jurisdictional anomaly between lawful combatants who violate the LOW, already subject to the UCMJ, and those unprivileged belligerents who commit the same crimes. As demonstrated by the recent addition of lawful combatants to Article 2, the proposed change is simple. Under the proposed framework, practitioners in the field as well as military trial and appellate judges will stand on familiar ground in charging, presiding over, and reviewing courts-martial involving unlawful combatants.

## Appendix A

### Charges at the *Jawad* Commission

Each charge listed below contained three specifications, identical in all respects except for the name of the vehicle occupant. The MCA 2006 defined the offenses.<sup>134</sup>

CHARGE I, Violation of 10 U.S.C. §§ 9501, 950v(b)(15), Attempted Murder in Violation of the Law of War.

Specification 1:

In that Mohammed Jawad, a person subject to trial by military commission as an alien unlawful enemy combatant, did, in and around Kabul, Afghanistan, on or about December 17, 2002, while in the context of, and associated with, an armed conflict, attempt to commit murder in violation of the law of war, by throwing a hand grenade into the

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<sup>134</sup> MCA 2006, *supra* note 3, § 950v(b)(13), (15). Those offenses are defined as follows:

(13) Intentionally causing serious bodily injury.

(A) Offense. Any person subject to this chapter who intentionally causes serious bodily injury to one or more persons, including lawful combatants, in violation of the law of war shall be punished, if death results to one or more of the victims, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a military commission under this chapter may direct.

(B) Serious bodily injury defined. In this paragraph, the term “serious bodily injury” means bodily injury which involves—

(i) a substantial risk of death;

(ii) extreme physical pain;

(iii) protracted and obvious disfigurement; or

(iv) protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

....

(15) Murder in violation of the law of war. Any person subject to this chapter who intentionally kills one or more persons, including lawful combatants, in violation of the law of war shall be punished by death or such other punishment as a military commission under this chapter may direct.

passenger compartment of a vehicle transporting U.S. or Coalition Forces, to wit, [name of occupant], [U.S. Army], with the intent to kill said [name of occupant].

CHARGE II: Violation of 10 U.S.C. § 950v(b)(13), Intentionally Causing Serious Bodily Injury.

Specification 1:

In that Mohammed Jawad, a person subject to trial by military commission as an alien unlawful enemy combatant, did, in and around Kabul, Afghanistan, on or about December 17, 2002, while in the context of, and associated with, an armed conflict, intentionally cause serious bodily injury in violation of the law of war, by throwing a hand grenade into the passenger compartment of a vehicle transporting U.S. or Coalition Forces, to wit, [name of occupant], [U.S. Army].

## Appendix B

### Potential Court-Martial Charges under the Current Framework

Sources for defining crimes under the LOW for Clause 2 purposes consist of LOW treaties, such as the Geneva and Hague Conventions and customary international law.<sup>135</sup> One potential source of crimes for purposes of charging under Clause 2 jurisdiction is the recent Study on Customary International Humanitarian Law by the International Committee of the Red Cross (ICRC Study).<sup>136</sup> The ICRC Study defines categories of crimes based on widely accepted principles: the principle of distinction, specially protected persons and objects, specific methods of warfare, weapons, treatment of civilians and persons hors de combat.<sup>137</sup> “Serious violations” of these LOW principles constitute war crimes.<sup>138</sup> The Rome Statute<sup>139</sup> and the statutes of *ad hoc* international war crimes tribunals also provide sources for ascertaining and charging violations of the laws of war.<sup>140</sup>

Considering the sources discussed above, the crime of “perfidy” might have provided subject-matter jurisdiction if the government had sought to try Mr. Jawad by court-martial under the current Clause 2. The

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<sup>135</sup> It is widely agreed that the existence of a rule of customary international law requires the presence of two elements, namely State practice (*usus*) and a belief that such a practice is required, prohibited, or allowed, depending on the nature of the rule, as a matter of law . . . .” Jean-Marie Henckaerts, *Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict*, 87 INT’L REV. OF THE RED CROSS 175, 178 (2005).

<sup>136</sup> I CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 1, *supra* note 61.

<sup>137</sup> *See id.* at 198–211.

<sup>138</sup> *See, e.g.*, Statute of the International Tribunal, *Report of the Secretary-General Pursuant to Paragraph 2 of U.N. Security Council Resolution 808*, U.N. GAOR, 48th Sess., 3175th mtg., arts. 2–5, U.N. Doc. S/2-5704 (1993), *reprinted in* 32 I.L.M. 1159, 1192–93 (1993) [hereinafter ICTY Statute]; Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., Annex, U.N. Doc. S/RES/955, art. 1 (1994).

<sup>139</sup> For instance, Article 8 of the International Criminal Court Treaty (“the Rome Statute”) lists “willful killing,” but only in conjunction with “grave breaches of the Geneva Conventions” and only against protected persons. Rome Statute of the International Criminal Court art. 8, July 17, 1998, 2187 U.N.T.S. 90, U.N. Doc. A/CONF.183/9 (1998) [hereinafter ICC Statute]. Although the United States has not ratified the ICC Statute, the United States actively participated in the negotiations and would agree that many elements expressed in the Treaty constitute customary international law. *See* David J. Scheffer, *The United States and the International Criminal Court*, 93 AM. J. INT’L L. 12 (1999).

<sup>140</sup> *See, e.g.*, ICTY Statute, *supra* note 138.

ICRC Study lists “killing, injuring or capturing an adversary by resort to perfidy” as a prohibition.<sup>141</sup> Additional Protocol I prohibits perfidy and defines it as “acts inviting the confidence of an adversary to lead him to believe that he is entitled to . . . protection under the rules of international law . . . with intent to betray that confidence.”<sup>142</sup> “Injuring” would subsume the intent behind the *Jawad* Commission charge of intentionally causing serious bodily injury” in violation of the laws of war. Additional Protocol I provides the following example of perfidy: “the feigning of civilian, non-combatant status.”<sup>143</sup> Perfidy contains an element of intent: in this case, the accused must have worn civilian clothes with the intent to betray a confidence invited by the very wearing of civilian clothes. In the hypothetical *Jawad* Clause 2 court-martial, circumstantial evidence alone may be enough to demonstrate that he intentionally used his blending in with the civilian population to get close enough to the vehicle to throw the hand grenade. In another case, though, such as a pitched battle, where U.S. forces attack a given site, knowing that the persons there are combatants, and the combatants openly respond as combatants, it would be difficult to argue perfidy despite the lack of belligerent immunity.<sup>144</sup> Thus, the mere fact that unlawful combatants fail to wear uniforms does not convert each instance in which they engage in hostilities into perfidy.<sup>145</sup>

The Rules for Courts-Martial set forth no specific distinction for charging “law of war violations” under Clause 2.<sup>146</sup> Only in the discussion to RCM 307(c)(2) is any distinction made for Clause 2 charging, and that consists merely of advising that the specification should be delineated as “Violation of the Law of War” on the charge sheet.<sup>147</sup> On a standard DD Form 458, the “perfidy” charge could take the following form:

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<sup>141</sup> See I CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 1, *supra* note 61, R. 65.

<sup>142</sup> API, *supra* note 41, art. 37.

<sup>143</sup> *Id.* art. 37(1)(c).

<sup>144</sup> These facts may be closer to those of another military commissions case, *United States v. Omar Ahmed Khadr*. See DoD Military Commissions Website, *supra* note 2, Charge Sheet.

<sup>145</sup> See W. Hays Parks, *Special Forces' Wear of Non-Standard Uniforms*, 4 CHI. J. INT'L L. 494 (2003). Mr. Parks, a renowned expert on the LOW, states in his article, “The law of war prohibits ‘killing or wounding treacherously individuals belonging to the hostile nation or army,’ commonly known as *perfidy*. . . . However, it is not a war crime for military personnel to wear or fight in civilian clothing unless it is done for the purpose of and with the result of killing treacherously.” *Id.* at 521–22.

<sup>146</sup> See MCM, *supra* note 6, R.C.M. 307.

<sup>147</sup> See *id.* R.C.M. 307(c)(2) discussion.

CHARGE I: Violation of the Law of War: Attempting to Treacherously Murder.

Specification 1:

In that Mohammed Jawad, an unlawful combatant subject to trial by military tribunal by the law of war, did, in and around Kabul, Afghanistan, on or about December 17, 2002, while in the context of, and associated with, an armed conflict, attempt to treacherously<sup>148</sup> commit murder, while feigning civilian, non-combatant status in order to effectuate said attempt, by throwing a hand grenade into the passenger compartment of a vehicle transporting U.S. or Coalition Forces [name of occupant of vehicle] with the intent to kill said [name occupant of vehicle].

...

CHARGE II: Violation of the Law of War: Treacherously Wounding.

Specification 1:

In that Mohammed Jawad, an unlawful combatant subject to trial by military tribunal by the law of war, did, in and around Kabul, Afghanistan, on or about December 17, 2002, while in the context of, and associated with, an armed conflict, treacherously wound [name of occupant of vehicle], while feigning civilian, non-combatant status, by throwing a hand grenade into the passenger compartment of a vehicle transporting U.S. or Coalition Forces [name of first occupant of vehicle].

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<sup>148</sup> See ICC Statute, *supra* note 139, art 8(b)(xi). Article 8 of the ICC Statute declares as war crimes “other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law.” Article 8(b)(xi) lists “killing or wounding treacherously individuals belonging to the hostile nation or army.” “Treacherously” is synonymous with “perfidiously.” See Parks, *supra* note 145, at 521 (“The law of war prohibits ‘killing or wounding treacherously individuals belonging to the hostile nation or army,’ commonly known as *perfidy*.”).

## Appendix C

### Amending Language and Potential Charge

The author proposes the italicized language as amendments to the Manual for Courts-Martial.

#### **Proposed Amendment to the Uniform Code of Military Justice:**

##### **§ 802. Art. 2. Persons subject to this chapter**

(a) The following persons are subject to this chapter:

...

*(14) Unlawful Combatants who have directly participated in hostilities against the United States or its coalition partners in time of declared war or contingency operation for acts committed during direct participation in hostilities and for acts related to such acts committed during direct participation in hostilities.*

#### **Proposed Amendment to the Rules for Courts-Martial:**

##### **Rule 103. Definitions and rules of construction.**

The following definitions and rules of construction apply throughout this Manual, unless otherwise expressly provided.

...

*(21) For purposes of Article 2(a)(14), "Unlawful combatant" means any person excluding any citizen of the United States who, while not falling into any other category described under Article 2, nevertheless, directly participates<sup>149</sup> in hostilities against U.S. armed forces or coalition partners.*

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<sup>149</sup> The MCM would have to also provide guidance on the meaning of "direct participation," restricting the term for purposes of the UCMJ as suggested in this article. See *supra* Part V.C.

**Example of a Specification:**

If Mr. Jawad were tried by court-martial under the proposed framework, the attempt charge would look very similar to a common attempt model specification:

The CHARGE, Violation of Article 80, UCMJ,  
Attempted Murder.

The Specification:

In that Mohammed Jawad, an unlawful combatant, did, in and around Kabul, Afghanistan, on or about 17 December 2002, during a contingency operation, attempt to murder [name of vehicle occupant], a U.S. servicemember, by throwing a hand grenade into the passenger compartment of the vehicle in which [name of occupant] was then a passenger, with the intent to kill the occupants of said vehicle.

**THE HISTORY OF “DON’T ASK, DON’T TELL” IN THE ARMY:  
HOW WE GOT TO IT AND WHY IT IS WHAT IT IS**

FRED L. BORCH III\*

## I. Introduction

While gays, lesbians, bisexuals (and transgendered men and women) have almost certainly served in America’s armed forces since the Revolutionary War, their status—as reflected in policy and regulation—has differed markedly over time. What follows is a historical overview of the Army’s treatment of gays, lesbians, and bisexuals<sup>1</sup>—and homosexual conduct—to provide a context for the contrasting articles on the future of “Don’t Ask Don’t Tell” authored by Major Sherilyn A. Bunn<sup>2</sup> and Major Laura R. Kesler.<sup>3</sup>

While this article does touch on the criminalization of homosexual conduct under the Articles of War (AW) and the Uniform Code of

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<sup>1</sup> While activists, commentators and scholars identify gay, lesbian, bisexual, and transgendered or “GLBT” as one single category, this article focuses chiefly on gay, lesbian and bisexual personnel, and excludes transgendered men and women. This is because Army policies and regulations in the 20th century dealt only with the first three categories, and because information on the presence of, and any official policy toward, transgendered Soldiers is scant.

<sup>2</sup> Major Sherilyn A. Bunn, *Straight Talk: The Implications of Repealing “Don’t Ask, Don’t Tell” and the Rationale for Preserving Aspects of the Current Policy*, 203 MIL. L. REV. 207 (2010).

<sup>3</sup> Major Laura R. Kesler, *Serving With Integrity: The Rationale for the Repeal of “Don’t Ask, Don’t Tell” and its Ban on Acknowledged Homosexuals in the Armed Forces*, 203 MIL. L. REV. 284 (2010).

Military Justice (UCMJ), it does so only as part of its primary focus: explaining the evolution of the twentieth century regulatory framework constructed by the Army to either preclude homosexuals from entering the Army or administratively eliminate them from the service. This article concludes with an examination of the legislation that created DADT in 1993, and a brief look at the most recent congressional hearings on it.

History shows that the Army did not have much official interest in homosexuals and homosexual conduct until the 1920s, when *consensual* sodomy was criminalized for the first time in the AW, and the Army began administratively discharging gay Soldiers regardless of conduct.<sup>4</sup> Although there certainly was a moral component underlying the Army's policy of discharging male homosexuals in the 1920s and 1930s, the official—and stated—rationale for these separations was medical: homosexuality was an illness and sick men should not be in uniform.<sup>5</sup> This medical rationale continued to be at the root of Army policy in World War II, as the Army—relying on the expert opinions of psychiatrists and psychologists—steadfastly insisted that homosexuality was a sexual psychopathy and that this deviancy required the exclusion of homosexual men (and women) from the Army.<sup>6</sup>

After World War II, the Army developed the first comprehensive policy on homosexuals and homosexual conduct when it published an army regulation devoted exclusively to the investigation and separation of homosexuals in 1950.<sup>7</sup> This separate and distinct regulation, however, disappeared in the 1960s, when the Army placed its homosexual discharge provisions in the administrative regulations containing all the bases (and criteria) for discharging of officers and enlisted personnel.<sup>8</sup>

The administrative discharge of officer and enlisted homosexuals under their respective administrative separation regulations continued unchanged until 1981, when the Army, in response to setbacks suffered in litigation in the federal courts, created separate chapters governing homosexuality in both regulations.<sup>9</sup> During this time period, the medical rationale that had originally supported the policy requiring the discharge

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<sup>4</sup> *Infra* Part II.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Infra* Part III.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

of gays, lesbians and bisexuals disappeared completely.<sup>10</sup> It was replaced by an official policy that required the exclusion of homosexuals from the Army because their presence was incompatible with good order and discipline.<sup>11</sup>

For the next twelve years, an administrative regulatory framework continued to control Army policy on gays and lesbians in green uniforms. In 1993, however, in response to proposals by newly elected President William J. Clinton to allow homosexual Soldiers to serve "openly," the Congress enacted legislation governing the status (and treatment) of gays, lesbians and bisexuals in the military—today commonly known as "Don't Ask, Don't Tell" (DADT).<sup>12</sup> Today's Army regulations reflect—and follow—this statute, which allows gays, lesbians, and bisexuals to serve, provided they do not disclose their sexual identities.

This article concludes with a brief look at the February 2010 congressional hearings on DADT—where the Secretary of Defense and Chairman of the Joint Chiefs of Staff both testified that it was time to end DADT—since the hearings are the latest, but certainly not the last, chapter in the history of homosexual policy in the Army.

## II. Revolutionary War through World War II (1775–1950)

The Old and New Testament's strict prohibitions on homosexuality<sup>13</sup> meant that American society, consisting mostly of men and women wedded to traditional Judeo-Christian concepts of morality and behavior, has been anti-homosexual and anti-bisexual for most of history.<sup>14</sup> Given its origins as an Army of citizen-Soldiers, it follows that this aversion to anything other than heterosexual conduct has been a part of the Army's history as well.

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Infra* Part IV.

<sup>13</sup> See, e.g., *Leviticus* 18:22 (King James) ("Thou shalt not lie with mankind, as with womankind; it is abomination"); *1 Corinthians* 6:9 (King James) ("Know ye not that the unrighteous shall not inherit the Kingdom of God? Be not deceived: neither fornicators, nor idolaters, nor adulterers, nor effeminate, nor abusers of themselves with mankind.").

<sup>14</sup> Major Jeffrey S. Davis, *Military Policy Toward Homosexuals: Scientific, Historical, and Legal Perspectives*, 131 MIL. L. REV. 55, 71 (1991).

In General George Washington's Continental Army, homosexuality was not accepted and at least one officer was court-martialed and "dismiss'd with Infamy" after being convicted of sodomy.<sup>15</sup> Interestingly, however, after the establishment of the U.S. Army in the 18th century—and enactment of AW by Congress—criminal prosecutions for homosexual acts apparently could not be conducted at courts-martial. This was because the AW contemplated that Soldiers who committed civil offenses would be tried in civilian courts.

Not until the Civil War did Congress enact legislation giving courts-martial subject-matter jurisdiction over civilian crimes committed by uniformed personnel—but only if these offenses occurred "in time of war" and only if the crimes were "graver civil crimes" like murder, rape and robbery.<sup>16</sup> While it appears that the Army first began court-martialing Soldiers for consensual sodomy during World War I<sup>17</sup>—as a non-capital crime or disorder "to the prejudice of good order and discipline" under Article 62<sup>18</sup>—it was not until 1920 that Congress amended the AW to make *consensual* sodomy a crime.<sup>19</sup>

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<sup>15</sup> RANDY SHILTS, CONDUCT UNBECOMING: LESBIANS AND GAYS IN THE U.S. MILITARY VIETNAM TO THE PERSIAN GULF 12 (1993). Lieutenant Gotthold F. Enslin, a German immigrant then serving in the Continental Army, was court-martialed on 10 March 1778; the president of the court was Lieutenant Colonel Aaron Burr. *Id.* at 11, 12, 17.

<sup>16</sup> W. WINTHROP, MILITARY LAW AND PRECEDENTS 667 (2d ed. 1920). Article 58, first enacted by Congress in 1874, was based on legislation, first passed by Congress in 1863, which provided that,

[I]n time of war, insurrection or rebellion, larceny, robbery, burglary, arson, mayhem, manslaughter, murder, assault and battery with intent to kill, wounding, by shooting or stabbing, with an intent to commit murder, rape or assault and battery with an intent to commit rape, shall be punishable by the sentence of a court-martial when committed by persons in the military service of the United States, and the punishment in any such case shall not be less than the punishment provided, for the like offense, by the laws of the State, Territory, or District in which such offense may have committed.

Articles of War, 1874, art. 58, 18 Stat. 234. According to Winthrop, the crimes listed in Article 58 could not legally be brought to court-martial in time of peace; Article 62 (the general article akin to Article 134, Uniform Code of Military Justice) also could not be used to assimilate these serious civil crimes under the Articles of War. WINTHROP, *supra* at 670–71.

<sup>17</sup> Richard D. Rosen, Homosexuals and the Military 11 (Fall 1985) (unpublished manuscript, on file with TJAGLCS).

<sup>18</sup> Articles of War, 1874, art. 6, 18 Stat. 234.

<sup>19</sup> Articles of War, 1920, art. 93, 41 Stat. 805, ch. 227.

Shortly after the Congress criminalized consensual sodomy in the military, the Army also began using its medical regulations to bar gay men from enlisting.<sup>20</sup> "The idea of excluding people for having a homosexual orientation," wrote journalist Randy Shilts, "as opposed to punishing only those who committed homosexual acts, was born during World War I, and advanced by practitioners in the fledging field of psychiatry."<sup>21</sup> This was a remarkable historical shift in the sense that homosexuality was now viewed—at least by the Army—as an illness rather than a sin or a crime. It follows that while a belief in the immorality of homosexual behavior could have been the basis for the Army's policy on homosexuals, it was not. On the contrary, the presence of gays in the Army could not be tolerated because, as a 1923 Medical Department regulation stated, homosexuality was a "sexual psychopathy" and, as sexual deviants, homosexuals were unfit for military service.<sup>22</sup>

This medical regulation gave commanders the basis to administratively discharge gay men who had already enlisted and were serving on the grounds that they had "habits or traits of character which serve to render their retention in service undesirable."<sup>23</sup> Consequently, while some courts-martial prosecutions for homosexual conduct continued, the 1920s marked the first time that the Army had a regulatory framework for refusing to admit homosexuals and discharging them based solely on status.

During World War II, the Army continued to exclude gays, lesbians, and bisexuals from military service, regardless of conduct, because "homosexuality was an indicator of psychopathology" which made one unfit for military service.<sup>24</sup> Draftees (and volunteers) were turned away if they acknowledged during their induction medical physicals that they were gay.<sup>25</sup> Homosexuals already in uniform could be administratively

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<sup>20</sup> Since women were not permitted to serve in the Army (except as nurses) until Congress established the Women's Army Auxiliary Corps in May 1942 (the forerunner of the Women's Army Corps), it follows that only gay men were prohibited from enlisting.

<sup>21</sup> SHILTS, *supra* note 15, at 15.

<sup>22</sup> U.S. WAR DEP'T, REG. NO. 40-105, MEDICAL DEPARTMENT—STANDARD OF PHYSICAL EXAMINATION FOR ENTRANCE INTO THE REGULAR ARMY, NATIONAL GUARD, AND ORGANIZED RESERVES para. 93p (23 May 1923); Rosen, *supra* note 17, at 13–14.

<sup>23</sup> U.S. WAR DEP'T, REG. 615-360, ENLISTED MEN—DISCHARGE para. 49 (1 Mar. 1926).

<sup>24</sup> LAUREN CASANEDA & SHANNON B. CAMPBELL, NEWS AND SEXUALITY: MEDIA PORTRAITS OF DIVERSITY 192 (2005).

<sup>25</sup> Rosen, *supra* note 17, at 15.

discharged and, in 1943 alone, the Army discharged 1625 Soldiers for homosexuality.<sup>26</sup>

However, because homosexuality was categorized as an illness, and because military psychiatrists apparently opined that some gay and lesbian Soldiers could be cured of their sexual deviancy, a commander did have the option to seek treatment for those “deemed reclaimable.”<sup>27</sup> This explains why War Department Circular No. 3, dated January 1944, advised commanders that “the interests of the Military Establishment” often were best served “by prompt elimination” of homosexuals by administrative means, and that these “true or confirmed” homosexuals were to be discharged unless they could be cured.<sup>28</sup> Absent an attempt to cure or “reclaim” an offender, however, discharge was the only option: gay officers were to be “offered the opportunity and permitted to resign for the good of the service;” enlisted men were to be administratively eliminated and given a discharge “without honor.”<sup>29</sup>

At the end of 1945, the Army revised and reprinted Circular No. 3 as Circular No. 385.<sup>30</sup> The War Department published additional guidance the following year in Circular No. 85. This last Army directive permitted commanders to issue an honorable discharge to gay and lesbian Soldiers being administratively eliminated, as long as they had not committed any homosexual acts.<sup>31</sup> Additionally, because the basis for the Army’s anti-homosexual policy was medical—Circular 85 stated that homosexuality was a “psychological maladjustment” or “psychoneurosis”<sup>32</sup>—a commander retained the option to hospitalize those individuals who might be cured of their sexual affliction, i.e., “whose cases reasonably

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<sup>26</sup> *Id.* at 18 (citing WILLIAM C. MENNINGER, *PSYCHIATRY IN A TROUBLED WORLD: YESTERDAY’S WAR AND TODAY’S CHALLENGES* 225 (1948)).

<sup>27</sup> U.S. WAR DEP’T, CIR. NO. 3, *HOMOSEXUALS* (3 Jan. 1944).

<sup>28</sup> *Id.* para. 2; Rosen, *supra* note 17, at 18.

<sup>29</sup> A “without honor” discharge was printed on blue colored paper and consequently earned the moniker “Blue Discharge.” Note, *Homosexuals in the Military*, 37 *FORDHAM L. REV.* 465, 466 (1969).

<sup>30</sup> U.S. WAR DEP’T, CIR. NO. 385, *HOMOSEXUALS* (28 Dec. 1945).

<sup>31</sup> U.S. WAR DEP’T, CIR. NO. 85, *HOMOSEXUALS* (23 Mar. 1946) [hereinafter *CIRCULAR NO. 85*]. In 1947, the Army’s administrative elimination regulations were modified again: a homosexual Soldier who had not committed any homosexual acts, but who had served honestly and faithfully, could be discharged with a general discharge; only a gay Soldier whose military record was “especially meritorious” was allowed to receive an honorable discharge. U.S. WAR DEP’T, REG. NOS. 615–368, *ENLISTED MEN—DISCHARGES—UNFITNESS* para. 2b(3)(a) (14 May 1947); Rosen, *supra* note 17, at 19–20.

<sup>32</sup> *CIRCULAR NO. 85, supra* note 31, para. I.5.

indicate the possibility of reclamation.”<sup>33</sup> As several authors have noted, these 1945 and 1946 circulars ultimately became the foundation of the Army’s post-World War II regulatory framework on homosexuality.<sup>34</sup>

### III. An Evolving Regulatory Framework (1950–1993)

In 1950, Congress swept away the old Articles of War and adopted a uniform criminal code applicable to the Army, Navy, and the newly created Air Force. This new UCMJ retained consensual sodomy as a court-martial offense under Article 125, thus continuing to give commanders an option to deal with a Soldier’s homosexual acts at courts-martial.<sup>35</sup>

At the same time, the Army published new regulatory guidance on homosexuals and homosexual conduct. Army Regulation 600-443, *Personnel—Separation of Homosexuals*, appeared on 12 January 1950. That regulation and its progeny,<sup>36</sup> which set out a comprehensive scheme that classified homosexuals and then established mandatory guidance on administratively separating homosexuals, are worth examining in some detail. At least three points are evident.

First, the Army acknowledged, apparently for the first time, that there were lesbians in uniform and insisted that their presence—like the presence of gay Soldiers—was intolerable. This is why AR 600-443 states at the outset that “true, confirmed, or habitual homosexual personnel, *irrespective of sex*, will not be permitted to serve in the Army in any capacity and prompt separation of *known* homosexuals from the Army is *mandatory*.”<sup>37</sup> Second (also apparently for the first time), the Army stated as official policy that every Soldier had a duty “to report to

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<sup>33</sup> *Id.* para. I.b.

<sup>34</sup> Rosen, *supra* note 17, at 19; Note, *supra* note 29, at 466–67.

<sup>35</sup> See MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 51 (2008). Some commentators argue that the constitutional validity of the UCMJ’s criminalization of consensual sodomy is uncertain after *Lawrence v. Texas*, 539 U.S. 558 (2003) (holding unconstitutional Texas statute that made it a crime for two persons of the same sex to engage in consensual sexual contact). See, e.g., Major Bailey W. Brown, *Don’t Ask, Don’t Tell: The Implications of 2008 Circuit Court Decisions for the Standard of Constitutional Review Applicable to the Homosexual Conduct Policy*, 201 MIL. L. REV. 184 (2009).

<sup>36</sup> U.S. DEP’T OF ARMY, REG. 600-443, PERSONNEL—SEPARATION OF HOMOSEXUALS (10 Apr. 1953).

<sup>37</sup> *Id.* para. 2 (emphasis added).

his commanding officer any facts which may come to his attention concerning overt acts of homosexuality.”<sup>38</sup>

Third, the Army established, again for the first time, a three-tier classification system that governed how homosexuals would be discharged from the service. Gays and lesbians falling into “Class I” had committed homosexual acts involving coercion, fraud or intimidation.<sup>39</sup> Under AR 600-443, all Class I individuals were required to be prosecuted at general courts-martial. “Class II” homosexuals covered “true” or “confirmed” gays or lesbians who committed homosexual acts that, because of the lack of aggravating factors listed in Class I, did not fall into that first category.<sup>40</sup> Those men and women in Class II had the option of accepting an undesirable discharge or facing general court-martial. Finally, “Class III” homosexuals covered those “rare cases wherein personnel only exhibit, profess or admit homosexual tendencies but wherein there are no specific, provable acts or offenses.”<sup>41</sup> Personnel in this classification also had options: voluntarily separate with either an honorable or general discharge, or face involuntary administrative elimination.<sup>42</sup>

In 1955, the Army published a new regulation governing homosexuals in uniform. Under AR 635-89, official policy continued to be predicated on the belief that gay Soldiers were “reclaimable” even if they had engaged in homosexual acts; these men could remain in the Army if a psychiatrist determined that they were not “confirmed homosexuals.”<sup>43</sup> The 1955 regulation also continued to classify homosexuals in three categories.<sup>44</sup> Courts-martial of Class I homosexuals was required, but a commander did have the option to treat Class I gays and lesbians as Class II homosexuals if criminal prosecution was not possible.<sup>45</sup> In the case of Class II homosexuals, AR 635-89 required a commander to prefer criminal charges against an offender, and

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<sup>38</sup> *Id.* para. 5. Presumably, it was a dereliction of duty in violation of UCMJ Article 92, to fail to report “overt acts of homosexuality.” UCMJ art. 92 (2008).

<sup>39</sup> AR 600-443, *supra* note 36, para. 3.a. Acts with a child under the age of sixteen, even if consensual, fell into this category. *Id.*

<sup>40</sup> *Id.* para. 3.b.

<sup>41</sup> *Id.* para. 3.c.

<sup>42</sup> *Id.* para. 3.a-c.

<sup>43</sup> U.S. DEPT. OF ARMY, REG. 635-89, PERSONNEL SEPARATIONS—HOMOSEXUALS (21 Jan. 1955).

<sup>44</sup> *Id.* para. 5.

<sup>45</sup> *Id.*

then force the accused to choose between a court-martial or a voluntary undesirable discharge.

As for Class III homosexuals, the 1955 regulation defined them as either "overt, confirmed homosexuals," who had not engaged in any homosexual acts while in the Army, or as men and women "who possess homosexual tendencies to such a degree as to render them unsuitable for military service."<sup>46</sup> Class III gays and lesbians were required to be administratively discharged (assuming they were not reclaimable) with a general or an undesirable discharge.<sup>47</sup> In exceptional cases, an honorable discharge might be given.<sup>48</sup>

Three years later, on 8 September 1958, the Army again modified its policy on homosexuals in uniform when it re-published AR 635-89.<sup>49</sup> For the first time, the regulation stated that medical reasons were not the sole basis for excluding gays and lesbians: "Homosexuals are unfit for military service because their presence impairs the morale and discipline of the Army, and homosexuality is a manifestation of a severe personality defect which appreciably limits the ability of such individuals to function effectively in society."<sup>50</sup> This was a significant departure from the Army's earlier regulatory scheme, which was predicated—at least in writing—on homosexuality as a psychopathy and the need to keep the Army free of mentally ill men and women. Now, however, the Army acknowledged that gays and lesbians in uniform undermined the Army's cohesiveness as an organization.

For the first time, the Army also defined the term "homosexual" and the term "homosexual act." The former was an "individual, regardless of sex, who demonstrates by behavior a preference for sexual activity with persons of the same sex."<sup>51</sup> The latter was "bodily contact between persons of the same sex actively undertaken or passively permitted with the intent of obtaining sexual gratification, or any proposal, solicitation, or attempt to perform such an act."<sup>52</sup>

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<sup>46</sup> *Id.* para. 2.c.

<sup>47</sup> *Id.* para 7.b.(1).

<sup>48</sup> *Id.*

<sup>49</sup> U.S. DEP'T OF ARMY, REG. 635-89, PERSONNEL SEPARATIONS—HOMOSEXUALS (8 Sept. 1958).

<sup>50</sup> *Id.* para. 2.a.

<sup>51</sup> *Id.* para. 3.a.

<sup>52</sup> *Id.* para. 3.b.

In 1966, the Army re-published AR 635-89, but the only change was that the new version provided a Soldier being discharged for homosexuality the right to consult with counsel and be represented by such counsel before a board of officers.<sup>53</sup>

In January 1970, the Army scrapped its separate and distinct homosexual regulation and merged its contents into its regulations governing officer<sup>54</sup> and enlisted<sup>55</sup> separations. The more stringent three-tier classification system was abolished and the Army announced that its new policy was simply that Soldiers who had “homosexual tendencies” or who committed “homosexual acts” were to be discharged. Officers would be separated for moral or professional dereliction or on national security grounds.<sup>56</sup> Enlisted personnel would be discharged for “unfitness” if they committed homosexual acts;<sup>57</sup> those Soldiers who had homosexual tendencies were eliminated for “unsuitability.”<sup>58</sup>

In November 1972, the Army republished AR 635-212 as AR 635-200, *Personnel Separations—Enlisted Personnel*, and placed enlisted separations for homosexual acts and tendencies in a new Chapter 13. Paragraph 13-5 of that chapter provided that:

Applicability. An individual is subject to separation under the provision of this chapter when one or more of the following conditions exist:

a. Unfitness.

...

(7) Homosexual acts. Homosexual acts are bodily contact between persons of the same sex, actively undertaken or passively permitted by either or both, with the intent of obtaining or giving sexual gratification, or

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<sup>53</sup> U.S. DEP'T OF ARMY, REG. 635-89, PERSONNEL SEPARATIONS—HOMOSEXUALITY paras. 16.a, 18.a, 20, 22.b (15 July 1966).

<sup>54</sup> U.S. DEP'T OF ARMY, REG. 635-100, PERSONNEL SEPARATIONS—OFFICER PERSONNEL (21 Jan. 1970) [hereinafter AR 635-100].

<sup>55</sup> U.S. DEP'T OF ARMY, REG. 635-212, PERSONNEL SEPARATIONS—DISCHARGE—UNFITNESS AND UNSUITABILITY (21 Jan. 1970) [hereinafter AR 635-212].

<sup>56</sup> AR 635-100, *supra* note 54, para. 5-12.a.(7).

<sup>57</sup> AR 635-212, *supra* note 55, para. 6.a.(7).

<sup>58</sup> *Id.* para. 6.b.(6).

any proposal, solicitation, or attempt to perform such an act. Individuals who have been involved in homosexual acts in an apparently isolated episode, stemming solely from immaturity, curiosity, or intoxication normally will not be processed for discharge because of homosexual acts. If other conduct is involved, individuals may be considered for discharge for other reasons set forth in this chapter.

...

b. Unsuitability.

...

(5) Homosexuality (homosexual tendencies, desires, or interest but without overt homosexual acts). Applicable to personnel who have not engaged in a homosexual act during military service, but who have a verified record of preservice homosexual acts. It is also applicable to other cases which do not fall within the purview of a(7) above.

During this time period, any remaining medical support for the view that homosexuality was a mental disorder or illness disappeared. Empirical research by psychologists and psychiatrists, changing societal views on the morality of sexual behavior, and the rise of a politically active GLBT community caused the American Psychiatric Association to declassify homosexuality as a mental disorder and removed it from the *Diagnostic and Statistical Manual of Mental Disorders* (DSM) II (2nd edition) in 1973.<sup>59</sup> Some psychiatrists and psychoanalysts opposed to the declassification of homosexuality as a mental illness forced the Association's membership to vote on the issue the following year, but their view was rejected.<sup>60</sup> As a result, by the late-1970s the prevailing

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<sup>59</sup> Am. Psychiatric Ass'n, *Homosexuality and Sexual Orientation Disturbance: Proposed Change to DSM-II*, 6th Printing, 44, APA Document Reference No. 730008 (1973), available at [http://www.psychiatryonline.com/DSMPDF/DSM-II\\_Homosexuality\\_Revision.pdf](http://www.psychiatryonline.com/DSMPDF/DSM-II_Homosexuality_Revision.pdf).

<sup>60</sup> Facts About Homosexuality and Mental Health, available at [http://psychology.ucdavis/rainbow/HTML/facts\\_mental\\_health.HTML](http://psychology.ucdavis/rainbow/HTML/facts_mental_health.HTML) (last visited Apr. 8, 2010). While the third edition of the DSM, published in 1980, did contain a new diagnosis for "ergo-dystonic homosexuality," this mental disorder focused on men and women who wanted a

view in the medical community was that gays and lesbians were not sexual deviants and that there was no medical basis to exclude them from the Army.<sup>61</sup> While the Army had long abandoned any claim that it was excluding gays and lesbians from its ranks for medical reasons, the lack of any credible medical support for discrimination against homosexuals in uniform meant that the Army now relied completely on good order and discipline as a rationale.<sup>62</sup>

In the 1970s, while the Army continued to discharge homosexuals under AR 635-200 and AR 635-100, those gays and lesbians facing these administrative eliminations began challenging their separations in U.S. District Court—and winning.<sup>63</sup> In *Watkins v. United States Army*, for example, Sergeant Perry J. Watkins sued after being discharged for being gay. The facts in the Watkins case were not favorable to the Army, since Watkins had admitted that he was a homosexual and admitted that he had engaged in same sex conduct at the time he had been drafted into the Army in August 1967.<sup>64</sup> Additionally, he had not hidden his sexual identity during the sixteen years of honorable service that followed his

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heterosexual relationship but who suffered from a “sustained pattern of *unwanted* homosexual arousal.” (emphasis supplied). *Id.*; see also AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (3d ed. 1980). This new diagnostic classification was deleted in 1986, and the fourth edition of the DSM, published in 1994 (revised 2000), contains no classification of homosexuality as a mental disorder. *Id.*; see also AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (text rev., 4th ed. 2000).

<sup>61</sup> At the same time that psychiatrists and psychologists were altering their views of homosexuality, biologists began investigating whether “same-sex sexuality” in human beings was unique, and whether there was a biological basis for it. While the scientific consensus is that “individuals, populations or species are considered to be entirely heterosexual until proven otherwise,” biologists have recorded same-sex sexual activity in more than 450 different species of animals. This suggests, at least to some scientists, that there is a biological basis for homosexuality. For a recent discussion of scientific research on the issue, see Jon Mooallem, *They Gay? There is a Science to Same-Sex Animal Behavior*, N.Y. TIMES MAG., Apr. 4, 2010, at 26–35, 44–46.

<sup>62</sup> In the 1980s, the emergence of Human Immunodeficiency Virus (HIV) and Acquired Immune Deficiency Syndrome in the United States—primarily among gay men—caused Army leaders to become concerned about the health of male Soldiers. John Lancaster, *Why the Military Supports the Ban on Gays*, WASH. POST, Jan. 28, 1993, at A8. But, while the Army initiated testing to determine whether soldiers were HIV-positive, and some might have argued that the prevalence of HIV among gay men was a reason to exclude homosexuals from the Army, this view was never adopted as official policy.

<sup>63</sup> According to one author, there were six reported court cases “that reached substantive challenges to the homosexual exclusion policy.” MELISSA WELLS-PETRY, EXCLUSION 192 n.1 (1993).

<sup>64</sup> SHILTS, *supra* note 15, at 62.

induction. After being discharged for homosexuality in 1983, Watkins sued and, after years of litigation, a panel of the Ninth Circuit ruled for Watkins—holding that homosexuals were a “suspect class” and that the Army’s regulatory anti-homosexual provisions of AR 635-200 failed to serve any “compelling government interest.”<sup>65</sup> The circuit court, sitting en banc, then ordered the Army to reenlist Watkins, since it determined that, as the Army had known that Watkins was gay, it was “equitably stopped” from discharging him.<sup>66</sup>

While the Army’s loss in *Watkins* was clearly based on the non-constitutional question of whether it was fair to separate Watkins when he had been honest about being gay, the Army was dealt a significant constitutional setback in the litigation involving Army Reserve Sergeant Miriam Ben-Shalom. In 1976, as she was about to graduate from Reserve drill sergeant school in Milwaukee, Wisconsin, Ben-Shalom announced to a local newspaper that she was a lesbian.<sup>67</sup> After her commander subsequently discharged her for homosexuality under Chapter 13, AR 635-200, Ben-Shalom sued in U.S. District Court in 1978. She argued that her discharge had resulted only from her statement that she was a lesbian, and not from any evidence that she had committed any homosexual acts. In *Ben-Shalom v. Secretary of the Army*, Judge Terrance Evans agreed with Ben-Shalom, and ruled that the term “homosexual tendencies” in Chapter 13 violated the First, Fifth, and Ninth Amendments. “Constitutional privacy principles,” wrote Evans, “clearly protect one’s sexual preference in and of themselves from governmental regulation.”<sup>68</sup> Additionally, wrote Evans, even if the Army had proved that Ben-Shalom had committed homosexual acts, it would still be required to prove that this conduct made her unsuitable for military service. Absent any such evidence, Evans ordered the Army Reserve to reenlist her.<sup>69</sup>

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<sup>65</sup> 847 F.2d 1329 (9th Cir. 1989). For more on *Watkins*, see MARY ANN HUMPHREY, *MY COUNTRY, MY RIGHT TO SERVE* 248–57 (1990).

<sup>66</sup> 875 F.2d. 699, 711 (9th Cir. 1989) (en banc).

<sup>67</sup> HUMPHREY, *supra* note 65, at 188.

<sup>68</sup> 489 F. Supp. 964 (E.D. Wis. 1980); SHILTS, *supra* note 15, at 264–65. See also HUMPHREY, *supra* note 65, at 187–93.

<sup>69</sup> *Id.* In August 1989, the Seventh Circuit Court of Appeals reversed the lower court’s decision. *Ben-Shalom v. Marsh*, 881 F.2d 454 (7th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990). Ben-Shalom then appealed to the U.S. Supreme Court, which denied her writ of certiorari on 26 February 1990.

At this point, Army judge advocates working at the Office of The Judge Advocate General's (OTJAG) Litigation Division, joined by OTJAG's Administrative Law Division, recommended amending AR 635-100 and 635-200 by stating, for the first time, that an admission of homosexuality amounted to a propensity to commit acts. According to retired Colonel Richard D. Rosen, who served in OTJAG's Litigation Division at the time, this change "might be more easily defended in litigation, since it was linked to conduct." Remembers Rosen: "We also wanted to shore up grounds for discharge for commission of acts by bringing greater specificity to the provision."<sup>70</sup>

At the same time that judge advocates were examining ways to make the Army's homosexual policy more legally defensible, lawyers at the Department of Defense (DoD) also looked for ways to ensure that the services—Army, Navy, and Air Force—had a uniform policy on gays and lesbians. In January 1981, the DoD issued a directive governing the administrative separation of homosexuals in the armed forces. That directive stated, in part, that:

Homosexuality is incompatible with military service. The presence of such members adversely affects the ability of the Armed Forces to maintain discipline, good order, and morale; to foster mutual trust and confidence among the members; to ensure the integrity of the system of rank and command; to facilitate assignment and worldwide deployment of members who frequently must live and work under close conditions affording minimal privacy; to recruit and retain members of the military services; to maintain the public acceptability of military services; and, in certain circumstances, to prevent breaches of security.<sup>71</sup>

In accordance with the DoD Directive, the Army implemented its new homosexual policy provisions in a completely new and separate regulatory chapters—Chapter 5 for officers and Chapter 15 for enlisted personnel—which was published in March 1981.<sup>72</sup>

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<sup>70</sup> Telephone Interview with Richard D. Rosen, Vice Dean and Professor of Law, Texas Tech University School of Law (Mar. 19, 2010).

<sup>71</sup> U.S. DEP'T OF DEF., DIR. 1332.14, ENLISTED ADMINISTRATIVE SEPARATIONS (15 Jan. 1981).

<sup>72</sup> *Id.*; U.S. DEP'T OF DEF. DIR. 1332.30, SEPARATION OF REGULAR COMMISSIONED OFFICERS FOR CAUSE (15 Jan. 1981); Rosen, *supra* note 17, at 31.

Under all versions of Chapter 5, AR 635-100, and Chapter 15, AR 635-200, published in the 1980s and early 1990s, gay, lesbian, and bisexual officers and enlisted personnel were required to be separated because homosexuality was "incompatible with military service."<sup>73</sup> Consequently, any male or female soldier who engaged in, attempted to engage in, or solicited another to commit a homosexual act was required to be discharged.<sup>74</sup> They also had to be separated if they admitted that they were homosexuals or bisexuals, because such statements "demonstrate a tendency to engage in homosexual conduct."<sup>75</sup> Finally, discharge was mandatory if they married or attempted to marry someone of the "same biological sex."<sup>76</sup>

This Chapter 15—and discharges under this provision—continued throughout the 1980s and early 1990s during which time there also continued to be impassioned debate on the wisdom of the policy.<sup>77</sup> But the entire regulatory framework was thrown into disarray after the election of William J. Clinton to the White House in November 1992.

#### IV. Don't Ask, Don't Tell (1993–present)

The regulations that had governed the status of gay and lesbian Soldiers for more than fifty years ended abruptly in 1993, when Congress enacted legislation creating what is now commonly called

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<sup>73</sup> U.S. DEP'T OF ARMY, REG. 635-200, PERSONNEL SEPARATIONS—ENLISTED PERSONNEL para. 15-1.a. (17 Oct. 1990).

<sup>74</sup> *Id.* para. 15-3.c.

<sup>75</sup> *Id.* paras. 15-1.a, 15-3.b.

<sup>76</sup> *Id.* para. 15-3.c. Interestingly, this new provision also retained some of the old "reclaimable" language of the 1950s, since it allowed a Soldier's retention if the homosexual act was a "departure from the member's usual and customary behavior," the conduct was "unlikely to occur," the Soldier's continued service was in the interests of good order and discipline and, the Soldier does not desire to commit additional homosexual acts. In short, a non-homosexual Soldier might be retained, even if he committed a homosexual act, provided there were extenuating circumstances. *See id.* para. 15-3.a.(1)–(5).

<sup>77</sup> *See, e.g.,* WELLS-PETRY, *supra* note 63 (favoring homosexual exclusion policy); Richard H. Kohn, *Women in Combat, Homosexuals in Uniform: The Challenge of Military Leadership*, PARAMETERS, Spring 1993, at 2, 2–4 (suggesting that allowing gays and lesbians to serve openly will not hurt military effectiveness); R. D. Adair & Joseph C. Myers, *Admission of Gays to the Military: A Singularly Intolerant Act*, PARAMETERS, Spring 1993, at 10, 10–19 (suggesting that the "integrati[on of] "avowed homosexuals" into the Armed Forces will undermine unit cohesion and "institutional morality").

“Don’t Ask, Don’t Tell.”<sup>78</sup> The legislation came in response to newly elected President William J. Clinton’s pledge—“a staple of his rhetoric” as a presidential candidate—to end the ban on homosexuals in the military.<sup>79</sup> While GLBT rights group applauded, Clinton’s promise allow gays and lesbians to openly serve unleashed a firestorm of criticism. *Newsweek* columnist David Hackworth, a retired Army officer and one of the most decorated combat veterans in history,<sup>80</sup> insisted that “putting homosexuals in foxholes” would “destroy fighting spirit and gut U.S. combat effectiveness.”<sup>81</sup> Wrote Hackworth: “Gays are not wanted by straight men or women in their showers, toilets, foxholes or fighting units.”<sup>82</sup> Retired Marine Lieutenant General Bernard E. Trainor insisted that permitting gays and lesbians to serve openly would be a “nightmare as far as the military is concerned” and would “threaten the strong, conservative, moralistic tradition of the troops.”<sup>83</sup> General Colin Powell, then Chairman of the Joint Chiefs of Staff, reportedly told Clinton that lifting the ban “would be prejudicial to good order and discipline.”<sup>84</sup> Senator Sam Nunn (D-Ga.), then the Chairman of the Senate Armed Services Committee, also voiced opposition.<sup>85</sup>

But Clinton was undeterred and, within days of taking office in late January 1993, his aides announced that he was planning to direct Defense Secretary Les Aspin “to prepare an executive order that would lift the ban on homosexuals in the military sometime in the next few months.”<sup>86</sup> The backlash against Clinton now grew greater and greater, if for no other reason than the President’s approach in dealing with the military was not to ask whether lifting the ban was wise, but rather “to

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<sup>78</sup> National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 571, 107 Stat. 1547 (1993).

<sup>79</sup> Dan Belz, *A Promise that Held Inevitable Collision*, WASH. POST, Jan. 28, 1993, at A6.

<sup>80</sup> Although not the most decorated Soldier in history, Hackworth did receive an unprecedented two Distinguished Service Crosses, ten Silver Stars, and eight Purple Hearts in his twenty years as an infantryman.

<sup>81</sup> David Hackworth, *Gays in Combat: Discrimination is Necessary*, WASH. POST, June 28, 1992.

<sup>82</sup> *Id.*

<sup>83</sup> Catherine S. Manegold, *The Odd Place of Homosexuality in the Military*, N.Y. TIMES, Apr. 18, 1993, at 1.

<sup>84</sup> *Id.*

<sup>85</sup> Lancaster, *supra* note 62.

<sup>86</sup> Eric Schmitt, *Clinton Set to End Ban on Gay Troops*, N.Y. TIMES, Jan. 20, 1993, at 1.

ask how it could be done and minimize the effect on combat effectiveness.”<sup>87</sup>

The end result was that Congress stepped into the fray and enacted legislation that codified the pre-Clinton policy on homosexuals in the Department of Defense—thereby preempting Clinton’s authority as Commander-in-Chief to lift the ban on homosexuals in uniform.<sup>88</sup> The future of this 1993 DADT legislation—now embodied in both AR 635-100 and AR 635-200—is the subject of the two articles that follow this introductory history piece.

#### V. The Latest Chapter

After the enactment of DADT, arguments on the wisdom of excluding homosexuals from the Armed Forces continued.<sup>89</sup> While newly elected President Barack Obama indicated his dissatisfaction with the policy—and voiced a desire to repeal the law<sup>90</sup>—the first official statements on DADT occurred on 3 February 2010, when Secretary of Defense Robert M. Gates and Chairman of the Joint Chiefs of Staff, Admiral Mike Mullen, testified before the Senate Armed Services Committee. As the *New York Times* reported it, both men “called for an end to the sixteen-year-old ‘don’t ask, don’t tell law,’ a major step toward allowing openly gay men and women to serve in the U.S. military for the first time.”<sup>91</sup>

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<sup>87</sup> Dan Balz, *A Promise That Held Inevitable Collision*, WASH. POST, Jan. 28, 1993, at A6.

<sup>88</sup> For a detailed legislative history of DADT, see Elaine Donnelly, *Constructing the Co-Ed Military*, DUKE U. J. GENDER L. & POL. 904 (2007). See also William A. Woodruff, *Homosexuality and Military Service*, 64 UMKC L. REV. 121 (1995).

<sup>89</sup> C. Dixon Osburn, *A Policy in Desperate Search of a Rationale: The Military’s Policy on Lesbians, Gays and Bisexuals*, 64 UMKC L. REV. 199 (1995) (arguing that the military’s policy on homosexuals “cannot stand equal protection review, even under the most deferential standard of review courts sometime accord to military decisions”). See also Colonel Om Prakash, *The Efficacy of “Don’t Ask, Don’t Tell,”* 55 JOINT FORCES Q. 88, 88–94 (2009) (arguing that a repeal of DADT will have no impact on military performance).

<sup>90</sup> Rowan Scarborough, *Obama to Delay “Don’t Ask, Don’t Tell” Repeal*, WASH. POST, Nov. 21, 2009, <http://www.washingtontimes.com/news/2008/nov/21/obama-to-delay-repeal-of-dont-ask-dont-tell/>.

<sup>91</sup> Elisabeth Bumiller, *Top Defense Officials Seek to End “Don’t Ask, Don’t Tell,”* N.Y. TIMES, Feb. 3, 2010, at A1.

Shortly after his appearance before Congress, Secretary Gates announced that the Pentagon would “ease enforcement” of DADT by restricting the authority to open a homosexual-related investigation to officers in the grade of brigadier general or rear admiral (lower half) or higher.<sup>92</sup> Additionally, only officers holding that rank or higher will now be permitted to decide whether a discharge is warranted for a gay, lesbian, or bisexual servicemember.<sup>93</sup> Finally, investigators “will generally ignore anonymous complaints and makes those who file them give statements under oath.”<sup>94</sup> Gates also directed the Defense Department “to study how the military would accommodate gay service members” if Congress were to repeal DADT. The study is to be completed by 1 December 2010 and is supposed to include “a ‘systematic’ assessment of the rank and file’s views on the subject.”<sup>95</sup>

Meanwhile, supporters of DADT also have been heard. Lieutenant General Benjamin Mixon, Commander, U.S. Army Pacific, wrote a letter to the *Stars and Stripes*, in which he suggested that Soldiers who supported DADT should tell their elected officials.<sup>96</sup> Secretary Gates called Mixon’s comments “inappropriate.”<sup>97</sup> Admiral Mullen concurred, and added that if commanders disagreed with policy changes, “they should not resort to political advocacy, but rather ‘vote with your feet’ by resigning.”<sup>98</sup>

What will happen to DADT? Will gays, lesbians and bisexuals soon serve openly in the Army and the other services? If so, how will the armed forces implement what is arguably going to have more impact than President Harry S. Truman’s 1948 order to desegregate the military? The answer to these questions must wait for another day—and for history to unfold.

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<sup>92</sup> Editorial, *Don’t Pursue: The Impact of New Rules on Gays in the Military*, WASH. POST, Mar. 27, 2010, at A12.

<sup>93</sup> *Id.*

<sup>94</sup> Craig Whitlock, *Pentagon Restricts Evidence That Can Be Used Against Gays*, WASH. POST, Mar. 26, 2010, at A3.

<sup>95</sup> Craig Whitlock, *A Bit of Catch-22 for Gays in the Military*, WASH. POST, Apr. 1, 2010, at A13.

<sup>96</sup> William McMichael, *Wrong Way to Tell: Lt. Gen. Overstepped His Bounds on “Don’t Ask,” Senior Leaders Say*, ARMY TIMES, Apr. 19, 2010, at 10.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

**STRAIGHT TALK: THE IMPLICATIONS OF REPEALING  
“DON’T ASK, DON’T TELL” AND THE RATIONALE FOR  
PRESERVING ASPECTS OF THE CURRENT POLICY**

MAJOR SHERILYN A. BUNN\*

*“There is a certain relief in change, even though it be  
from bad to worse! As I have often found in traveling in  
a stagecoach, that it is often a comfort to shift one’s  
position, and be bruised in a new place.”<sup>1</sup>*

I. Introduction

After graduating at the top of his class at the U.S. Military Academy at West Point with degrees in environmental engineering and Arabic, Infantry Second Lieutenant Daniel Choi proceeded swiftly through Airborne, Air Assault, Ranger School, and the Scout Leader’s Course.<sup>2</sup> He then completed a 15-month deployment to the “Triangle of Death” in South Baghdad, Iraq, where he served with the 10th Mountain Division as an Iraqi-Arabic language instructor.<sup>3</sup> Now-First Lieutenant (1LT) Choi left active duty in 2008 and attended Harvard University while continuing his military service in the New York Army National Guard.<sup>4</sup> After falling in love with another man, 1LT Choi became concerned with

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<sup>1</sup> WASHINGTON IRVING, *TALES OF A TRAVELLER*, at xi (1824).

<sup>2</sup> See Charles Karel Bouley, *Why is Obama Firing Dan Choi?*, HUFFINGTON POST, Oct. 6, 2009, [http://www.huffingtonpost.com/charles-karel-bouley/why-is-obama-firing-dan-c\\_b\\_311084.html](http://www.huffingtonpost.com/charles-karel-bouley/why-is-obama-firing-dan-c_b_311084.html).

<sup>3</sup> *Id.*

<sup>4</sup> See T.M. Lindsey, *Lt. Dan Choi: “Don’t Ask, Don’t Tell” Is a “Disease of Shame,”* IOWA INDEP., Feb. 2, 2010, <http://iowaindependent.com/28399/lt-dan-choi-don%E2%80%99t-ask-don%E2%80%99t-tell-is-a-%E2%80%98disease-of-shame%E2%80%99>.

the military's policy on open homosexuality.<sup>5</sup> Volunteering as the spokesperson of "Knights Out," a group of West Point alumni who support open service of lesbian, gay, bisexual, and transgender (LGBT) servicemembers in the armed forces,<sup>6</sup> 1LT Choi appeared on MSNBC's *Rachel Maddow Show* on 20 March 2009, and announced to millions of the show's viewers that he was gay.<sup>7</sup> Within a matter of months, a military board composed of four officers recommended that 1LT Choi be discharged from the military for making the televised statement in violation of the military's "Don't Ask, Don't Tell" (DADT) policy.<sup>8</sup>

Despite the fact that the board had not finalized its recommendation and no separation had been directed, 1LT Choi commenced a new "full time job" publicly protesting the policy.<sup>9</sup> With a calendar of public speaking engagements, gay pride parades, and protests, Choi stood out among several of his similarly-situated peers to become the poster-child for repealing DADT.<sup>10</sup> A strong, physically fit, mentally-agile, and combat-tested officer, Choi garnered the support of many influential people in Washington, D.C., as well as some of his fellow Soldiers.<sup>11</sup> After months of publicly fighting DADT, Choi, along with many LGBT servicemembers, celebrated the Commander-in-Chief's State of the

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<sup>5</sup> See Delena Wickerson, *Dan Choi and Matthew Kinsey: The Story Continues*, 10,000 COUPLES, Nov. 30, 2009, <http://10thousandcouples.com/issue/december-2009/article/love-and-romance-dan-and-matthew> (describing 1LT Choi and partner Matthew Kinsey's courtship).

<sup>6</sup> See Mission Statement, Knight's Out, available at <http://www.knightsout.org/> (last visited Mar. 28, 2010). "Knight's Out is an organization of West Point Alumni, Staff and faculty who are united in supporting the rights of Lesbian, Gay, Bisexual, and Transgender Soldiers to openly serve their country." *Id.*

<sup>7</sup> See Interview of Lieutenant Dan Choi, Mar. 18, 2009, available at <http://www.msnbc.msn.com/id/26315908/#29807116> (last visited Mar. 28, 2010).

<sup>8</sup> See Martin Wisckol, *Military Board Calls for Discharge of Gay Tustin Soldier*, ORANGE COUNTY (BETA) REG., June 30, 2009, <http://www2.ocregister.com/articles/choi-military-don-2480161-gay-national>. The discharge recommendation followed hours of deliberation and consideration of over 260,000 letters of support. *Id.* Currently, the National Guard bureau has not made an official decision. *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> Between 1 April and 27 June 2010, 1LT Choi scheduled nine public speaking events. See 1LT Dan Choi's press kit/calendar, available at <http://www.ltdanchoi.com/press.html> (last visited Mar. 28, 2010). From March 2009 to the time of this writing, 1LT Choi has participated as a public speaker in opposition of DADT at over fifty conferences, gay pride marches, and gay rights protests. See 1LT Dan Choi's Biography, available at <http://www.ltdanchoi.com/bio.html> (last visited Mar. 28, 2010).

<sup>11</sup> See Wisckol, *supra* note 8. During his statement to the administrative board, Choi declared he was speaking for ". . . all the deployed soldiers or anyone who feels isolated, that indeed NO soldier stands alone." *Id.*

Union address, in which the President publicly demanded repeal of the policy.<sup>12</sup>

Only weeks later, on 2 February 2010, Secretary of Defense Robert Gates and Chairman of the Joint Chiefs of Staff, Admiral Michael Mullen, voiced their personal objections to the policy and announced that the armed forces would commence a year-long study to better prepare for the repeal of DADT.<sup>13</sup> With Senate hearings underway and some of the highest ranking military officers ready to defend personal beliefs at odds with a majority of the military,<sup>14</sup> many expected exhilaration and celebration from opponents of the ban that their day had finally arrived.<sup>15</sup> Events soon demonstrated that this was far from reality.

On 18 March 2010, unsatisfied with the pace of congressional efforts and perceiving limited presidential support, 1LT Choi mobilized with Captain Jim Pietrangelo, an officer who had already been discharged under DADT, wearing the Army Combat Uniform. Flanked by nearly one hundred protesters, Choi hugged the gate surrounding the White

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<sup>12</sup> See Remarks by the President in the State of the Union Address, Jan. 27, 2010, available at <http://www.whitehouse.gov/the-press-office/remarks-president-state-union-address> (last visited Mar. 28, 2010). President Obama pledged during the 2010 State of the Union Address, “[t]his year, I will work with Congress and our military to finally repeal the law that denies gay Americans the right to serve the country they love because of who they are. It’s the right thing to do.” *Id.*

<sup>13</sup> See Barbara Starr, *Gates: Pentagon Preparing Repeal of “Don’t Ask, Don’t Tell” Policy*, Feb. 2, 2010, available at <http://www.cnn.com/2010/POLITICS/02/02/gays.military/index.html> (last visited Mar. 28, 2010). In his statement before the Senate Armed Services Committee, Admiral Mullen said it was his “personal belief” that “allowing gays and lesbians to serve openly [in the military] would be the right thing to do.” *Id.* Additionally, Secretary Gates testified, “The question before is not whether the military prepares to make this change, but how we best prepare for it . . . We have received our orders from the commander in chief and we are moving out accordingly.” *Id.*

<sup>14</sup> On 18 March 2010, the following witnesses testified regarding their beliefs about current application of DADT and the potential impact of DADT’s repeal: General John J. Sheehan, USMC (Ret.), Former Supreme Allied Commander, Atlantic, and Former Commander in Chief, U.S. Atlantic Command; Michael D. Almy, Former Major, U.S. Air Force; Jenny L. Kopfstein, Former Lieutenant Junior Grade, U.S. Navy. See Witness List for the U.S. Senate Armed Services Committee hearing, Mar. 28, 2010, available at [http://armed-services.senate.gov/e\\_witnesslist.cfm?id=4476](http://armed-services.senate.gov/e_witnesslist.cfm?id=4476) (last visited Mar. 28, 2010).

<sup>15</sup> See Joe Solmonese, *U.S. Senate Committee Hears Testimony from Military Veterans on “Don’t Ask, Don’t Tell,”* Mar. 18, 2010, available at <http://www.hrc.org/14212.htm> (last visited Mar. 28, 2010). Joe Solmonese, as President of the Human Rights Campaign (HRC) organization, “hailed” the discussions at the Senate Armed Service Committee hearing on DADT and the military veterans that addressed the dilemmas posed by the current application of DADT. *Id.*

House and received assistance handcuffing himself to its iron bars in an effort to “send the President a message.”<sup>16</sup> Reminiscent of a martyr, Choi now declared war on the Commander-in-Chief in a series of acts that violated not only the civilian law of the District of Columbia,<sup>17</sup> but ones—that even the freshest West Point Plebe is trained from the first days of indoctrination<sup>18</sup> are—in defiance of the Uniform Code of Military Justice.<sup>19</sup>

After his arrest and booking, 1LT Choi pleaded “not guilty.”<sup>20</sup> Opting for a public trial, rather than paying a fine, Choi solemnly announced to the public:

There was no freer moment than being in that prison. It was freeing for me . . . but the message was very clear to all of the people who think that equality can be purchased with a donation . . . . We are worth more than tokens. We have absolute value. And when the person who is oppressed by his own country wants to find out

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<sup>16</sup> Killian Melloy, *Lt. Dan Choi's White House Arrest Sparks Debate About HRC's (Non?) Activism*, Mar. 19, 2010, available at <http://www.edgesanfrancisco.com/index.php?ch=news&sc=&sc2=&sc3=&id=103647> (last visited Mar. 28, 2010). At a public protest rally sponsored by HRC, Choi gathered protestors for his march by urging continuation of the protest at the White House. “You’ve been told that the White House has a plan. . . . But we learned this week that the president is still not fully committed . . . . Following this rally, I will be leading [the protest] to the White House to say ‘enough talk.’ . . . I am still standing, I am still fighting, I am still speaking out, I am still gay.” *Id.*

<sup>17</sup> Choi was cited with a violation of the District of Columbia Municipal Regulations, providing that “[n]o person shall fail or refuse to comply with any lawful order or direction of any police officer, police cadet, or civilian crossing guard invested by law with authority to direct, control, or regulate traffic. This section shall apply to pedestrians or to the operators of vehicles.” D.C. MUN. REGS. tit. 18, § 2000.2 (2010).

<sup>18</sup> See U.S. Military Academy at West Point, Admissions Information for Plebe Summer, available at [http://admissions.usma.edu/prospectus/wpe\\_military.cfm](http://admissions.usma.edu/prospectus/wpe_military.cfm) (last visited Mar. 28, 2010) (“The bulk of ‘hands on’ military training occurs during the summer. Freshmen, or ‘plebes,’ begin their West Point experience with Cadet Basic Training. This six-week program of instruction focuses on basic Soldier skills and courtesies, discipline, personal appearance, military drill and ceremony, and physical fitness.”).

<sup>19</sup> Under Article 88, Uniform Code of Military Justice (UCMJ), “Any commissioned officer who uses contemptuous words against the President . . . shall be punished by court-martial.” MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 12 (2008) [hereinafter MCM].

<sup>20</sup> Eve Conant, *This Is My Mission*, Mar. 22, 2010, available at <http://www.newsweek.com/id/235290> (last visited Mar. 28, 2010) (“Choi and Pietrangelo spent one night in jail. Both men appeared in court the next day, in shackles and handcuffs, and pleaded not guilty to the charge of failing to obey a lawful order. A trial date is set for April 26.”).

how to get dignity back—being chained up and being arrested—that’s how you get your dignity conferred back upon you.<sup>21</sup>

Lieutenant Choi continued, growing visibly agitated:

And so I think that by actions, my call is to every leader—not just talking gay leaders—I’m talking any leader who believes in America, and the promises of America can be manifest. We’re gonna do it again. And we’re going to keep doing it until the promises are manifest. And we will not stop. This is a very clear message to President Obama and any other leader who supposes to talk for the American promise and the American people. We will not go away.<sup>22</sup>

With these comments, 1LT Choi’s defiance marked a new era in DADT reform attempts. Threats, violations of civil and military law, and public comments against the President now characterized the posture of this commissioned officer. Respectful dialogue had devolved, with many proponents of DADT’s repeal wondering whether 1LT Choi’s deeds had undone decades’ of coordinated efforts and sacrifices.<sup>23</sup>

Especially now, as policymakers contemplate the elimination of DADT, 1LT Choi’s actions are relevant, not just because of his personal history and message, but, more importantly, because of what these actions signify on a larger scale. Lieutenant Choi’s tactics demonstrate the powder keg waiting to erupt in the face of any policy change instituted without a cautious and deliberate plan. Will there ever be enough accommodation to satisfy the opponents, or will the threats and defiance by 1LT Choi and his followers continue on each point of contention as an eventual plan takes shape? Ultimately, time will tell. However, this most recent episode foreshadows the controversy, high emotion, and conflict facing an already thinly-stretched military in the wake of an impulsive repeal. Now more than ever, it is critical for the nation’s leadership to consider the second- and third-order effects of

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<sup>21</sup> Joe Sudbay, *Dan Choi and Jim Pietrangelo Are Out of Jail, Plead Not Guilty*. *Dan Says*: “We will not go away,” Mar. 19, 2010, available at <http://gay.americablog.com/2010/03/dan-choi-and-jim-pietrangelo-are-out-of.html> (last visited Mar. 28, 2010).

<sup>22</sup> *Id.*

<sup>23</sup> See Melloy, *supra* note 16.

DADT's repeal. They must consider the context of the international armed conflicts in progress—and on the horizon—that surround our armed forces, as well as the need for a unified defensive armed force.

This article contemplates a range of issues surrounding the possible repeal of DADT. Part II explores the scope and inherent limitations of any change to the current policy. While some presume that elimination of DADT will automatically invalidate various military administrative and criminal provisions, this part considers the fundamental difference between statements, acts, or marriage—the inconsistent and incomparable behaviors now prohibited by DADT. For example, the momentum surrounding the repeal efforts have centered around those servicemembers subject to separation merely for openly stating their sexual preference—those who claim that they must lie about themselves in order to serve.<sup>24</sup> These debates have not touched upon a servicemember's right to sexually proposition another member of the same sex, display homosexual pornography, or engage in sexual acts now prohibited by a wide array of criminal statutes that are equally applicable to heterosexual servicemembers. Here, especially, it is naive to assume that a statement of one's identity automatically is part-in-parcel with deliberate and calculated physical conduct.

Part III addresses issues of applicability. The key question here is whether any policy change can adequately and proportionately address concerns related to bisexual and transgender servicemembers or recruits. As only one example, consideration of the "T" aspect of "LGBT" requires exploration of unique psychological needs related to Gender Identity Disorder, the complications of hormonal treatments, and the real possibility of gender reassignment surgery—with its requisite mental health evaluations. If legislators paint with a broad brush, assuming that repeal applies equally to all sexual minorities, they must be able to address such complex biomedical and psychosocial concerns.

Part IV addresses the interrelationship between non-legislative provisions in housing and other benefits and legislative changes. This part considers, for example, the dependence of criminal statutes like

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<sup>24</sup> Present and former servicemembers, such as First Lieutenant Dan Choi, Michael Almy, James Pietrangelo, and Jenny L. Kopfstein, assert that DADT forces them to lie about themselves in order to serve in the military. See, e.g., Chuck Colbert, *DADT Subject to Hearing, Protests in DC, SF*, BAY AREA REP., Mar. 25, 2010, <http://www.bayareareporter.net/news/article.php?sec=news&article=4655>.

wrongful cohabitation on modifications to the living arrangements of servicemembers who self-identify as homosexual. After exploring these non-legislative considerations, Part V considers additional organizational accommodations that may be necessary to effectuate repeal, such as separate housing, changing areas, or shower facilities.

Having exposed limitations of many implicit assumptions about repeal of DADT, and the host of administrative and organizational changes that will inevitably influence the reach of any legislative action, Part VI addresses the experience of foreign nations repealing similar provisions and the inapplicability of their experience to the United States. Part VII explores the problem of inconsistent statutory definitions of key terms like “husband and wife,” “marriage,” and other concepts related to the LGBT community. This Part also considers important lessons from state jurisdictions, which collectively signal the great difficulty—if not impossibility—of developing equitable, all-encompassing definitions. Completing the overall consideration of precursors to and issues surrounding specific legislative changes, Part VIII explores the constitutional dimension of DADT repeal, including the application of *Lawrence v. Texas*<sup>25</sup> and its recognition of privacy rights in adult, consensual, sexual activity, as well as concerns over the implications of *voir dire* and the right to a fair trial.

Part IX contemplates the effect of DADT repeal on the marital privilege now recognized in Military Rule of Evidence (MRE) 504, especially in light of varying types of unions now permitted in some, but not all, jurisdictions. Part X next explores a range of military criminal provisions that might be affected by the repeal of DADT, including adultery, bigamy and polygamy, wrongful cohabitation, and other offenses that would impair good order and discipline in the armed forces or which would be service discrediting under the provisions of General Article 134. Part XI addresses a full range of additional policy considerations, from faulty analogies to racial integration and partial integration of women to misplaced reliance on statistics about homosexual discharges from the armed forces. This article concludes with an eye toward mission effectiveness and a plea to withhold sweeping changes until a time when failed experiments in political correctness will not accrue to our enemies on the battlefield and result in the unnecessary loss of American lives.

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<sup>25</sup> 539 U.S. 558 (2003).

## II. The Potential Scope of Repeal: Homosexual Acts are Not Necessarily Related to One's Identity and Can Be Addressed in an Entirely Separate Manner

As noted by one historian, “[i]t is clear that a common way of life involves a common view of life, common standards of behavior, and common standards of value.”<sup>26</sup> A universal approach to sexual expression in the military, whether by heterosexuals or homosexuals is essential to both unit cohesiveness and the *esprit de corps* necessary to fight our enemies and win. Now challenged with the repeal of DADT, the military must tackle how and to what extent homosexuals are integrated into the armed forces by balancing the need for common standards in military life necessary to accomplish the mission.<sup>27</sup> At all times, no one can lose sight of the fact that military service requires servicemembers to exercise a tremendous degree of restraint over their verbal and physical expressiveness to meet countervailing necessities of military readiness.<sup>28</sup>

The repeal of DADT poses multiple issues for the armed forces that touch on moral, fiscal, political, and practical effects of integration. When deciding how and to what extent homosexuals will be integrated into the armed forces, several questions must be addressed. First, who should be the ultimate decision-maker for aspects of repeal? Should it be the Commander-in-Chief, the military leadership (as a group or individually), the U.S. Congress, society, some other entity, or a

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<sup>26</sup> WILLIAM J. BENNETT, *THE DEVALUING OF AMERICA: THE FIGHT FOR OUR CULTURE AND OUR CHILDREN* 25 (1999) (quoting Christopher Dawson).

<sup>27</sup> This balance is required in several dimensions of personal, physical, and spiritual expressiveness. For example, Soldiers are prohibited from publicly displaying body piercings, to include areas as the “tongue, lips, inside mouth, and other surfaces of the body which might not be readily visible” when they “in uniform, in civilian clothes on duty, or in civilian clothes off duty (this includes earrings for male soldiers).” U.S. DEP’T OF ARMY, REG. 670-1, WEAR AND APPEARANCE OF ARMY UNIFORMS AND INSIGNIA ¶ 1-14c (3 Feb. 2005).

<sup>28</sup> See *Parker v. Levy*, 417 U.S. 733, 759 (1974) (citing *United States v. Gray*, 42 C.M.R. 255 (1970) (“In military life, however, other considerations must be weighed. The armed forces depend on a command structure that at times must commit men to combat, not only hazarding their lives but ultimately involving the security of the Nation itself. Speech that is protected in civil population may nonetheless undermine the effectiveness of response to command. If it does, it is constitutionally unprotected.”)). See also *United States v. Womack*, 29 M.J. 88, 91 (C.A.A.F. 1989) (holding that the First Amendment and other privacy concerns apply differently to the military community, allowing the armed forces to constitutionally protect or regulate conduct which might be permissible elsewhere).

combination of these? This determination involves a host of other concerns. For example, in evaluating the position of some DADT opponents that society is now tolerant of homosexuality, what do the phrases “society” and “tolerant” really mean? “Society” surely does not include the majority of California voters who passed a constitutional amendment prohibiting gay marriage,<sup>29</sup> despite the California Supreme Court’s ruling that gay marriage is constitutionally protected.<sup>30</sup> Nor does “society” include the legislatures of the great majority (82%) of states who similarly prohibit gay marriage.<sup>31</sup> “Society” likewise cannot include the majority of states (58%) who, even to this day, have refused to enact employment antidiscrimination laws to protect homosexuals, specifically.<sup>32</sup>

Whoever makes the final decision on DADT repeal, he (or they) must keep in mind a crucial distinction. Don’t Ask, Don’t Tell is criticized by many, including the Commander-in-Chief, for promoting “lies” among servicemembers who must suppress the expression of their sexual preferences in order to serve.<sup>33</sup> In a society that treasures freedom of expression and diversity of personal ideologies, DADT opponents say such limitations are not only offensive to servicemembers, but also the

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<sup>29</sup> On 4 November 2008, Proposition 8 added a new amendment to the California Constitution, which provided that “[o]nly marriage between a man and a woman is valid or recognized in California.” CAL. CONST. art. I, § 7.5.

<sup>30</sup> Prior to the passage of Proposition 8, the California Supreme Court heard the *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008), which held that it was a state constitutional violation to deny same-sex couples the ability to marry. After the passage of Prop 8, on 25 May 2009, the California Supreme Court issues its decision in *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009), which upheld the proposition but validated all marriages performed before 5 November 2008.

<sup>31</sup> Those states *without* marriage prohibitions, either from statutory law or amendments to their respective state constitution are Connecticut, Iowa, Massachusetts, New Hampshire, New Jersey, New Mexico, New York, Rhode Island, and Vermont. See HRC Map of Statewide Marriage Prohibitions, Jan. 13, 2010, available at [http://www.hrc.org/documents/marriage\\_prohibitions\\_2009.pdf](http://www.hrc.org/documents/marriage_prohibitions_2009.pdf) (last visited Mar. 28, 2010).

<sup>32</sup> Those states with employment laws prohibiting employment discrimination on the basis of sexual orientation and/or gender identity are: California, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Washington, and Wisconsin. See HRC Map of Statewide Employment Laws & Policies, Feb. 3, 2010, available at [http://www.hrc.org/documents/Employment\\_Laws\\_and\\_Policies.pdf](http://www.hrc.org/documents/Employment_Laws_and_Policies.pdf) (last visited Mar. 28, 2010).

<sup>33</sup> See Christine Simmons, *Obama HRC Speech: “I Will End Don’t Ask, Don’t Tell,” Says President Obama*, Oct. 10, 2009, available at [http://www.huffingtonpost.com/2009/10/10/obama-says-he-will-end-do\\_n\\_316524.html](http://www.huffingtonpost.com/2009/10/10/obama-says-he-will-end-do_n_316524.html) (last visited Mar. 28, 2010).

fundamental values that undergird our Republic.<sup>34</sup> Just as it enhances a Soldier's morale and dignity to freely worship a particular faith, so too would free and open expression of his sexual preference, argue the opponents of DADT.<sup>35</sup>

Overwhelmingly, the issue of personal sexual identity and its expression has taken center stage in the public discourse and has fueled the fire that now envelopes DADT. Opponents of DADT have strategically offered officers like Second Lieutenant Sandy Tsao<sup>36</sup> and 1LT Daniel Choi in an effort to carefully and narrowly frame the issue as one of "identity."<sup>37</sup> But this clean, sanitized picture has been cropped neatly to avoid the more controversial issues. While a key issue focuses on the right to "say who he or she is" by announcing an affinity for a member of the same sex,<sup>38</sup> public discussions have focused far less on the relationship between sexual identity and physical acts in furtherance of that identity—whether those acts include propositioning the same sex to engage in dates or sexual acts or engaging in the actual sexual acts. The obvious connection between beliefs and acts raises the question of whether policymakers *must* treat both issues as a unified whole, rather than two entirely separate issues.

Addressing the repeal of DADT requires policymakers to first distinguish between beliefs and acts. A belief is entirely a product of the

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<sup>34</sup> See NATHANIEL FRANK, UNFRIENDLY FIRE: HOW THE GAY BAN UNDERMINES THE MILITARY AND WEAKENS AMERICA 291–95 (2009).

<sup>35</sup> See *id.*

<sup>36</sup> Second Lieutenant Sandy Tsao revealed her sexual orientation to her commanding officer while at the same time writing a personal letter to President Obama, urging the Commander-in-Chief to repeal DADT. On 5 May 2009, Tsao received a handwritten letter from President Barack Obama stating: "Thanks for the wonderful and thoughtful letter. It is because of outstanding Americans like you that I committed to changing our current policy. Although it will take some time to complete (partly because it needs Congressional action) I intend to fulfill my commitment." Andy Marra, *A Personal Promise from President Obama on "Don't Ask, Don't Tell,"* May 7, 2009, available at <http://glaadblog.org/2009/05/07/a-personal-promise-from-president-obama-on-dont-ask-dont-tell/> (last visited Mar. 31, 2010). See also Spencer Ackermen, *DADT: LT Choi Not Back on Active Duty After All*, WASH. INDEP., Feb. 10, 2010, <http://washingtonindependent.com/76243/dadt-lt-choi-not-back-on-active-duty-after-all>.

<sup>37</sup> See Bridgette P. LaVictoire, *Dan Choi's Actions at White House Largely Lacking Support in LGBT Community*, Mar. 23, 2010, available at <http://lezgetreal.com/?p=29204> (last visited Mar. 29, 2010).

<sup>38</sup> Many advocates for repeal of DADT and former gay and lesbian servicemembers explain how the current policy accounts for their inability to "tell" fellow servicemembers that they are homosexual, which is separate from discussions of homosexual acts. See, e.g., FRANK, *supra* note 34, at 258–90.

mind and need not be expressed. Acts are either voluntary or involuntary. That society and the military do not punish a person for thinking even the most horrendous criminal thoughts evidences the sanctity of belief.<sup>39</sup> Debates have raged about whether being gay is voluntary or involuntary—that is, whether biochemical or other conditions are responsible for creating homosexual urges.<sup>40</sup> While this determination is well beyond the scope of the DADT debate, it illuminates the difference between beliefs and acts: even if a homosexual servicemember has no iota of control over his homosexual desires, he always retains the ability to regulate how, when, where, and to what intensity those desires are expressed.

A Soldier who is homosexual and wants to express her identity verbally may desire to tell close friends during the process of “coming out” in a very private and personally significant way.<sup>41</sup> Alternatively, she may want to announce her homosexual identity during a formation to ensure that everyone in her unit is aware of it. Because she always maintains the ability to time and control her verbal expression and the very words she uses, the Soldier is always responsible and accountable for her errors in judgment. We hold heterosexual Soldiers to the same standard, as evident in prohibitions on harassing language,<sup>42</sup> and must, therefore, apply these standards and restrictions uniformly. As reflected

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<sup>39</sup> See, e.g., WAYNE R. LAFAVE, CRIMINAL LAW 206 (4th ed. 2003) (providing that “[b]ad thoughts alone cannot constitute crime [and] there must be an act, or omission to act, where there is a legal duty to act”).

<sup>40</sup> See, e.g., Peter S. Bearman & Hannah Brueckner, *Opposite-sex Twins and Adolescent Same-Sex Attraction*, 107 AM. J. SOC. 1179, 1181 (2002) (discussing findings that “adolescent males who are opposite-sex twins are twice as likely as expected to report same-sex attraction”); Brian S. Mustanski et al., *A Genome-wide Scan of Male Sexual Orientation*, 116 HUM. GENETICS 272, 273–78 (2005); Dean H. Hammer et al., *A Linkage Between DNA Markers on the X Chromosome and Male Sexual Orientation*, 261 SCI. 321, 322–25 (1993); S. LeVay, *A Difference in Hypothalamic Structure Between Heterosexual and Homosexual Men*, 253 SCI. 1034, 1035–37 (1999).

<sup>41</sup> Many homosexuals have described the coming-out process as an integral part of one’s self-development. See generally ROB EICHBERG, *COMING OUT: AN ACT OF LOVE* (1990) (discussing how gays and lesbians can use methods such as letter writing and formal meetings to ease the difficulty of the coming out process). See generally MARY V. BOHREK, *COMING OUT TO PARENTS: TWO-WAY SURVIVAL GUIDE FOR LESBIANS AND GAY MEN AND THEIR PARENTS* (1983).

<sup>42</sup> “Sexual harassment” under the UCMJ includes “influencing, offering to influence, or threatening the career, pay, or job of another person in exchange for sexual favors, and deliberate or repeated offensive comments or gestures of a sexual nature.” UCMJ art. 92 (2008). See also U.S. DEP’T OF DEF, DIR. 1350.2, DEPARTMENT OF DEFENSE MILITARY EQUAL OPPORTUNITY (EO) PROGRAM (21 Nov. 2003).

in the Model Penal Code<sup>43</sup> and the Uniform Code of Military Justice,<sup>44</sup> a sexual advance, such as flirtation or a request for a date, is a matter entirely of volition, deliberation, and calculation. It is paramount to recognize that being gay does not “cause” a servicemember to reach for the same sex’s crotch, any more than being heterosexual “causes” one to reach for the opposite sex’s crotch.

In fact, given that there are homosexuals who know their sexual identity but who have never acted on it,<sup>45</sup> it cannot be said that being homosexual necessarily includes or involves engaging in a particular sexual act. To presume so would devalue the experiences of a great many members of the LGBT community, who have recognized, sometimes since the earliest days of their childhood, that something was “different” about the way they felt inside—about their spirituality and the concept of who they were as people and individuals.<sup>46</sup> If it is a discriminatory mindset that repeal of DADT is supposed to eliminate, addressing the issue of sexuality in a respectful and nondiscriminatory manner also requires recognition of the cheapening effects of labeling.<sup>47</sup> Homosexuals must not be defined by the sexual acts in which they could potentially engage, no more than Jews are defined by the wearing of

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<sup>43</sup> See MODEL PENAL CODE, § 2.02 (Official Draft 1962).

<sup>44</sup> See *United States v. Axelson*, 65 M.J. 501, 513 (A.C.C.A. 2007) (“A bodily movement, to qualify as an act forming the basis of criminal liability, must be voluntary.” (citing *LAFAVE*, *supra* note 39, at 208)).

<sup>45</sup> See, e.g., *SKI HUNTER, COMING OUT AND DISCLOSURES: LGBT PERSONS ACROSS THE LIFESPAN* 29 (2007) (identifying cases in which “some women and men identify as lesbian, gay, or bisexual and experience both affectional and sexual desire for others of the same sex-gender but currently have no sexual partners” and further explaining that “[t]his could be a desired or undesired state”). For a military example, Marine Staff Sergeant Eric Alva, the first American wounded in the war in Iraq, came out after being medically discharged from the military. See Eric Alva, *Coming Out Against Don’t Ask, Don’t Tell*, available at <http://www.hrc.org/alva/index.htm> (last visited Mar. 30, 2010).

<sup>46</sup> See, e.g., *DANA ROSENFELD, THE CHANGING OF THE GUARD: LESBIAN AND GAY ELDERS, IDENTITY AND SOCIAL CHANGE* 14 (2003) (observing the experiences of people who knew of their sexual orientation “during the early years, often in childhood”); Julie Bolcer, *Bono to ET: “I Always Felt Male,”* Oct. 29, 2009, available at [http://www.advocate.com/Arts\\_and\\_Entertainment/Entertainment\\_News/Chaz\\_Bono\\_Talks\\_with\\_Entertainment\\_Tonight/](http://www.advocate.com/Arts_and_Entertainment/Entertainment_News/Chaz_Bono_Talks_with_Entertainment_Tonight/) (last visited Mar. 31, 2010); Matt Sedansky, *Gay Seniors Come Out Late, Start Second Lifetime*, ASSOCIATED PRESS, Mar. 15, 2010, available at [http://www.google.com/hostednews/ap/article/ALeqM5g4EmbNtiFqVvMnsVPU\\_z\\_4LTVSbQD9EETR283](http://www.google.com/hostednews/ap/article/ALeqM5g4EmbNtiFqVvMnsVPU_z_4LTVSbQD9EETR283) (last visited Mar. 31, 2010) (addressing several senior citizens “different” feelings they felt throughout life was the realization that they were gay).

<sup>47</sup> See FRED L. PINCUS, *UNDERSTANDING DIVERSITY: AN INTRODUCTION TO CLASS, RACE, GENDER, AND SEXUAL ORIENTATION* 169–70 (2d ed. 2010).

Yarmulkes.<sup>48</sup> For the military to assume that identifying oneself as a homosexual automatically includes engagement in specific sexual acts has precisely this prohibited, marginalizing, and stereotyped effect.

The examples from religion are also instructive on the issue of DADT’s repeal. Allowing a Soldier to serve openly as a Christian currently may involve many things. It may involve identifying oneself as a practicing member of the faith and attending religious services.<sup>49</sup> But even with these allowances, come restrictions that acknowledge overriding communal aspects of military service.<sup>50</sup> Being a Christian does not allow a Soldier to proselytize persons of other faiths or to baptize an unwilling peer.<sup>51</sup> Ultimately, it would be rash and illogical to assume that repeal of DADT necessarily requires elimination of prohibitions on homosexual conduct. Just as it is illegal to shout “fire” in a crowded auditorium, even despite freedom of speech,<sup>52</sup> prohibitions on homosexual banter, solicitation to engage in homosexual acts, the display of homosexual pornographic materials, graphic discussions of homosexual sexual activities, display of one’s genitals to a member of the same sex, or sexual touching, groping, or grabbing—occurring in public social settings or the military workplace—all have an independent

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<sup>48</sup> See generally Iddo Tavary, *Of Yarmulkes and Categories: Delegating Boundaries and the Phenomenology of Interactional Expectation*, 39 THEORY & SOC’Y 49 (2009).

<sup>49</sup> See U.S. DEP’T OF DEF., INSTR. 1300.17, ACCOMMODATION OF RELIGIOUS PRACTICES WITHIN THE MILITARY SERVICES (10 Feb. 2009) [hereinafter DoDI 1300.17]. See also U.S. DEP’T OF ARMY, REG. 600-20, ARMY COMMAND POLICY ¶ 5-6 (7 June 2006) [hereinafter AR 600-20].

<sup>50</sup> The Department of Defense specifies that each of the branches “should” grant requests for religious accommodations but only “when accommodation will not have an adverse impact on military readiness, unit cohesion, standards, or discipline.” DoDI 1300.17, *supra* note 49. Although the language is slightly different, the Army, Air Force, Navy and Marines, and Coast Guard apply the same general principle. See AR 600-20, *supra* note 49; U.S. DEP’T OF NAVY, SEC’Y OF NAVY INSTR. 1730.8B, ACCOMMODATION OF RELIGIOUS PRACTICES (2 Oct. 2008); U.S. DEP’T OF AIR FORCE, INSTR. 36-2706, MILITARY EQUAL OPPORTUNITY AND TREATMENT PROGRAM (29 July 2004); U.S. COAST GUARD, INSTR. 1730.4B, RELIGIOUS MINISTRIES WITHIN THE COAST GUARD (30 Aug. 1994).

<sup>51</sup> See Headquarters, Dep’t of Army, Gen. Order No. 1 (4 Apr. 2009).

<sup>52</sup> *Schenck v. United States*, 249 U.S. 47 (1919). During World War I, Charles Schenck, the General Secretary of the Socialist Party of America, was convicted for violating the Espionage Act when he mailed about 15,000 circulars to draftees suggesting they resist the draft. See *id.* at 49. In a unanimous decision, Justice Oliver Wendell Holmes, Jr., wrote, “The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre causing panic.” *Id.* at 52.

basis for prohibition, irrespective of one's sexual identity.<sup>53</sup> Even if policymakers must make some accommodations for the "expression" of one's homosexuality, they must acknowledge the independent justifications for separation of acts from identity and addressing those acts entirely independently.

### III. Matters of Inclusiveness: Repeal of DADT Would Apply Inconsistently to Bisexual and Transgender Servicemembers

A visit to almost any college campus in America would probably reveal the way sexual minorities in the LGBT community have been lumped together as a single entity and interest group.<sup>54</sup> The acronym LGBT, alone, is suggestive of this prevailing view.<sup>55</sup> However, a careful analysis of the unique concerns related to each of these groups evidences dissimilar experiences, needs, and reactions from the public.<sup>56</sup> As opposed to homosexuality, which characterizes an affinity and attraction to solely the same sex,<sup>57</sup> bisexuality is characterized mainly by the transitory nature of one's sexual affinity and the desire and ability to shift sexual attention to members of both sexes.<sup>58</sup> Contrarily, the diagnosis of transgender involves an element of dissatisfaction with one's own biologically assigned gender, which might involve affinity towards members of either sex, but, at its heart, generally involves an expressive

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<sup>53</sup> Under Article 134, the military may punish acts which are "prejudicial to good order and discipline" or "service discrediting". UCMJ art. 134 (2008). Acts such as the display of one's genitals may also be punishable as an Indecent Exposure under Article 120. *Id.* art. 120(n).

<sup>54</sup> Campus Pride is a nonprofit organization and online community devoted to "develop necessary resources, programs, and services to support LGBT and ally students on college campuses across the United States." CampusPride.org, *available at* <http://www.campuspride.org/aboutus.asp> (last visited Mar. 31, 2010).

<sup>55</sup> *See generally* LGBT Rights: Lesbian, Gay, Bisexual and Transgender Project, American Civil Liberties Union, *available at* <http://www.aclu.org/lgbt-rights> (last visited Mar. 31, 2010). However, there are activists from separate communities who have argued for separate consideration based on the incongruity of various interests. *See* The National Gay and Lesbian Task Force, Bisexual Issues, *available at* <http://www.thetaskforce.org/issues/bisexuality>, and Transgender Issues, *available at* <http://www.thetaskforce.org/issues/transgender> (last visited Mar. 31, 2010).

<sup>56</sup> *See* Mary Bradford, *The Bisexual Experience: Living in a Dichotomous Culture*, 4 J. BISEXUALITY 7, 8–13 (2004).

<sup>57</sup> *See* MERRIAM WEBSTER'S MEDICAL DICTIONARY (ONLINE) (2010), <http://www.merriam-webster.com/medical/homosexual> (defining "homosexual").

<sup>58</sup> *See id.* (defining "bisexual").

component in the desire to appear outwardly as the opposite gender of one’s birth.<sup>59</sup>

Bisexual servicemembers present unique concerns that cannot easily be addressed by policy regimes solely applicable to their homosexual and heterosexual counterparts. If the military institutes accommodations for homosexual servicemembers based solely on same-sex attraction, such as segregated barracks, the question still remains as to how the military accommodates its bisexual servicemembers. This determination potentially hinges on the individual practices of each bisexual servicemember, as a bisexual servicemember may be attracted to both sexes concurrently or sequentially.<sup>60</sup> Further complicating matters is the unpredictable nature of a bisexual person’s sexual attraction. While some may suggest that gays and lesbians are not sexually attracted to heterosexuals, thereby negating any reason to provide separate accommodations, a bisexual’s sexual attraction is often determined by factors besides sexual orientation or gender.<sup>61</sup> Additionally, homosexual servicemembers could reasonably oppose the inclusion of bisexuals in such accommodations because of their affinity for members of the opposite gender and the desire to maintain an individual identity without the discomfort of exposure to a heterosexual lifestyle. Bisexual servicemembers could likewise voice opposition to such arrangements for much the same reason. Ultimately, the consideration of bisexuality will require not only additional accommodations, but also different treatment, above and beyond changes instituted specifically for homosexual servicemembers.

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<sup>59</sup> As an official diagnosis, a transgender person, or one diagnosed with gender dysphoria, “[a] persistent aversion toward some or all of those physical characteristics or social roles that connote one’s own biological sex.” See AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 823 (text rev., 4th ed. 2000) [hereinafter DSM-IV-TR].

<sup>60</sup> See MARJORIE GARBER, VICE VERSA: BISEXUALITY AND THE EROTICISM OF EVERYDAY LIFE 147 (1995) (“Clinicians these days tend to characterize bisexuality as either ‘sequential’ or ‘concurrent,’ depending upon whether the same-sex/opposite sex relationships are going on at the same time . . . what, precisely, is ‘the same time’? Alternate nights? The same night? The same bed?”).

<sup>61</sup> See MARTIN S. WEINBERG ET AL., DUAL ATTRACTION: UNDERSTANDING BISEXUALITY 55 (1994) (“I don’t think it has much to do with pitting a good-looking man against a good-looking woman. I think it has more to do with my own feelings of whether I’m attracted to men or women more at a particular point.”).

Although bisexual servicemembers add a layer of complexity to DADT repeal efforts, transsexual servicemembers add several more. While, in modern times, most clinicians no longer treat homosexuality as a disease or disorder,<sup>62</sup> the same cannot be said for the psychological condition related to transgender persons. Not only is this lifestyle associated with a clinically diagnosable condition—“gender dysphoria,”<sup>63</sup> also known as “Gender Identity Disorder.”<sup>64</sup> Gender Identity Disorder (GID) is a basis for disqualification from service in the U.S. armed forces on entirely medical grounds.<sup>65</sup> For a person to be diagnosed with GID under the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-IV-TR), that person must meet all of the following four diagnostic criteria:

- (1) Evidence of a “strong and persistent” identification with another gender;<sup>66</sup>
- (2) Evidence of a persistent anxiety or unease with the gender assigned at birth;<sup>67</sup>
- (3) No concurrent physical intersex characteristics;<sup>68</sup>
- (4) Significant clinical distress or impairment with work, social situations, or other aspects of life.<sup>69</sup>

Although some transgender personnel may be gay, lesbian, or bisexual, the resulting gender identification is not comparable to homosexuality; gender identity refers to one’s sense of “maleness” or “femaleness,”<sup>70</sup>

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<sup>62</sup> In 1973, the American Psychiatric Association altered its classification of homosexuality as a mental disease or disorder. See Am. Psychiatric Ass’n, Homosexuality and Sexual Orientation Disturbance: Proposed Change in DSM-II (Position Statement Retired), available at [http://www.psychiatryonline.com/DSMPDF/DSM-II\\_Homosexuality\\_Revision.pdf](http://www.psychiatryonline.com/DSMPDF/DSM-II_Homosexuality_Revision.pdf) (last visited Mar. 31, 2010). But see U.S. DEP’T OF DEF., INSTR. 1332.38, PHYSICAL DISABILITY EVALUATION (10 July 2006) (classifying homosexuality as a mental disorder for the purposes of the DoD physical disability evaluation, even though homosexuality is not classified as a mental disease).

<sup>63</sup> See DSM-IV-TR, *supra* note 59, at 823.

<sup>64</sup> *Id.*

<sup>65</sup> See U.S. DEP’T OF ARMY, REG. 40-501, STANDARDS OF MEDICAL FITNESS ¶ 3-35 (10 Sept. 2008) (rendering the individual administratively unfit for military service).

<sup>66</sup> See DSM-IV-TR, *supra* note 59, at 581.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> See generally Anita C. Barnes, *The Sexual Continuum: Transsexual Prisoners*, 24 NEW ENG. INT’L & COMP. L. ANN. 599, 600–02 (1998) (discussing the difficulties faced by transgender prisoners when the Federal Bureau of Prisons placed persons with like-

while homosexuality refers to one’s sexual attraction to a member of a specific gender.<sup>71</sup>

For a majority of transgender persons, simply living a stable life requires extensive medical treatment and clinical assistance.<sup>72</sup> Necessary care normally includes “ongoing psychotherapy and counseling sessions, periodic hormone treatment, long-term electrolysis sessions, periodic outpatient body-counteracting procedures, and other medically necessary procedures to effectuate and maintain the transition from one sex to another.”<sup>73</sup> Required hormone therapy may range from infrequent to weekly or even daily depending on one’s physical composition.<sup>74</sup> Hormone treatments further regulate a range of physiological functions, including one’s “mood, eating, and sleeping.”<sup>75</sup> Without such therapeutic intervention, transgender personnel can suffer extensive psychological trauma that not only interferes with their well-being, but also the well-being of co-workers or people in close physical proximity.<sup>76</sup>

Of significance to military service, especially in deployed areas or field training settings, hormone treatments can, and frequently do, result in significant complications. For example, estrogen therapy has resulted in the increased risk of thromboembolic disease, myocardial infarction, breast cancer, abnormal liver function, and fertility problems.<sup>77</sup> Testosterone therapy likewise results in the increased risk of strokes and heart attacks, abnormal liver function, renal disease, endometrial cancer, and osteoporosis.<sup>78</sup>

Costs of accommodating the unique needs of transgender servicemembers under a repealed DADT would be monumental, especially considering the price tag accompanying gender reassignment surgery. The costs of hormone therapy, simply in preparation for the

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gender physical attributes, to include pre-operative transgender prisoners, in the same holding facilities).

<sup>71</sup> *Id.*

<sup>72</sup> See Jennifer L. Levi & Bennett H. Klein, *Pursuing Protection for Transgender People Through Disability Laws*, in *TRANSGENDER RIGHTS* 74, 85 (Paisley Currah et al. eds., 2006).

<sup>73</sup> *Id.*

<sup>74</sup> See *id.*

<sup>75</sup> See generally <http://depts.washington.edu/hiv aids/spop/case4/discussion.html> (last visited Mar. 31, 2010) [hereinafter *Transgender Issues*].

<sup>76</sup> See Levi & Klein, *supra* note 72, at 86.

<sup>77</sup> See generally *Transgender Issues*, *supra* note 75.

<sup>78</sup> *Id.*

operation, can range from \$300 to \$2,400 per year,<sup>79</sup> while surgery on just the genitals costs approximately \$15,000.<sup>80</sup> More extensive work on the genitalia, face, and chest may exceed \$50,000, solely for those procedures,<sup>81</sup> exclusive of the psychotherapy required to acclimate to the demands of this tremendous transition. These costs also do not contemplate corrective surgery, which is often required for procedures of this sensitive nature, especially the construction of a prosthetic penis in a female-to-male conversion and treatment for urinary tract infections.<sup>82</sup>

For anyone doubting that transgender personnel may desire to enter military service, or are already serving silently like homosexuals, a 2008 study conducted by the Palm Center, a research organization at the University of California, Santa Barbara, provides important guidance.<sup>83</sup> Basing its findings on information obtained from members of the Transgender American Veterans Association (TAVA), the Palm Center concluded that the DADT policy was of primary concern to transgender servicemembers,<sup>84</sup> whose numbers on active duty accounted for some of the 660 self-identified responses.<sup>85</sup> Buttressing these findings is the fact that many open transgender community activists formerly served in the armed forces.<sup>86</sup>

Concerns over transgender personnel serving openly in the military include not only issues of physical appearance, but more importantly, the emotional highs and lows commonly experienced during the course of one's transition, which pose problems even if these servicemembers do not deploy. Military courts have commented on some of the problems related to cross-dressing in the military community. In the case of

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<sup>79</sup> See, e.g., Sex Reassignment Surgery Costs, available at <http://www.costhelper.com/cost/health/sex-reassignment-surgery.html> (last visited Mar. 31, 2010) [hereinafter Reassignment Costs]. For a range of procedures that transgender reassignment surgery may entail, including surgery and additional cosmetic procedures, see The Cost of Transition: The High and the Low Road, available at <http://www.tsroadmap.com/reality/finance/fintrncost.html> (last visited Mar. 31, 2010).

<sup>80</sup> Reassignment Costs, *supra* note 79.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> See Karl Bryant & Kristen Schilt, *Transgender People in the U.S. Military: Summary and Analysis of the 2008 Transgender American Veterans Association Survey*, Aug. 2008, available at <http://www.palmcenter.org/files/TGPeopleUSMilitary.pdf> (last visited Mar. 31, 2010).

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

*United States v. Davis*, the U.S. Navy prosecuted Electrician’s Mate Second Class Charles Marks<sup>87</sup> for wearing women’s clothing (a skirt, nylons, a women’s blouse, a bra, women’s fashion jeans, nail polish, a purse, and a wig) on numerous occasions while at the Puget Sound Naval Shipyard.<sup>88</sup> In two instances, Davis wore women’s attire in public areas such as outside the Bachelor Enlisted Quarters and the Motion Picture Exchange.<sup>89</sup> Davis defended his conduct on the grounds that the wearing of women’s attire is not “criminal conduct.”<sup>90</sup> While agreeing that the wear of women’s attire by a male is not “inherently unlawful,” the Court of Military Appeals rejected Davis’s assertions, largely due to Davis’s admissions that “he was aware of the adverse effects created by his conduct.”<sup>91</sup> In rejecting his defense, the Court of Military Appeals, upheld his conviction under Article 134 on the grounds that:

The particular facts and circumstances . . . in this case describe conduct on a military installation which virtually always would be prejudicial to good order and discipline and discrediting to the Armed Forces. The fact that there are some conceivable situations—such as a King Neptune ceremony and Kibuki theater—where “cross-dressing” might not be prejudicial to good order and discipline is not significant. These occasions do not generally occur in or near a barracks or a theater, the locations describe in the specifications.<sup>92</sup>

Objections that servicemembers can freely attend gay bars, which customarily feature performances by “drag queens,” and that such “performers” have changed public opinion on transgender persons, represent a mere trivialization of a serious issue. One need only review documentary films about the experiences of post-operative transgender people, who, despite full conversion to the living conventions of their new physical identity, are routinely shunned from the workplace, subject

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<sup>87</sup> At the time of appellate review, Electrician’s Mate Second Class Charles Marks had changed his name to Ms. Karen Davis. *See United States v. Davis*, 26 M.J. 445 (C.M.A. 1988).

<sup>88</sup> *Id.* at 447.

<sup>89</sup> *See id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 448. During the court-martial, Davis “admitted that his co-workers had refused to work with him as a result of his cross-dressing and that the command would not use him in his rating because of this.” *Id.*

<sup>92</sup> *Id.* at 449.

to harassment, and even abandoned by their former friends and their current family members.<sup>93</sup> Any efforts to repeal DADT or replace it with a new policy must contemplate the complex issues generated by transsexual and bisexual servicemembers who prefer sexual activities with members of either gender. If the armed services are fashioned as a mere Petri dish for uninformed social experimentation, the policymakers responsible for such experimentation must be ready to shoulder responsibility if their experiments fail and the resulting reactions limit the effectiveness of our military at a time of war and global terrorism.

#### IV. DADT's Repeal Will Depend on Non-Legislative Policy Changes

While DADT came about as the result of congressional enactments,<sup>94</sup> its repeal can only be effectuated through a variety of actions, only some of which relate to Congress. If the repeal of DADT is predicated upon the desire to permit not only a servicemember's ability to enter into a gay marriage, but also official recognition thereof, repeal of DADT would necessarily require administrative action to provide housing and other allowances for homosexual married couples.<sup>95</sup> At a minimum, meeting desired objectives would require amendments to housing regulations, assuming this could be done in a fair manner.<sup>96</sup>

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<sup>93</sup> For example, the eight-part documentary *TransGeneration* covers the difficulties that four college students face with their family, friends, and daily lives, as they undergo gender transition. See *TRANSGENERATION* (Sundance Channel 2005).

<sup>94</sup> See Fred L. Borch, *The History of "Don't Ask, Don't Tell" in the Army: How We Got to It and Why It Is What It Is*, 203 MIL. L. REV. 189 (2010).

<sup>95</sup> Military regulations typically refer to a servicemember's ability to obtain additional Basic Allowances for Housing (BAH) at the "with dependent" rate, only after the servicemember establishes the dependent through official documentation. See U.S. DEP'T OF ARMY, REG. 680-300, REPORTING OF DEPENDENTS OF ACTIVE DUTY MILITARY PERSONNEL AND US CITIZEN EMPLOYEES ¶ 3 (12 Jan. 1976).

<sup>96</sup> See, e.g., Kathi Westcott & Rebecca Sawyer, *Silent Sacrifices: The Impact of "Don't Ask, Don't Tell" on Lesbian and Gay Military Families*, 14 DUKE J. GENDER L. & POL'Y 1121, 1121-26 (2007). In this article, the authors note some examples of areas requiring fundamental changes, such as: (1) U.S. DEP'T OF DEF., INSTR. 1000.13, IDENTIFICATION (ID) CARDS FOR MEMBERS OF THE UNIFORMED SERVICES, THEIR DEPENDENTS, AND OTHER ELIGIBLE INDIVIDUALS (1997); (2) U.S. DEP'T OF DEF., INSTR. 1341.2, DEFENSE ENROLLMENT ELIGIBILITY REPORTING SYSTEM (DEERS) PROCEDURES (1999) (requiring the enrollment of military dependents, usually lawful spouses and minor children, in order to receive military benefits as a result of their recognized relationship to the servicemember). These are only a few examples of the multiple administrative policies that would require changes following the repeal of DADT.

Whether predicate action is necessary to address housing allowances<sup>97</sup> or the construction of gay, bisexual, and/or transgender housing facilities,<sup>98</sup> policymakers must explore not only the nature of administrative action but also the source of funding to accommodate such objectives.<sup>99</sup> Comparing rates across the military in 2007, the Tenth Quadrennial Review of Military Compensation reported that the average housing allowance for a married servicemember ranged from \$1,064.00 for an E-1 to \$2,285.00 for a Flag Officer, while the average housing allowance for single servicemember ranged from \$877.00 for an E-1 to \$1,953.00 for a Flag Officer.<sup>100</sup> Over time, with an unknown number of gay, bisexual, or transgender recruits joining the forces or emerging from within to take advantage of these benefits,<sup>101</sup> it will be impossible to plan effectively for the administrative and non-legislative action required to truly effectuate DADT’s repeal. Without addressing the full range of issues in a prudent manner, repeal of DADT may only sound good on paper, but in effect, may do nothing more than permit someone to self-identify their sexual preference, even if the new policies are supposed to do far more.

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<sup>97</sup> See *infra* Part VII.

<sup>98</sup> See *infra* Part V.A.

<sup>99</sup> Without exploring funding considerations, integration of homosexuals into the military could result in a situation similar to “No Child Left Behind.” Although that program was enacted as an incentive to standardized testing and close student achievement gaps, absence of federal funding has essentially made the program ineffective. See Dan Lips & Evan Feinberg, *The Administrative Burden of No Child Left Behind*, FOX NEWS, Apr. 6, 2007, <http://www.foxnews.com/story/0,2933,264700,00.html>.

<sup>100</sup> These rates represent the average amount that all servicemembers receive. 1 AVERAGE MONTHLY BASIC ALLOWANCE FOR HOUSING (BAH) RATES BY PAY GRADE AND DEPENDENCY STATUS, DoD TENTH QUADRENNIAL REVIEW OF MILITARY COMPENSATION (QRMC), CASH COMPENSATION 82 (2008).

<sup>101</sup> Although it is unknown to what extent the LGBT population may increase if DADT is repealed, or to what extent benefits will increase for LGBT personnel and their dependents, it is logical to assume that there will be more LGBT servicemembers who take advantage of military benefits for their dependents. After all, LGBT servicemembers often cite to the fact that their partner was unable to take advantage of the military’s benefits. See NATHANIEL FRANK, GAYS AND LESBIANS AT WAR: MILITARY SERVICE IN IRAQ AND AFGHANISTAN UNDER “DON’T ASK, DON’T TELL” (2004), available at [http://www.palmcenter.org/system/files/Frank091504\\_GaysAtWar.pdf](http://www.palmcenter.org/system/files/Frank091504_GaysAtWar.pdf) (last visited Mar. 31, 2010).

V. The Organizational Accommodations Required for DADT's Repeal are Fiscally and Practically Unattainable

A. Structural Accommodations

Military service requires close and intimate living and working arrangements. Servicemembers must often sleep, bathe, and work in close quarters under extremely strenuous conditions, which are only amplified in deployed environments or field training settings. Consider, for example, the vivid description of living arrangements in a part of Fallujah, Iraq, on 26 August 2007:

The Marines of Fox Company, 1st Platoon, literally don't have a pot to piss in. Staying in a makeshift police station at the northeastern end of Fallujah, they fill bottles instead—and load up plastic “wag bags,” draped around netted toilets, when they need to turn around. Marines sleep eight to a room. Shaving means staring into a Humvee mirror. Communication with the outside, non-military world is basically impossible. There is some kind of jury-rigged shower, allegedly.<sup>102</sup>

Those urging repeal of DADT argue that allowing the practice of open homosexuality will not detrimentally impact the privacy interests of other servicemembers or result in a hostile work environment for heterosexuals.<sup>103</sup> In making this argument, opponents of the current policy suggest that homosexual servicemembers will not “hit on” or “leer at” every other servicemember of the same gender.<sup>104</sup> Logically, this argument makes sense. Surely, a heterosexual male Soldier will not be attracted to every female Soldier he serves with, at least in the great majority of cases. However, because a heterosexual male Soldier *may* be attracted to some female Soldiers, the military has taken significant affirmative action to minimize opportunities for intimate sexual contact and communication between male and female Soldiers. Women sleep and shower in segregated quarters.

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<sup>102</sup> Noah Shachtman, *Iraq Diary: No Showers, No Toilet, No Problem*, WIRED, 27 Aug. 2007, <http://www.wired.com/dangerroom/2007/08/iraq-diary-no-s/>.

<sup>103</sup> See, e.g., AARON BELKIN & GEOFFREY BATEMAN, DON'T ASK, DON'T TELL: DEBATING THE GAY BAN IN THE MILITARY 51–67 (2003).

<sup>104</sup> See *id.* at 52.

While there are limited instances where men and women have shared sleeping accommodations,<sup>105</sup> these instances are far outweighed by the numerous personal accounts whereby close training and living accommodations increased sexual tension among servicemembers.<sup>106</sup> Although females may now serve on submarines, which had once been reserved only for male sailors, even in this environment, living accommodations are severely restricted, with separate dorms, separate bathing facilities, and strict penalties for even walking into gender-segregated areas.<sup>107</sup> Collectively, these instances demonstrate fundamental flaws in the argument that homosexual servicemembers would *never* be attracted to heterosexuals during slumber or bathing or act on such attraction.<sup>108</sup> Not surprisingly, among servicemembers convicted of same-sex forcible sodomy, many of the reported cases address situations where sex acts were performed as the victims slept or were highly intoxicated.<sup>109</sup> The true number of such cases may be far more widespread, as victims of homosexual assault have great incentive not to report crimes for fears that they too will be considered homosexuals.<sup>110</sup> These historical events all support the fact that shared

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<sup>105</sup> See Suzanne Fields, *Self-Discipline or Cohabitation—Which is Military Fantasy?*, INSIGHT ON NEWS, Feb. 13, 1995, [http://findarticles.com/p/articles/mi\\_m1571/is\\_n7\\_v11/ai\\_16679996/](http://findarticles.com/p/articles/mi_m1571/is_n7_v11/ai_16679996/). During operations in Haiti in the 1990s, men and women shared tents with no barriers, resulting in outrage by many family members and senior leaders. *Id.* See also Steven Lee Myers, *Living and Fighting Alongside Men, and Fitting In*, N.Y. TIMES, Aug. 16, 2009, [http://www.nytimes.com/2009/08/17/us/17women.html?\\_r=1](http://www.nytimes.com/2009/08/17/us/17women.html?_r=1) (reporting that women sometimes share sleeping quarters with men).

<sup>106</sup> See Fields, *supra* note 105. The 2009 Department of Defense Report on Sexual Assaults in the armed forces reported that 279 sexual assaults had occurred in combat areas, a sixteen percent increase from 2008, with seventy-seven percent of those sexual assaults occurring in Iraq and Afghanistan. U.S. DEP’T OF DEF., REPORT, SEXUAL ASSAULT PREVENTION AND RESPONSE 85–86 (MAR. 2010) [hereinafter 2009 DoD SAPR REPORT].

<sup>107</sup> See David Kerley & Luis Martinez, Navy to Lift Ban on Women Serving Aboard Submarines, 23 Feb. 2010, *available at* <http://abcnews.go.com/Politics/navy-end-ban-women-serving-aboard-submarines-congress/story?id=9921378> (last visited 31 Mar. 2010).

<sup>108</sup> Additionally, writers such as Steven Zeeland provide support for the idea that there are homosexuals who consider themselves “military chasers,” actively seeking military men as the “object” of their sexual desire. See generally STEVEN ZEELAND, MILITARY TRADE (1999).

<sup>109</sup> See 2009 DoD SAPR REPORT, *supra* note 106, tab A (Army), 54–131; tab B, Attachment 5 (Navy), 1–41; tab B, Attachment 5 (Marines) 1–13; tab C, Attachment 5 (Air Force) 1–24.

<sup>110</sup> See 2009 DoD SAPR REPORT, *supra* note 106. Of the 2516 unrestricted reports filed in 2009, the number of men reporting sexual assaults increased by forty percent, from 128 to 173. *Id.* at 58. Additionally, the number of women reporting sexual assaults by other women increased from nine to seventeen. *Id.* at 89. However, because there were

living arrangements which pair open homosexuals with heterosexuals will increase the opportunity for the creation of a hostile work environment.<sup>111</sup> Simultaneously, drinking habits of many Soldiers create additional opportunities for same sex sexual assaults, as alcohol consumption and loss of consciousness among both genders is a factor that repeatedly arises in military sexual assault cases.<sup>112</sup>

Policymakers contemplating repeal of DADT must inevitably address whether to provide separate living and bathing facilities based on the gender and sexual preferences of open homosexuals, bisexuals, heterosexuals, and—quite possibly—transgendered persons. In order to adequately protect servicemembers' privacy interests and prevent hostile environments, the military would *minimally* need to provide separate living and bathing facilities for heterosexual men, heterosexual women, gay men, lesbians, bisexual men, bisexual women, and potentially transgender men and women. Providing facilities for each of these distinct categories could result in staggering costs and require physical expansion of most housing areas.

Policymakers would likewise need to address how living accommodations could be assigned to prevent gays, lesbians, and bisexuals from sharing rooms with their unmarried partners in a manner consistent with prohibitions on uniformed heterosexual couples.<sup>113</sup> Even in the event that the military adopts a “sour grapes” option, in which roommates must share quarters with members of the same gender, regardless of differences in sexual preference or orientation, such a policy would be inconsistent with existing policies that prohibit males and females from sharing the same quarters or bathing facilities. In essence, same sex heterosexuals would have to bear the burden of the same behaviors that are now feared in heterosexual arrangements, with little means of recourse. Such inconsistent policies would run counter to the very reason why heterosexual couples are not now intimately paired, unless the ultimate concern is merely avoidance of pregnancy, which would seem to be a very uncalculated response to such an important issue.

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837 restricted reports, it is impossible to determine exactly how many same-sex assaults occurred as well as how many were not reported at all. *Id.* at 58.

<sup>111</sup> See Fields, *supra* note 105.

<sup>112</sup> See generally 2009 DoD SAPR REPORT, *supra* note 106.

<sup>113</sup> See generally U.S. DEP'T OF ARMY, REG. 210-50, HOUSING MANAGEMENT (3 Oct. 2005) [hereinafter AR 210-50].

Considerations are not merely limited to garrison environments. Especially for those in the deployed environment, the challenge of structural accommodation becomes exponentially greater due to the constraints on space and locations of units. In any environment fathomable, if separate living and bathing facilities are not provided, the military must decide whether it will force cohabitation if a servicemember is morally or religiously opposed to the practice of open homosexuality.

#### B. Medical Considerations

A concern stemming from the repeal of DADT is the degree to which homosexuality can affect the medical readiness of the military force. During the 1980s, the military became extremely concerned about the impact of Acquired Immune Deficiency Syndrome (AIDS) on readiness.<sup>114</sup> The disease AIDS was a devastating medical development for society in general, and the military was no exception.<sup>115</sup> At that time, due to the increase of Human Immunodeficiency Virus (HIV)-positive servicemembers and the increase of AIDS-related deaths,<sup>116</sup> the military made concerted efforts to reduce HIV and AIDS by implementing new standards for testing members of the armed forces, screening blood donors, creating educational programs, and increasing access to contraceptives.<sup>117</sup>

While any sexual acts, by a male or female heterosexual or homosexual can lead to the spread of contagious disease,<sup>118</sup> an increase in sexual behaviors that are common among homosexuals could substantially impact the medical readiness of the armed forces. These

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<sup>114</sup> See Major Elizabeth Beard McLaughlin, A “Society Apart?”: *The Military’s Response to the Threat of Aids*, ARMY LAW., Oct. 1993, at 3–5.

<sup>115</sup> Memorandum from Sec’y of Def., Policy on Identification, Surveillance, and Administration of Personnel Infected with Human Immunodeficiency Virus (Apr. 20, 1987) (providing that “[f]rom October 1985 to August 1989, more than 6200 service members were diagnosed as positive for HIV. As of August 1989, nearly 300 service members have died of AIDS.”).

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> E.g., MICHAEL SHERNOFF, WITHOUT CONDOMS: UNPROTECTED SEX, GAY MEN & BAREBACKING 11 (2006) (“It is now freely admitted that even ‘safer sex’ is not without its risks.”).

behaviors sometimes involve multiple partners.<sup>119</sup> Some of the sexual practices necessitated by anatomical differences in homosexual pairing increase the likelihood of disease transmission, genital trauma, and infection. As one example, male homosexual acts, such as “penile-anal, mouth-penile . . . hand-anile” and “mouth-anal” contact can all increase the risk of diseases caused by bowl pathogens, especially when practiced fluidly, without cleansing between such contacts.<sup>120</sup> In addition, certain conventions in lesbian sexual practices also raise unique concerns. While many lesbians avoid public discussion about their common sexual practices,<sup>121</sup> studies of behavior reveal a higher likelihood of disease transmission tied to sadomasochism (S/M) and “intense penetration” of the genitals.<sup>122</sup> As one lesbian scholar observes,

Despite a growing awareness that there are lesbians with AIDS, many of us believe we are safe from the transmission of STDs or HIV. Women who use penetrating sex toys or engage in S/M practices involving urine, feces, fisting, whipping, cutting, or piercing are at risk because of breaks in the mucosal and skin barriers that usually protect us against infection. In the same way, untreated STDs provide a potential route for HIV transmission because disrupted genital tissue is more likely to bleed during sexual activity.<sup>123</sup>

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<sup>119</sup> Kitty Tsui, *Lesbian Marriage Ceremonies: I do*, in DYKE LIFE: A CELEBRATION OF THE LESBIAN EXPERIENCE 111, 122 (Karla Jay ed., 1995) (“Relationships that are both long-term and monogamous are often hard to find in the lesbian community and perceived to be difficult . . .”).

<sup>120</sup> See JOHN R. DIGGS, JR., THE HEALTH RISKS OF GAY SEX, CORPORATE RESOURCE COUNCIL 2-3 (2002).

<sup>121</sup> Karen F. Kerner, *Health Care Issues*, in DYKE LIFE, *supra* note 119, at 313, 320 (“Lesbians are often reluctant to talk about what we do in bed. As [one authority] puts it ‘it’s very controversial for a lesbian to talk about whether or not she uses sex toys, she fu\*\*ks men, or whether or not she rims or is rimmed by her girlfriend.’ But it is precisely our sexual activity that defines our risk.”).

<sup>122</sup> Marny Hall, *Clit Notes*, in DYKE LIFE, *supra* note 119, at 197, 217 (“When the vaginal lining or the delicate rectal lining has been traumatized by fisting or intense penetration, it is especially important to avoid introducing a partner’s blood or vaginal fluid into the vagina or rectum.”).

<sup>123</sup> Kerner, in DYKE LIFE, *supra* note 119, at 321. See also ANN CVETKOVICH, AN ARCHIVE OF FEELINGS: TRAUMA, SEXUALITY, AND LESBIAN PUBLIC CULTURES 60 (2003) (“Lesbian sexuality requires a language for penetration with dildos, fingers, or fists, and it faces the challenge of expanding the erotics of penetrating objects or body parts, which is too often limited to a focus on penises or phallic substitutes.”).

Despite the possibility that heterosexuals could engage in the very same acts, these concerns are far more relevant in homosexual relationships because of the impossibility (in non-heterosexual couplings) of vaginal-penile penetration.<sup>124</sup>

Although some assume that all servicemembers educated on safe-sex practices will automatically understand, appreciate, and implement safer practices in their own sexual relationships, knowledge does not dictate sexual practice, nor does it prevent safer sex from eliminating the risk of sexually transmitted disease. While screening and education of the force is extremely important, these measures completely ignore the overriding power of sexual impulse, alcohol or other intoxication, individual choice, or a host of other factors that contribute to unsafe sex.<sup>125</sup> For many people, HIV, AIDS, and STDs are diseases that “other people” contract and are often a fleeting thought until it becomes a stark reality.<sup>126</sup> Let us not forget that the armed forces are challenged daily with higher rates of alcohol and drug use, incidents of suicide, and other mental illnesses due to the challenges of coping with numerous deployments, all of which may impact the mental faculties of a servicemember and impair his or her ability to make sound decisions about sexual practices.

The ability of servicemembers to deploy at a moment’s notice is of primary concern for their health and effectiveness. Servicemembers who are HIV-positive cannot deploy or serve overseas and require extensive precautions to prevent other co-workers from contracting their condition.<sup>127</sup> While advocates of DADT’s repeal suggest that the military’s mandatory bi-annual and predeployment testing are sufficient

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<sup>124</sup> See GABRIEL ROTELLO, *SEXUAL ECOLOGY: AIDS AND THE DESTINY OF GAY MEN* 112 (1998) (“Anal intercourse is the sine qua non of sex for many gay men.”). This author, Gabriel Rotello, wrote from his personal experiences as an open homosexual. *Id.*

<sup>125</sup> See, e.g., SHERNOFF, *supra* note 118, at xiv (describing various factors, which individually and collectively, have contributed to the spread of sexually transmitted diseases among gay men); *id.* (“One night when a gay HIV prevention educator named Seth Watkins got depressed, he met an attractive stranger, had anal intercourse without a condom—and became HIV positive in spite of his job training.”).

<sup>126</sup> MARK J.K. WILLIAMS, *SEXUAL PATHWAYS* 105–08 (1999) (referencing interviews with numerous homosexual couples who ignored the risk of contracting HIV/AIDS until one partner contracted an STD or HIV). For example, one particular male involved in a homosexual relationship noted, “I don’t think the thought of AIDS necessarily ever crossed my mind until I got in a three-way relationship where I started thinking that things can get passed back and forth very easily between two people.” *Id.* at 107.

<sup>127</sup> U.S. DEP’T OF ARMY, REG. 600–110, IDENTIFICATION, SURVEILLANCE, AND ADMINISTRATION OF PERSONNEL INFECTED WITH HUMAN IMMUNODEFICIENCY VIRUS (HIV) (15 July 2005) [hereinafter AR 600–110].

to address the spread of HIV among homosexual servicemembers,<sup>128</sup> this position completely ignores two important facts: First, simply based on the allowance of homosexual acts, more servicemembers will express their sexuality and ultimately engage in a higher number of homosexual liaisons.<sup>129</sup> Second, and in relation to the first point, those servicemembers who do not know they have contracted a disease may continue to engage in risky behavior while unknowingly exposing others to it.<sup>130</sup> The DADT opponents' position certainly ignores servicemembers who feel that sexually transmitted diseases are something "other people contract"<sup>131</sup> or those who would intentionally avoid using protection during high-risk encounters.<sup>132</sup> Policymakers must therefore consider the potential risks posed by the open practice of homosexuality and homosexual acts in the military. Ironically, avoidance of these concerns—stemming from a desire to avoid appearing homophobic—could prove deadly for the very population of homosexuals intended for increased protection and respect.

As a final medical consideration, discussions about DADT's repeal must also touch upon the financial costs necessary to treat homosexual servicemembers or family members infected with sexually transmitted diseases. Importantly, adequate medical treatment for the average HIV-positive patient ranges from \$14,000 to \$37,000 per year, with

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<sup>128</sup> Major Laura R. Kesler, *Serving with Integrity: The Rationale for the Repeal of "Don't Ask, Don't Tell" and Its Ban on Acknowledged Homosexuals in the Armed Forces*, 203 MIL. L. REV. 284, 306–307 (2010).

<sup>129</sup> Lesbian scholar Marny Hall observes how the celebration of coming out of the closet as a lesbian often involves impulsive homosexual behavior that is subject to feelings of deep regret after the fact:

For Flynn, casual sex was linked to her first heady whiff of sexual freedom: "I wanted to be more than a lesbian in theory. A woman in my group made it clear she was interested in me. After a dance party, we came to my place and had sex. It was impulsive. I wasn't feeling romantic, but it was fine sexually . . . mutually orgasmic . . . . Afterward, I got nervous that she would expect to have sex again, and I didn't particularly want to."

Hall, *in* DYKE LIFE, *supra* note 119, at 197–98.

<sup>130</sup> See, e.g., U.S. Ctrs. for Disease Control & Prevention, HIV Testing, *available at* <http://www.cdc.gov/hiv/topics/testing/index.htm> (last visited Mar. 31, 2010).

<sup>131</sup> See WILLIAMS, *supra* note 126, at 107.

<sup>132</sup> E.g., SHERNOFF, *supra* note 118, at 12 ("Since the onset of the AIDS epidemic, there have always been some gay men who refused to practice safer sex, though aware that condoms could mitigate the risk of contracting HIV through anal sex.").

substantial cost increases if HIV progresses to full-blown AIDS.<sup>133</sup> These are just some of the costs associated with an increase in sexual acts capable of compromising the medical fitness of our fighting forces.

### C. Other Accommodations

It may be impossible to contemplate the full range of accommodations required, or somehow related to, the repeal of DADT. However, the common concern is accounting for the time, money, personnel, and planning required to implement any significant changes. Just as policymakers must consider the re-entry of veterans previously discharged under DADT and whether they must provide grade increases or back pay to account for lost time or grade, they must likewise consider issues related to the allocation of housing or pension benefits. In an Army where same-sex marriage is permitted, would any prohibitions exist to stop a male Soldier from marrying another male who suffers from AIDS or advanced HIV, simply to provide for state-of-the-art medical treatments or hospice care? Although answers are difficult to come by, these are precisely the hard questions that must be asked when contemplating the repeal of DADT.

## VI. The Experiences of Foreign Militaries, That Have Allowed Open Homosexual Service, Are Inapplicable to the U.S. Military

Critics of DADT often point to permitted open homosexual service in foreign militaries as a basis for encouraging repeal of the U.S. policy.<sup>134</sup> At the writing of this article, twenty-five foreign countries either allow homosexuals to openly serve among the ranks or place minimal limitations on open homosexual service.<sup>135</sup> Many of these foreign

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<sup>133</sup> See U.S. Ctrs. for Disease Control & Prevention, Statistics Regarding Costs of HIV/AIDS, available at <http://www.cdc.gov/hiv/topics/basic> (last visited Mar. 2, 2010).

<sup>134</sup> See, e.g., MELISSA SHERIDAN EMBSEHER-HERBERT, THE U.S. MILITARY’S “DON’T ASK, DON’T TELL” POLICY: A REFERENCE HANDBOOK 58, 59–80 (2007).

<sup>135</sup> See NATHANIEL FRANK, GAYS IN FOREIGN MILITARIES 2010: A GLOBAL PRIMER 2 (Feb. 2010), available at <http://www.palmcenter.org/files/GaysinForeignMilitaries2010.pdf>. These countries include: Australia, Austria, Belgium, Canada, The Czech Republic, Denmark, Estonia, Finland, France, Germany, United Kingdom of Great Britain, Ireland, Israel, Italy, Lithuania, Luxembourg, Netherlands, New Zealand, Norway, Slovenia, South Africa, Spain, Sweden, and Switzerland. *Id.*

militaries have integrated not only gays and lesbians, but bisexual and transgender personnel.<sup>136</sup>

Out of the twenty-five foreign countries that allow homosexuals to serve openly, Canada, Australia, Great Britain, and Israel are commonly offered as examples of successful LGBT integration for the United States to follow.<sup>137</sup> Although each of these countries allows open service, not all aspects of their cultures, governments, or laws, are comparable to the U.S. armed forces.<sup>138</sup> Without an in-depth analysis of each foreign military's size, mission, structure, and the circumstances surrounding their integration of LGBT servicemembers, purported justifications for U.S. repeal are premature at best, and, at worst, entirely misplaced.

#### A. The United Kingdom's Experience

The British armed forces are all-volunteer, comprised of approximately 200,000 members in the active components.<sup>139</sup> The minimum age for recruitment is 15.9 years, with the maximum being 32 years.<sup>140</sup> The most recent statistics from 2007–2008 show that approximately 30,000 members of the British Armed Forces deployed during that timeframe.<sup>141</sup> Due to a European court's ruling that the exclusion of homosexuals from the military violated the European Convention on Human Rights, the United Kingdom (U.K.) has allowed gays, lesbians, and transgender soldiers to serve openly since 12 January

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<sup>136</sup> See EMBSER-HERBERT, *supra* note 134, at 58–60. See also TARYNN M. WHITTEN, GENDER IDENTITY AND THE MILITARY—TRANSSEXUAL, TRANSSEXUAL, AND INTERSEX-IDENTIFIED INDIVIDUALS IN THE U.S. ARMED FORCES 5 (Feb. 2007), <http://www.palmcenter.org/files/active/0/TransMilitary2007.pdf>.

<sup>137</sup> See, e.g., FRANK, *supra* note 135, at 138–43.

<sup>138</sup> In a discussion with several notable scholars from advocating for LGBT inclusion and acceptance into foreign militaries, Aaron Belkin, advocate for repealing DADT, states, “Many people who oppose gays and lesbians raise credible arguments that U.S. culture is different from Israeli culture or British culture.” See BELKIN & BATEMAN, *supra* note 103, at 105.

<sup>139</sup> See U.K. Armed Forces: Full Time Strengths and Requirements, available at <http://www.dasa.mod.uk/applications/newWeb/www/apps/publications/pubViewFile.php?content=41&date=2008-11-27&type=html&PublishTime=09:30:00> (last visited Mar. 31, 2010) [hereinafter U.K. Full Time Strengths]. These numbers encompass members of the active component that are considered both trained and untrained. *Id.*

<sup>140</sup> See CIA Field Listing: United Kingdom Military Service Age and Obligation, available at <https://www.cia.gov/library/publications/the-world-factbook/geos/uk.html> (last visited Mar. 31, 2010).

<sup>141</sup> U.K. Full Time Strengths, *supra* note 139.

2000.<sup>142</sup> It is virtually impossible to determine the number of open homosexuals in the U.K.’s military or the number the U.K. has gained through recruiting efforts because the necessary polls might constitute discrimination under their law.<sup>143</sup> While many British servicemembers opposed LGBT integration, because of the court’s ruling, the military had no choice. By allowing open service, the resulting changes did not prevent discharges or punishment for homosexual acts like fellatio, cunnilingus, and consensual sodomy, if such acts were deemed disruptive to mission accomplishment.<sup>144</sup> Instead, British military regulations require a commanding officer to inquire into all instances of questionable conduct, regardless of sexual orientation.<sup>145</sup>

In addressing such conduct, commanders apply the “service test,” which directs them to consider whether “the actions or the behavior of an individual adversely impacted or are . . . likely to impact on the efficiency or the operational effectiveness of the service.”<sup>146</sup> Commonly referred to in the British community as “Don’t Ask, Can Tell,” the policy empowers commanding officers to decide whether a soldier’s actions warrant punishment or discharge.<sup>147</sup> According to Christopher Dandeker, a Professor of Military Sociology in the Department of War Studies at London’s King’s College, the service test implicitly includes a “don’t flaunt it” component.<sup>148</sup> Professor Dandeker has further commented about the context surrounding this rule: “This is a process of change and transition[; m]ost of those involved in the European Court of Human Rights case were aware that the price to be paid for lifting the ban was discretion, even reticence, with regard to sexual orientation until such time as the glacial pace of cultural change shifts the nature of the heterosexual culture in the armed services.”<sup>149</sup> Because the “shifts” continue, the overall effects of the policy are still debatable.

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<sup>142</sup> See HEW STRACHAN, *THE BRITISH ARMY, MANPOWER, AND SOCIETY IN THE TWENTY-FIRST CENTURY* 120 (2000).

<sup>143</sup> See Sarah Lyall, *British Navy Seeks More Gays and Lesbians*, N.Y. TIMES, 23 Feb. 2001, <http://www.nytimes.com/2005/02/22/world/europe/22iht-britain.html>.

<sup>144</sup> See EMBSER-HERBERT, *supra* note 134, at 72–73.

<sup>145</sup> *Id.* at 74.

<sup>146</sup> See AARON BELKIN & R.L. EVANS, *EFFECTS OF INCLUDING GAY AND LESBIAN SOLDIERS IN THE BRITISH ARMED FORCES* 26–27 (Nov. 1, 2000), available at [http://www.palmcenter.org/publications/dadt/british\\_soldier\\_motivation](http://www.palmcenter.org/publications/dadt/british_soldier_motivation) (referencing British Ministry of Defence 2000a Report).

<sup>147</sup> See BELKIN & BATEMAN, *supra* note 103, at 115.

<sup>148</sup> *Id.* at 134.

<sup>149</sup> *Id.* at 120.

Any suggestion that the U.K.'s policy has been completely successful is quite misleading. Frequently absent from the discussions of DADT opponents is the impact of resignations that occurred in the British units after the ban on gays was lifted.<sup>150</sup> In a document retrieved under the U.K.'s open records laws, a 2002 review by the British Service Personnel Board disclosed that, even though the Navy officially reported no significant problems, several senior warrant officers and NCOs immediately resigned after the policy changed.<sup>151</sup> The report also indicated that many junior members within the infantry indicated they felt "that homosexuality undermined unit or team cohesion."<sup>152</sup> Army Trooper James Wharton, an openly gay U.K. soldier, who appeared on the front cover of an official British military magazine, acknowledged that integration has created some problems because, even in the U.K., ". . . there are still people who can't accept the change."<sup>153</sup> While celebrated by many as a success, internal reviews and key insights by British officials show that the integration of homosexuals into the British military has caused some discord within the ranks.<sup>154</sup>

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<sup>150</sup> See Dominic Kennedy, *Officers Quit Navy After Forces Lifted the Ban on Gays, Secret Paper Revealed*, TIMES ONLINE, Oct. 15, 2007, <http://www.timesonline.co.uk/tol/news/uk/article2658127.ece>. Additionally, Center for Military Readiness Director Elaine Donnelly refers to public accounts whereby the British experienced some form of "recruiting and disciplinary problem" due to repealing of the ban on homosexuals in the British Armed Forces. Elaine Donnelly, *Constructing the Co-Ed Military*, 14 DUKE J. GENDER L. & POL'Y 815, 926 (2007). Critics, such as Professors Frank and Belkin, minimize these accounts by stating that these are "isolated adjustment problems" that have not impacted the countries "overall military effectiveness." Jeanne Scheper et al., *The Importance of Objective Analysis on Gays in the Military: A Response to Elaine Donnelly's Constructing the Co-Ed Military*, 15 DUKE J. GENDER L. & POL'Y 419, 428 (2008). Ironically, neither Professors Frank nor Belkin acknowledge whether these incidents detrimentally impacted the military effectiveness of the individual units in which they occurred.

<sup>151</sup> See BRITISH SERVICE PERSONNEL BOARD, TRI-SERVICE REVIEW OF THE ARMED FORCES POLICY ON HOMOSEXUALITY AND CODE OF SOCIAL CONDUCT 13 (Dec. 2002), [http://www.mod.uk/NR/rdonlyres/ACED4F62-2C04-4B19-AC50-E49552732385/0/impact\\_studies\\_homosexuality.pdf](http://www.mod.uk/NR/rdonlyres/ACED4F62-2C04-4B19-AC50-E49552732385/0/impact_studies_homosexuality.pdf) [hereinafter BRITISH TRI-SERVICE REVIEW].

<sup>152</sup> *Id.* at 6.

<sup>153</sup> Trooper James Wharton appeared in his military uniform on the front cover of Soldier magazine, the British Army's official publication. See Terri Judd, *How the Forces Finally Learnt to Take Pride*, U.K. INDEP., July 27, 2009, <http://www.independent.co.uk/news/uk/home-news/how-the-forces-finally-learnt-to-take-pride-1762057.html>.

<sup>154</sup> In fact, some of the very concerns addressed by those opposing any change to DADT surfaced when the British changed their policy. Two and a half years after the integration, the British Army reported that while the British military had made successful changes, there were still multiple concerns regarding favoritism, benefits, and shared accommodations, all of which created concerns about the "possibility of greater problems

Wharton’s open display of gay “pride” demonstrates another stark difference between British and U.S. military cultures:<sup>155</sup> The British are far more permissive than the United States in areas such as public celebration, protest, and displays of affection while in uniform.<sup>156</sup> Examples of acceptable conduct by British soldiers include hugging and kissing in uniform and marching in uniform at public protests.<sup>157</sup> Recently, the U.K. even agreed to pay expenses for its servicemembers who marched in gay pride events,<sup>158</sup> while the branches of their armed forces actively recruited at these very same events.<sup>159</sup>

Another difference between the U.K. and the United States is the treatment of homosexual marriage. As of December 2005, homosexuals in the U.K. have had the ability to engage in civil partnerships, but not same-sex marriage.<sup>160</sup> At sixteen years of age, anyone in the U.K. desiring to enter into a civil partnership with their same-sex partner can do so, entitling the couple to the same benefits as heterosexuals.<sup>161</sup> Even with the ability to enter civil partnerships, advocates of gay marriage in the U.K. continue to push for the ability to “marry” a person of the same-sex.

#### B. The Canadian Experience

The Canadian Forces (CF) are all-volunteer, comprised of approximately 68,000 members in the active ranks and approximately

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arising during High Intensity Operations.” BRITISH TRI-SERVICE REVIEW, *supra* note 151, at 12–16.

<sup>155</sup> See Judd, *supra* note 153.

<sup>156</sup> See Jonathan Leake & Philip Cardy, *Army on Parade for Gay Recruits*, TIMES ONLINE, Aug. 28, 2005, [http://www.timesonline.co.uk/tol/news/uk/article\\_559936.ece](http://www.timesonline.co.uk/tol/news/uk/article_559936.ece).

<sup>157</sup> See STRACHAN, *supra* note 142, at 128.

<sup>158</sup> See Rupert Neate, *Gay Soldiers to be Paid Expenses for Attending Pride Marches*, TELEGRAPH.CO.UK, July 2, 2008, <http://www.telegraph.co.uk/news/newsttopics/onthe frontline/2235672/Gay-soldiers-to-be-paid-expenses-for-attending-Pride-marches.html> (last visited Apr. 1, 2010).

<sup>159</sup> *Id.*

<sup>160</sup> See Editorial, “*Gay Weddings*” *Become Law in UK*, BBC NEWS, Dec. 5, 2005, [http://news.bbc.co.uk/2/hi/uk\\_news/4493094.stm](http://news.bbc.co.uk/2/hi/uk_news/4493094.stm).

<sup>161</sup> See British Ministry of Defence, *available at* <http://www.mod.uk/DefenceInternet/AboutDefence/People/Speeches/MinAF/20100308ModernSocietyMilitaryTraditionsAndEffectiveArmedForcesInTodaysBritain.htm> (last visited Apr. 1, 2010).

20,000 in supplementary reserve ranks.<sup>162</sup> The minimum age for recruitment is 17 years-old, although a minor at the age of 16 years can join the Reserves with parental permission.<sup>163</sup> The maximum age for recruitment is 34.<sup>164</sup> The most recent deployment statistics revealed that approximately 2500 members of the CF deployed to Afghanistan during the past year.<sup>165</sup> Due to a 1992 ruling that CF's gay service ban violated Canada's Charter of Rights and Freedoms, federal courts forced the CF to lift the ban on homosexuality in the armed forces.<sup>166</sup> Like the U.K., it is impossible to determine the number of openly gay servicemembers serving in the CF because the necessary polls might constitute discrimination under Canadian law.<sup>167</sup> However, such service may be confirmed through open displays of affection, protests and rallies, and attendance at gay pride events, in which homosexual and transgender CF members may participate like their U.K. counterparts.<sup>168</sup>

Although many of the servicemembers within the CF opposed the change, the CF leadership has reported little trouble with the integration of homosexuals and transgender personnel.<sup>169</sup> However, the CF leadership has emphasized that a huge component of successful integration was "the fact that the implementation had been accomplished in a low-profile fashion, without numerous public pronouncements or media scrutiny."<sup>170</sup> In addition, while changes were slowly implemented, the CF required no mandatory sensitivity training, no demands for living in the same barracks and same bathing areas, and no "zero-tolerance"

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<sup>162</sup> See Canadian Forces, available at <http://www.forces.gc.ca/site/news-nouvelles/news-nouvelles-eng.asp?cat=00&id=3240> (last visited Apr. 1, 2010) [hereinafter Canadian Forces Website].

<sup>163</sup> See CIA Field Listing: Canadian Forces Military Service Age and Obligation, available at <https://www.cia.gov/library/publications/the-world-factbook/geos/ca.html> (last visited Apr. 1, 2010).

<sup>164</sup> See *id.*

<sup>165</sup> See Editorial, *Canada Won't Rethink 2011 Afghanistan Pullout after Obama Win: Cannon*, CBC NEWS, Nov. 5, 2008, <http://www.cbc.ca/canada/story/2008/11/05/obama-afghanistan.html>.

<sup>166</sup> See EMBESHER-HERBERT, *supra* note 134, at 60–61.

<sup>167</sup> See Tobi Cohen, *Canada Quietly Marks Anniversary for Gays in Military While U.S. Debate Rages*, COAST REP., Oct. 24, 2009, <http://www.coastreporter.net/article/GB/20091022/CP02/310229819/-1/sechelt/canada-quietly-marks-anniversary-for-gays-in-military-while-us&template=cpArt>.

<sup>168</sup> See Editorial, *Soldiers March in Toronto Gay Pride Parade*, CBC NEWS, June 29, 2008, <http://www.cbc.ca/canada/story/2008/06/29/gay-pride.html>.

<sup>169</sup> See EMBESHER-HERBERT, *supra* note 134, at 63–64.

<sup>170</sup> *Id.*

approach to the non-acceptance of the homosexual lifestyle.<sup>171</sup> While CF military personnel were adamantly opposed to integration, those advocating for the ability to serve openly did so without the expectation that change would occur overnight or that heterosexual servicemembers would immediately accept and accommodate every demand of homosexuals who desired inclusion.<sup>172</sup>

One notable difference between the CF and the U.S. military is the required length of service for military personnel. In the CF, most personnel leave the service before the end of the first year, or once they have become eligible for a military pension—normally after 25 years of service.<sup>173</sup> Contrastingly, in the U.S. military, most personnel, unless discharged for other reasons, complete their initial military obligation, which ranges from two to five years of service.<sup>174</sup>

Unlike the United States, on 20 June 2005, Canada granted same-sex couples the ability to marry.<sup>175</sup> Since this change, same-sex marriages have been allowed and recognized in every province and territory within Canada.<sup>176</sup> Couples in Canada can opt for a civil or religious ceremony.<sup>177</sup> Recently, the first same-sex couple married in a church at a Canadian military base.<sup>178</sup> In addition, same-sex marriages, civil unions, and domestic partnerships are afforded identical benefits as heterosexual marriages, and Canada recognizes all same-sex marriages and other similar same-sex partnerships.<sup>179</sup>

While the integration of homosexuals into the CF is seemingly persuasive, the CF experience lacked the meddling of politicians and

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<sup>171</sup> See CTR. FOR MIL. READINESS, FOREIGN NATIONS THAT ACCOMMODATE HOMOSEXUALS IN THEIR MILITARIES ARE NOT AN EXAMPLE FOR AMERICA’S MILITARY (Sept. 2009), <http://cmrlink.org/CMRdocuments/CMRPolicyAnalysis-September2009.pdf> [hereinafter CMR FOREIGN MILITARIES REPORT].

<sup>172</sup> *Id.*

<sup>173</sup> See Canadian Forces Website, *supra* note 162.

<sup>174</sup> See U.S. DEP’T OF LABOR, BUREAU OF LABOR STATISTICS, JOB OPPORTUNITIES IN THE ARMED FORCES (11th ed. 2010), <http://www.bls.gov/oco/ocos249.htm>.

<sup>175</sup> See Gay & Lesbian Advocates and Defenders, Canadian Marriage Facts: What Do I Need to Know About Getting Married in Canada?, Mar. 2010, *available at* <http://www.glad.org/uploads/docs/publications/canada-marriage-faq.pdf> (last visited Mar. 28, 2010) [hereinafter Canadian Marriage Facts].

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> See Editorial, *Canada’s First Same-Sex Military Wedding*, *CBC News*, CBC NEWS, Jun. 15, 2005, <http://www.alterheros.com/english/edito/index.cfm?recordID=85>.

<sup>179</sup> See Canadian Marriage Facts, *supra* note 175.

LGBT advocates jockeying for votes and support.<sup>180</sup> In fact, once ordered to integrate, external pressure and interest regarding the CF's integration of homosexuals ceased to be of concern.<sup>181</sup> However, integration of homosexuals into the U.S. armed forces appears to be but one rung on the ladder to LGBT "equality," with politicians and gay rights advocates demanding immediate results before reasoned analysis.<sup>182</sup> For these reasons, the CF experience is simply inapplicable to the repeal of DADT.

### C. The Australian Experience

The Australian military is an all-volunteer force, comprised of approximately 80,000 members.<sup>183</sup> The minimum age for recruitment is 17 years-old, although there are options for entry at 16-and-a-half years of age, with the maximum age for recruitment being 34.<sup>184</sup> The most recent deployment statistics showed that approximately 1550 members of the Australian military were deployed to Afghanistan during April 2010.<sup>185</sup> In November 1992, due to the adoption of a number of international human rights conventions in Australian domestic law, the Australian government lifted the ban on open homosexuality in the military.<sup>186</sup> In Australia, like the U.K. and Canada, data on the number of open LGBT servicemembers are severely limited by the perception that polling on sexual preference might violate antidiscrimination laws. Australia, therefore, cannot be compared to the United States situation either.<sup>187</sup> If, for example, only one hundred Australian servicemembers elected to serve openly, the issue of integration would clearly be less

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<sup>180</sup> See FRANK, *supra* note 34, at 165.

<sup>181</sup> See BELKIN & BATEMAN, *supra* note 103, at 122.

<sup>182</sup> See Michael Riley, *Dems in Congress Unwilling to Wait on Lengthy Repeal of military "Don't Ask, Don't Tell"*, DENVER POST, Apr. 21, 2010, [http://www.denverpost.com/search/ci\\_14925042](http://www.denverpost.com/search/ci_14925042).

<sup>183</sup> See Australian Recruitment Center, Age and Gender, Defense Jobs, *available at* <http://www.defencejobs.gov.au/recruitmentCentre/canIJoin/ageAndGender/> (last visited 1 Apr. 2010).

<sup>184</sup> See CIA Field Listing: Australian Military Forces Military Service Age and Obligation, *available at* <https://www.cia.gov/library/publications/the-world-factbook/fields/2024.html> (last visited Mar. 28, 2010).

<sup>185</sup> See Australia in Afghanistan, Global Collaborative, *available at* <http://gc.nautilus.org/Nautilus/australia/afghanistan/australia-in-afghanistan-q-and-a> (last visited Apr. 8, 2010).

<sup>186</sup> See FRANK, *supra* note 34, at 137.

<sup>187</sup> See generally FRANK, *supra* note 135.

concerning because it would not affect a large cross-section of the Australian armed forces.

While the Australian military opposed the change to its policy, the government implemented an immediate transition to allow homosexual and transgender personnel to serve openly.<sup>188</sup> This swift change occurred in the backdrop of a military culture that differs substantially from the U.S. military. In 2008, the Australian Navy completely shut down to provide a two month break for Christmas, demonstrating how the distinction between military and civilian life is far less prominent than in the United States<sup>189</sup> Furthermore, Australian military members are allowed to openly march in gay pride events.<sup>190</sup> Australian military forces rarely undertake long deployments, and it is common for members of these forces to return home after two or three months of deployment.<sup>191</sup> For these reasons, it cannot be said that Australia provides a roadmap for social terrain that can easily be traversed in the U.S.

#### D. The Israeli Experience

The Israeli Defense Force (IDF) is a conscripted military force.<sup>192</sup> The minimum age for entry is 18 years, with Israeli enlisted men obligated to serve 36 months, enlisted women 24 months, and officers 48 months.<sup>193</sup> The military lifted its gay ban in June 1993 after dramatic Knesset hearings prompted a public outcry against the armed forces’ exclusion of gay and lesbian soldiers.<sup>194</sup> While none of the other foreign militaries explored above have defense responsibilities similar to the

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<sup>188</sup> See EMBESHER-HERBERT, *supra* note 134, at 67–68.

<sup>189</sup> See generally CMR FOREIGN MILITARIES REPORT, *supra* note 171.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> See IDF Background Information, available at <http://www.mahal-idf-volunteers.org/information/background/content.htm> (last visited Apr. 1, 2010).

<sup>193</sup> See CIA Field Listing: Israeli Defense Forces Military Service Age and Obligation, available at <https://www.cia.gov/library/publications/the-worldfactbook/fields/2024.html> (last visited Apr. 1, 2010).

<sup>194</sup> See, e.g., MARY FAINSOD KATZENSTEIN & JUDITH REPPY, BEYOND ZERO TOLERANCE: DISCRIMINATION IN MILITARY CULTURE 235 (1999). Prior to 1980, while homosexuality was never formally prohibited in the IDF, most open homosexuals were discharged. *Id.* In 1983, the Israeli Manpower Division issued an order addressing that the military service of homosexuals would only be limited in positions regarding a security issues. *Id.*

IDF, the IDF's military responsibilities require nearly the number of personnel that the U.S. military does for its national defense.<sup>195</sup>

Interestingly, while the IDF's formal, written policy on homosexuality states that homosexual soldiers may serve openly and under conditions of equality with heterosexual servicemembers, the paper implementation of the policy vastly differs from its practical application.<sup>196</sup> Israeli culture, as well as military practices within the IDF, plays an important role in assignments to elite military forces.<sup>197</sup> Although not specifically prohibited, homosexuals are not assigned to such positions within the IDF.<sup>198</sup> Additionally, when a homosexual soldier lives in the barracks, commanders often give heterosexual soldiers the option to live off base if there are objections to rooming arrangements.<sup>199</sup> Likewise, homosexual soldiers in the IDF have the option to live on a closed post, but may request the ability to live on an open post to provide a more private living environment.<sup>200</sup> Most importantly, these provisions meld with the IDF's goal to "socialize" its men and women into society.<sup>201</sup> For these reasons, the IDF experience is inapplicable to the U.S. armed forces.

#### E. Overarching Concerns of Inapplicability

While the U.K., Canada, Australia, and Israel all allow for some degree of homosexual conduct in their militaries, the laws of each country vary, representing different ideas on the acceptability of sexual conduct. While polygamy is illegal in all four countries, it is not prosecuted in Israel because enforcement of such laws would infringe on the religious practices of the Bedouin culture.<sup>202</sup> These nations also differ in their liberal views on sexuality in general, perhaps best reflected in toleration for sexual relationships that would be entirely illegal in the United States.

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<sup>195</sup> See CMR FOREIGN MILITARIES REPORT, *supra* note 171.

<sup>196</sup> *Id.*

<sup>197</sup> See Aaron Belkin & Melissa Levitt, *Homosexuality and the Israel Defense Forces; Did Lifting the Gay Ban Undermine Military Performance?*, 27 ARMED FORCES & SOC'Y 541, 553–55 (2001).

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> See BELKIN & BATEMAN, *supra* note 103, at 112.

<sup>202</sup> See KATZENSTEIN & REPPY, *supra* note 194, at 234–36.

In Israel, for example, while the age of consent for sexual intercourse is sixteen,<sup>203</sup> a person can enter into a sexual relationship between the ages of fourteen and sixteen as long as the age difference is not greater than three years.<sup>204</sup> In Australia and Great Britain, the age of consent is also sixteen.<sup>205</sup> Despite the Canadian age of consent at sixteen, a twelve- or thirteen-year-old can consent to sexual intercourse with a person that is up to two years older, and a fourteen or fifteen-year-old can consent to sexual intercourse with a person that is no more than five years older.<sup>206</sup> These standards are not comparable to the Uniform Code of Military Justice or most state laws in the United States.

Despite acceptance of transsexuals in some of the surveyed nations, many foreign militaries, aside from the United States, believe a transgender person suffers from a mental disorder, and prohibit entry into the service on that very basis.<sup>207</sup> It is noteworthy that supporters of DADT’s repeal compare our military to these foreign militaries, yet fail to acknowledge the major differences. Each of the above countries differs on the extent to which members of their militaries can protest in uniform, whether homosexuals can serve in certain positions, whether homosexuals and their same-sex partners can reside in military housing, whether homosexuals can marry, and whether the country recognizes same-sex marriage.<sup>208</sup>

Of the twenty-five foreign militaries that allow open homosexuality, not one country has the number of personnel, disciplinary structure, or number of global commitments as the U.S. military.<sup>209</sup> The current trend for U.S. military forces is multiple and prolonged deployments.<sup>210</sup>

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<sup>203</sup> See Worldwide Ages of Consent, Avert, available at <http://www.avert.org/age-of-consent.htm#below> (last visited Mar. 27, 2010).

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> KARL BRYANT & KRISTEN SCHILT, TRANSGENDER PEOPLE IN THE U.S. MILITARY: SUMMARY AND ANALYSIS OF THE 2008 TRANSGENDER AMERICAN VETERAN’S ASSOCIATION SURVEY (2008), available at [http://www.palmcenter.org/publications/dadt/transgender\\_people\\_us\\_military](http://www.palmcenter.org/publications/dadt/transgender_people_us_military) (last visited Mar. 27, 2010).

<sup>208</sup> See generally GARY L. LEHRING, OFFICIALLY GAY 165–77 (2003).

<sup>209</sup> See generally BELKIN & BATEMAN, *supra* note 103, at 103–37.

<sup>210</sup> See LEONARD WONG & STEPHEN GERRAS, THE EFFECTS OF MULTIPLE DEPLOYMENTS ON ARMY ADOLESCENTS (Jan. 2010), <http://www.strategicstudiesinstitute.army.mil/pubs/display.cfm?pubID=962> (last visited Apr. 4, 2010). General Charles Campbell, Commander of U.S. Army Forces Command, stated in the forward to this article that “[m]ultiple deployments have become a way of life for our Soldiers.” *Id.*

Because of this high op-tempo, many U.S. servicemembers spend significant parts of their lives in close proximity to their peers, and have little, if any, privacy.<sup>211</sup> While foreign militaries may have experienced few difficulties implementing their repeal of prohibitions on open homosexual service, there is hardly a guarantee that the U.S. military, with its significant differences will respond in a similar manner.

## VII. Inconsistent and Undefined Terms will Limit the Reach of DADTs Repeal

### A. The Federal Defense of Marriage Act

Enacted in 1996, the Federal Defense of Marriage Act (DOMA) defines marriage at the federal level.<sup>212</sup> The legislative intent for DOMA was to protect the institution of traditional marriage as well as the rights of states to recognize same-sex unions.<sup>213</sup> The second section of DOMA affords states the ability to recognize homosexual marriages or other similar same-sex relationships, but does not require such recognition.<sup>214</sup> Because DOMA defines marriage in this manner, only heterosexual marriages are guaranteed federal benefits under the law, while states may permit or limit the benefits of homosexual relationships.<sup>215</sup> The third section of DOMA is most applicable to DADT's repeal because it defines marriage:

In determining the meaning of any act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word spouse refers only to a person of the opposite sex who is husband or wife.<sup>216</sup>

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<sup>211</sup> See discussion *supra* Part V.A.

<sup>212</sup> Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2000) and 28 U.S.C. § 1738C (2000)) [hereinafter DOMA].

<sup>213</sup> See H.R. REP. NO. 104-664, at 1-18 (1996) ("The legislative history reflects congressional concern about the effect that legalizing same-sex 'marriage' in Hawaii would have on other states, federal laws, the institution of marriage, traditional notions of morality, and state sovereignty.").

<sup>214</sup> 1 U.S.C. § 7 (2006); 28 U.S.C. § 1738C (2006).

<sup>215</sup> 1 U.S.C. § 7; 28 U.S.C. § 1738C.

<sup>216</sup> 1 U.S.C. § 7; 28 U.S.C. § 1738C.

In the absence of this provision, under the Full Faith and Credit Clause,<sup>217</sup> states might otherwise be required to recognize same-sex marriages contracted in different states, affording those marriages the benefits and protections conferred on heterosexual married couples.<sup>218</sup> These provisions have been frequently litigated in the federal courts, with one of the most recent cases filed in the District of Massachusetts.<sup>219</sup>

For much the same reason that DOMA has entered the federal courts, DOMA raises important concerns about the interpretation of military crimes and military privileges, which are addressed below. At the more global level, however, conflicts between various states have helped to shed light on the broader array of considerations.

#### B. Interstate Concerns

Even though DOMA does not bar states from instituting homosexual marriage or other similar same-sex relationships, thirty-seven states have their own Defense of Marriage Acts (DOMAs) with two additional states defining “marriage” as an act that can only be accomplished between one man and one woman.<sup>220</sup> Similarly, at least thirty states have passed constitutional amendments defining marriage as an act that can be accomplished only between one man and one woman.<sup>221</sup> Only five states have responded differently to DOMA, effectively permitting same-sex marriage.<sup>222</sup> Thus far, Massachusetts, Connecticut, Iowa, New Hampshire, and Vermont are the only states that have legalized same-sex

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<sup>217</sup> U.S.CONST. art. IV, § 1.

<sup>218</sup> See Julia Halloran McLaughlin, *DOMA and the Constitutional Coming Out of Same-Sex Marriage*, 24 WIS. J.L. GENDER & SOC’Y 145, 150 (2009).

<sup>219</sup> On 6 May 2010, the Federal District Court in Boston will hear the case of *Gill et al. v. Office of Pers. Mgmt.* In this case, the Gay & Lesbian Advocates and Defenders (GLAD), on behalf of eight married same-sex couples and three surviving spouses, asserts that “DOMA Section 3 violates the federal constitutional guarantee of equal protection as applied to federal income taxation, Social Security benefits, and federal employee and retirement benefits.” See GLAD’s DOMA Challenge Heads to Court May 6, Apr. 8, 2010, available at <http://www.glad.org/current/news-detail/glads-doma-challenge-heads-to-court-may-6/> (last visited Apr. 8, 2010).

<sup>220</sup> See DOMA Watch, Issues by State, available at <http://www.domawatch.org/stateissues/index.html> (last visited Mar. 28, 2010) [hereinafter DOMA issues].

<sup>221</sup> See DOMA Watch, Marriage Amendment Summary, available at <http://www.domawatch.org/amendments/amendmentssummary.html> (last visited Mar. 28, 2010).

<sup>222</sup> See DOMA Issues, *supra* note 220 (listing Massachusetts, New Jersey, New Mexico, New York, and Rhode Island).

marriage.<sup>223</sup> While New Hampshire and Vermont passed legislation, Massachusetts, Connecticut, and Iowa legalized marriage as the result of court decisions.<sup>224</sup> California, for a short time, permitted gay marriage as the result of a ruling by the State's highest court.<sup>225</sup> However, voters soon prohibited the practice.<sup>226</sup>

More revealing than the institution of DOMAs in the majority of states are the conflicts that have arisen from spouses in homosexual relationships who have relocated to other states. A representative sample of conflicts includes recognition of adoptions,<sup>227</sup> child support/visitation,<sup>228</sup> inheritance, healthcare insurance, and decision-making authority. Because military families are inherently mobile, moving from one state to another as the result of military need,<sup>229</sup> the federal DOMA and state DOMAs will significantly impact homosexual military members, especially if the military recognizes forms of homosexual marriages or other unions that a majority of states have legally rejected. Historically, and today, the military has been concerned with "preventive law" and the desire to eliminate the number of legal conflicts experienced by servicemembers to permit them to focus on their military duties. In this light, Army Regulation 27-3, *The Legal Assistance Program*, which addresses the need for Army preventive law programs, observes: "Personal legal difficulties may cause low morale and disciplinary problems and may adversely affect combat readiness. Prompt legal assistance in resolving these difficulties is an effective

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<sup>223</sup> *See id.*

<sup>224</sup> *Id.*

<sup>225</sup> *See generally* California DOMA Watch, available at <http://www.domawatch.org/stateissues/california/index.html> (last visited Mar. 28, 2010) (highlighting the key controversial cases and timeline of same-sex marriage in California).

<sup>226</sup> *See id.* *See also* discussion *supra* Part II and notes 29 and 30.

<sup>227</sup> In Maine, a non-biological lesbian partner won the right to have full parental rights and responsibilities when the child's biological mother attempted to terminate the legal relationship. Both women were involved in raising the child. Maine's highest court ruled it is the parent-child relationship, and not just the biological or adoptive relationship, that governs the best interests of the child. *See C.E.W. v. D.E.W.*, 845 A.2d 1146 (Me. 2004).

<sup>228</sup> The parties T.F. and B.L., two lesbian women, decided to have a child together, with both parents agreeing to raise the child. However, the partners separated prior to the child's birth. The Massachusetts Supreme Court held that the non-biological parent does not have an obligation to support the child, even though she agreed to do so. *See T.F. v. B.L.*, 813 N.E.2d 1244 (Mass. 2004).

<sup>229</sup> Although servicemember relocations may vary and servicemembers typically are able to request certain duty assignments and locations, military needs ultimately dictate the servicemember's place of assignment.

preventive law measure.”<sup>230</sup> The military recognition of homosexual marriage in geographic duty locations where non-federal jurisdictions may lawfully and simultaneously prohibit the same invites legal conflicts in servicemembers’ lives and violates the very principles embodied in the ages-old concept of preventive law.

Servicemembers in long-term homosexual relationships, particularly ones with children, will inevitably face complex and, potentially, recurring legal issues as they move around the world. Unfortunately, these problems will not only cause morale issues, but they will also keep Soldiers in court, in legal offices, and, at the very least, not focused on the mission. Furthermore, attorneys will require education in these complex legal issues, which, by their nature, require a level of expertise not easily learned.

#### VIII. Constitutional Considerations

##### A. The Right to Engage in Consensual Sodomy, Under Certain Circumstances, Does Not Support DADT’s Repeal

Historically, the military prohibited consensual and forcible sodomy, even though it was not until the 1920 Articles of War that the single act of sodomy became a criminal offense.<sup>231</sup> Article 125 of the Uniform Code of Military Justice now criminalizes all consensual and forcible acts of “unnatural carnal copulation with another person of the same or opposite sex.”<sup>232</sup> Under a plain reading of the statute, acts of sodomy are criminal whether “consensual or forcible, heterosexual or homosexual, public or private.”<sup>233</sup> A servicemember may receive a dishonorable discharge and five years of confinement even for totally consensual acts that fall under Article 125’s sodomy prohibitions.<sup>234</sup>

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<sup>230</sup> U.S. DEP’T OF ARMY, REG. 27-3, THE ARMY LEGAL ASSISTANCE PROGRAM ¶ 2-1, 3 (21 Feb. 1996). *See also* U.S. DEP’T OF ARMY, REG. 600-14, PREVENTATIVE LAW PROGRAM ¶ 1, at 1 (10 Jan. 1963) (“An effective program will result in the saving of countless man-hours now used in remedial counseling and the processing of courts-martial and administrative actions. Further, this program will enhance the morale, efficiency, and prestige of the individual soldier.”). Other services recognize this same mandate. *See, e.g.*, Lieutenant Colonel Michael A. Rodgers, *Preventive Law Programs: A SWIFT Approach*, 47 A.F. L. REV. 111 (1999) (applying this principle to the U.S. Air Force).

<sup>231</sup> *See* FRANK, *supra* note 34, at 5.

<sup>232</sup> UCMJ art. 125.

<sup>233</sup> *United States v. Marcum*, 60 M.J. 198, 202 (C.A.A.F. 2004).

<sup>234</sup> UCMJ art. 125.

In 2003, the Supreme Court issued its historic *Lawrence v. Texas* ruling, which invalidated state sodomy statutes on the basis of the right to engage in adult, private, consensual sexual activity.<sup>235</sup> While, under various circumstances, sodomy can still be punished, such as acts in the course of prostitution or accomplished in a situation where consent could not be obtained, the holding severely restricted the reach of most American criminal statutes.<sup>236</sup> Shortly after *Lawrence*, the U.S. Court of Appeals for the Armed Forces (CAAF) issued its own decision regarding consensual sodomy in the military.<sup>237</sup> In *United States v. Marcum*, Technical Sergeant Marcum engaged in acts of sodomy with a junior servicemember under his direct supervision, while both men were off-post and off-duty.<sup>238</sup> Upon finding Marcum “not guilty of forcible sodomy, but guilty of consensual sodomy,”<sup>239</sup> a panel of officer and enlisted members sentenced Marcum to “confinement for 10 years, a dishonorable discharge, total forfeitures, and reduction to the lowest enlisted grade.”<sup>240</sup>

Using the rationale provided in *Lawrence*, the CAAF upheld the constitutionality of Article 125, asserting that the *Lawrence* Court “did not expressly identify the liberty interest as a fundamental right.”<sup>241</sup> In applying the decision in *Lawrence* to *Marcum*, the CAAF explained that “. . . an understanding of military culture and mission cautions against sweeping constitutional pronouncements that may not account for the nuance of military life.”<sup>242</sup> Accordingly, the CAAF refused to recognize “a fundamental right in the military environment when the Supreme Court declined in the civilian context to expressly identify such a fundamental right.”<sup>243</sup> The CAAF, in *Marcum*, while applying the decision in *Lawrence*, essentially held that all homosexual sexual conduct is not prohibited by Article 125.<sup>244</sup> Additional cases addressing sodomy, occurring in public or linked to adulterous behavior, have established that *Lawrence* and *Marcum* do not permit all instances of

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<sup>235</sup> 539 U.S. 558 (2003).

<sup>236</sup> *See id.* at 578.

<sup>237</sup> *See generally Marcum*, 60 M.J. at 198.

<sup>238</sup> *Id.* at 200.

<sup>239</sup> *Id.* at 201.

<sup>240</sup> *Id.* at 199.

<sup>241</sup> *Id.* at 205.

<sup>242</sup> *Id.* at 206.

<sup>243</sup> *Id.* at 205.

<sup>244</sup> *Id.* at 206.

sodomy committed by servicemembers.<sup>245</sup> Reconciliation of these cases, therefore, requires careful analysis of the conduct surrounding any given sexual act performed in the military environment.<sup>246</sup> Those urging that *Lawrence* mandates the repeal of DADT incorrectly imply that the policy of DADT and Article 125 are somehow co-dependent.<sup>247</sup> The CAAF’s analysis in *Marcum* assists in demonstrating the flaws in such an argument.<sup>248</sup>

In addressing whether *Lawrence* applied to the set of facts in *Marcum*, the CAAF identified three questions to determine the constitutionality of Article 125. First, the CAAF assumed that Marcum’s private, consensual sex with another man fell within the liberty interest prescribed in *Lawrence* because the panel found Marcum guilty of non-forcible sodomy.<sup>249</sup> Second, the CAAF analyzed whether Marcum’s conviction of non-forcible sodomy encompassed any conduct outside the liberty interest identified by the *Lawrence* Court.<sup>250</sup> Drawing attention to the Air Force fraternization policy and Marcum’s potential violation of a lawful order under Article 92, the CAAF explained how Marcum’s consensual sexual acts with an adult fell outside the zone of protection established by *Lawrence*.<sup>251</sup> Here, the CAAF stated “. . . this right must be tempered in a military setting based on the mission of the military, the need for obedience of orders, and civilian supremacy.”<sup>252</sup> Comparing Marcum’s consensual sexual conduct with a subordinate to an act in

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<sup>245</sup> See *United States v. Johns*, 2007 WL 2300965 (A.F. Ct. Crim. App. 2007) (holding that Article 125 was constitutional as applied to consensual *heterosexual* sodomy between an accused servicemember and the wife of another deployed servicemember because of the effect on good order and discipline).

<sup>246</sup> See generally *Marcum*, 60 M.J. at 207 (observing that “the nuance of military life is significant”).

<sup>247</sup> See Mick Meehan, *Military Ban on Gays Turns Ten*, Dec. 18, 2003, available at [http://www.palmcenter.org/press/dadt/in\\_print/military\\_ban\\_on\\_gays\\_turns\\_ten](http://www.palmcenter.org/press/dadt/in_print/military_ban_on_gays_turns_ten) (last visited 29 Mar. 2010) (quoting Pat Logue, legal director at Lambda Legal Defense, “I am convinced that Article 125 is unconstitutional and there has been no compelling argument on the part of the military why there should be restrictions on private sexual conduct.”). See also Palm Center Press Documents, *Legal Scholars Question whether Sodomy Ruling will Affect Military Gay Ban*, 26 Jun. 2003, available at <http://www.palmcenter.org/files/active/0/LegalScholarsQuestionWhetherSodomyRulingWillAffectBan6-26-03.pdf> (last visited Mar. 29, 2010) (“The Government has just lost its weapon of mass destruction. . . . As of today, all sodomy laws are unconstitutional.”).

<sup>248</sup> See generally *Marcum*, 60 M.J. at 198.

<sup>249</sup> *Id.* at 207.

<sup>250</sup> *Id.*

<sup>251</sup> *Id.* at 208.

<sup>252</sup> *Id.* at 209 (citing *United States v. Brown*, 45 M.J. 389, 397 (C.A.A.F. 1996)).

which a person “might be coerced” or “where consent might not easily be refused,” the CAAF held that Article 125 was constitutional as it applied to Marcum.<sup>253</sup>

*Lawrence* and *Marcum* highlight the flaws in DADT opponents’ assertion that *Lawrence* granted a fundamental right to engage in homosexual acts, thereby making Article 125 unconstitutional. *Lawrence*, in fact, granted a personal liberty interest under the Due Process Clause, and not a fundamental liberty under the Equal Protection Clause.<sup>254</sup> Under the Due Process Clause, the determination of whether a liberty interest is reasonably related to a legitimate government interest requires a low level of scrutiny.<sup>255</sup> By holding the Texas anti-sodomy statute unconstitutional, but caveating that the facts in *Lawrence* did not involve certain types of conduct, the Supreme Court implied that a state may have a legitimate interest in regulating private sexual conduct under certain circumstances.<sup>256</sup> Given the nature of excepted circumstances defined by *Lawrence* and the military’s need to maintain good order and discipline, the military’s criminalization of private, consensual sodomy under Article 125 indeed meets the low level of scrutiny required to withstand a constitutional challenge.<sup>257</sup>

Opponents of DADT further argue that *Lawrence* prohibits the punishment of consensual sodomy under Article 125 and allows the practice of open homosexuality.<sup>258</sup> These arguments are equally flawed; they confuse the policy of DADT with the rationale for criminalizing acts of sodomy. While consensual sodomy between adults is not criminal under the facts in *Lawrence*, in other circumstances, consensual sodomy between adults in the military is still a crime.<sup>259</sup> Along the same lines permitting these sodomy punishments—the “fundamental necessity for obedience, and the consequent necessity for imposition of discipline”<sup>260</sup>—other acts which may be permitted in civilian society are,

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<sup>253</sup> *Id.* at 208 (quoting *Lawrence v. Texas*, 539 U.S. 558, 578 (2003)).

<sup>254</sup> *Id.* at 205.

<sup>255</sup> *Witt v. Dep’t of the Air Force*, 527 F.3d 806, 818 (2008) (“Substantive due process cases typically apply strict scrutiny in the case of a fundamental right and rational basis review in all other cases.”).

<sup>256</sup> *Marcum*, 60 M.J. at 206.

<sup>257</sup> *Id.* at 208.

<sup>258</sup> See *supra* note 241 and accompanying text.

<sup>259</sup> *Marcum*, 60 M.J. at 207.

<sup>260</sup> See *Parker v. Levy*, 417 U.S. 733, 758 (1974) (“The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render

nonetheless, criminal in the military, including desertion,<sup>261</sup> disrespect to superiors,<sup>262</sup> adultery,<sup>263</sup> and disobeying orders.<sup>264</sup>

The *Lawrence* and *Marcum* decisions deal with the ability to criminalize consensual sexual acts between consenting adults and not with the military’s ability to enforce policies necessary to maintain good order and discipline.<sup>265</sup> In recognition of unique military needs, the Supreme Court has routinely upheld the armed forces’ ability to enforce policies and procedures that reduce servicemembers’ abilities to engage in otherwise constitutionally permissible conduct.<sup>266</sup> Although it is legal for a citizen to possess adult pornography that is not obscene, military commanders may prohibit servicemembers from displaying pornography in barracks rooms or common living areas,<sup>267</sup> on government computers,<sup>268</sup> or from possessing pornography in certain deployed areas.<sup>269</sup> While it may also be permissible for a civilian to possess and display adult pornography, the military prohibits this conduct to protect the good order and discipline of military units.<sup>270</sup> On this basis, and in

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permissible within the military that which would be constitutionally impermissible outside it.”).

<sup>261</sup> UCMJ art. 85 (2008). *See also* United States v. Deller, 12 C.M.R. 165 (C.M.A. 1953) (affirming conviction of an accused for intending to permanently avoid “completion of basic training and useful service as a soldier”).

<sup>262</sup> UCMJ art. 89. *See also* United States v. Najera, 52 M.J. 247 (C.A.A.F. 2000) (holding that an accused’s statement to a superior commissioned officer, “You can’t make me, you can give me any type of discharge you want, you can give me a DD, I would rather have a dishonorable discharge than return to training, I refuse,” made in a manner that was “contemptuous, cocky, and sarcastic,” was disrespectful and sufficient to find the accused guilty of violation Article 89, UCMJ.)

<sup>263</sup> UCMJ art. 134. *See also* United States v. Green, 39 M.J. 606 (A.C.M.R. 1994) (holding that acts of adultery in the barracks were prejudicial to good order and discipline).

<sup>264</sup> UCMJ art. 92. *See also* United States v. Kisala, 64 M.J. 50 (C.A.A.F. 2007) (upholding the lawfulness of a direct order to receive an anthrax vaccination in the absence of any notice by the Secretary of Defense because the anthrax vaccine was not an investigational drug).

<sup>265</sup> *See* United States v. Marcum, 60 M.J. 198, 208 (C.A.A.F. 2004).

<sup>266</sup> *See* Parker v. Levy, 417 U.S. 733, 758 (1974).

<sup>267</sup> *See* AR 600-20, *supra* note 49, ¶ 4-12c (“Commanders have the authority to prohibit military personnel from engaging in or participating in any other activities that the commander determines will adversely affect good order and discipline or morale within the command. This includes, but is not limited to, the authority to order the removal of symbols, flags, posters, or other displays from barracks. . . .”).

<sup>268</sup> *See* U.S. DEP’T OF ARMY, REG. 25-1, ARMY KNOWLEDGE MANAGEMENT AND INFORMATION TECHNOLOGY ¶ 6-1.f(1) (4 Dec. 2008) [hereinafter AR 25-1].

<sup>269</sup> *See* Headquarters, Dep’t of Army, Gen. Order No. 1 (4 Apr. 2009).

<sup>270</sup> *See generally* AR 600-20, *supra* note 49.

furtherance of the need to promote good order and discipline, if DADT is repealed, the military could still prohibit acts of sodomy under certain conditions or in certain locations.<sup>271</sup> In repealing DADT, the military could prohibit any sexual display or act of homosexuality in the barracks, common areas, or other military areas on an installation. Therefore, contrary to assertions made by opponents of DADT, Congress could decriminalize sodomy and yet prohibit openly homosexual behaviors if doing so protects the good order and discipline of the armed forces.

#### B. *Voir Dire* Will Result in Discord Among Military Units Following DADT's Repeal

Repealing DADT will likely result in additional criminal cases involving issues of homosexuality, especially considering the increased number of sexual assaults since women were integrated into various occupational specialties.<sup>272</sup> In addressing these concerns, some legislators have referred to the explosive rates of sexual assault as a “horrifying” trend in the armed forces.<sup>273</sup> With an increase in homosexual behaviors after a repeal of DADT, logically, homosexual servicemembers will participate in courts-martial as either victims or witnesses. Likewise, considering the already existing problem of homosexual assaults,<sup>274</sup> it is unlikely that there will be no further criminal

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<sup>271</sup> See *United States v. Marcum*, 60 M.J. 199, 202 (C.A.A.F. 2004). The military’s imposition of limitations on acts of sodomy under certain circumstances would apply equally to heterosexuals and homosexuals. See UCMJ art. 125 (“Any person subject to this chapter who engages in unnatural carnal copulation with another person of the same or opposite sex or with an animal is guilty of sodomy.”) (emphasis added).

<sup>272</sup> Sexual assaults against women have drastically increased over the past three years. In 2009, there were 2302 unrestricted reports of sexual assault against women. 2009 DOD SAPR REPORT, *supra* note 106, at 89. In 2008, there were 2105 unrestricted reports of sexual assaults against women. U.S. DEP’T OF DEF., REPORT, SEXUAL ASSAULT PREVENTION AND RESPONSE 79 (Mar. 2009) [hereinafter 2008 DOD SAPR REPORT]. In 2007, there were 1355 unrestricted reports of sexual assaults against women. U.S. DEP’T OF DEF., REPORT, SEXUAL ASSAULT PREVENTION AND RESPONSE 32 (Mar. 2008) [hereinafter 2007 DOD SAPR REPORT].

<sup>273</sup> See *Testimony before the House Oversight and Government Reform Subcommittee on National Security and Foreign Affairs’ Oversight Hearing on Sexual Assault in the Military* (July 31, 2008) (Rep. Louise Slaughter, Chairwoman, House Comm. on Rules).

<sup>274</sup> In 2009, there were 190 same-gender sexual assaults. 2009 DOD SAPR REPORT, *supra* note 106, at 89. In 2008, there were 132 same-gender sexual assaults. 2008 DOD SAPR REPORT, *supra* note 272, at 79. In 2007, there were 152 same-gender sexual assaults. 2007 DOD SAPR REPORT, *supra* note 272, at 32.

acts committed by homosexual servicemembers in the wake of a repeal of DADT.

Although homosexuality is not frequently encountered at courts-martial, most likely due to the stigma of DADT, military courts-martial do, at times, involve homosexuality.<sup>275</sup> In these cases, appellate courts have typically supported a military judge’s decision to completely prohibit or substantially curtail evidence that may expose the sexual orientation of a servicemember based on the severe consequences of admissions in violation of DADT.<sup>276</sup> By repealing DADT and removing such roadblocks, counsel may have more leniency to inquire about a witness’ or accused’s homosexuality.

In addition to possible changes of permissible questions for witnesses and victims, the repeal of DADT would necessitate changes to *voir dire*. A functioning military justice system requires a court-martial free from bias and partiality.<sup>277</sup> In courts-martial, *voir dire* is the primary method for the military judge and counsel to “ferret out facts” and “make conclusions about panel members’ sincerity,” and, furthermore, “adjudicate members’ ability to sit as part of a fair and impartial panel.”<sup>278</sup> Upon electing trial by members, an accused exercises the right to seat a panel free of outside influences.<sup>279</sup> Through *voir dire*, the military judge and counsel can acquire spontaneous information from the members about the essential issues related to the case.<sup>280</sup>

In certain cases, bias may prevent a servicemember from sitting as a panel member.<sup>281</sup> When a member demonstrates either actual or implied bias, the bias may impermissibly infringe on an accused’s right to a fair

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<sup>275</sup> See, e.g., *United States v. Collier*, 67 M.J. 347 (C.A.A.F. 2009); *United States v. Elfayoumi*, 66 M.J. 354 (C.A.A.F. 2008); *United States v. Marcum*, 60 M.J. 198 (C.A.A.F. 2004).

<sup>276</sup> *Collier*, 67 M.J. at 353.

<sup>277</sup> MCM, *supra* note 19, R.C.M. 912(f)(1)(N). See also *United States v. Brown*, 13 M.J. 890 (A.C.M.R. 1982) (holding position as law enforcement officer, absent any additional evidence of bias, is insufficient to challenge a member for cause).

<sup>278</sup> *United States v. Bragg*, 66 M.J. 325, 327 (C.A.A.F. 2008).

<sup>279</sup> See, e.g., *United States v. Glenn*, 25 M.J. 278, 279 (C.M.A. 1987) (“We find it difficult to believe that either appellant or the public could be convinced that he received a fair trial when he was not apprised of the fact that a member of the staff judge advocate’s family was sitting on his court-martial.”).

<sup>280</sup> MCM, *supra* note 19, R.C.M. 912(d) Discussion.

<sup>281</sup> See *United States v. Wiesen*, 56 M.J. 172, 174 (C.A.A.F. 2001).

trial by members.<sup>282</sup> Actual bias deals with a panel member's specific beliefs:<sup>283</sup> "The test for actual bias is 'whether any bias is such that it will not yield to evidence presented and judge's instructions.'"<sup>284</sup> In determining whether a panel member's actual bias is sufficient to challenge him or her for cause, the military judge will evaluate the member's "credibility and demeanor."<sup>285</sup>

Alternatively, implied bias is "intended to address the perception or appearance of fairness of the military justice system."<sup>286</sup> Implied bias exists when a reasonable person in the panel member's position could not fairly evaluate the evidence or listen and adhere to the military judge's instructions.<sup>287</sup> Viewed objectively, through the eyes of the public, this inquiry addresses whether a person outside the court-martial process would have reservations about the impartiality of the court-martial.<sup>288</sup> If a reasonable person could listen to the trial proceedings and evaluate the evidence in a fair and impartial manner, regardless of his or her personal beliefs, the military judge will most likely deny a challenge for cause.<sup>289</sup>

Repealing DADT could impact the *voir dire* process by exposing a member's personal beliefs in opposition to the repeal of DADT, which could promote a hostile environment for members of the unit who are privy to the member's comments. Because the topic of homosexuality can evoke emotions grounded in moral and religious beliefs,<sup>290</sup> most cases now involving homosexual issues require extensive *voir dire* to ensure that personal beliefs do not affect one's ability to evaluate the evidence.<sup>291</sup> In these cases, *voir dire* about members' personal and

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<sup>282</sup> *Id.* See also *United States v. Napoleon*, 46 M.J. 279, 282–84 (C.A.A.F. 1997).

<sup>283</sup> *United States v. Richardson*, 61 M.J. 113, 118 (C.A.A.F. 2005).

<sup>284</sup> *Napoleon*, 46 M.J. at 284 (internal citations omitted).

<sup>285</sup> *Id.*

<sup>286</sup> *Wiesen*, 56 M.J. at 174.

<sup>287</sup> See *United States v. Napolitano*, 53 M.J. 162, 167 (C.A.A.F. 2000).

<sup>288</sup> See *United States v. Schlamer*, 52 M.J. 80, 93 (C.A.A.F. 1999).

<sup>289</sup> *Id.*

<sup>290</sup> See *United States v. Elfayoumi*, 66 M.J. 354, 356 (C.A.A.F. 2008).

<sup>291</sup> For example, in the case of *United States v. Elfayoumi*, the following line of questioning by the military judge was sufficient to ensure that the member's personal beliefs did not affect his ability to evaluate the evidence:

- MJ: Earlier you indicated you had some strong objections to homosexuality?  
MEM: That is correct, sir.  
MJ: Could you explain a little bit about that.

religious beliefs may be necessary.<sup>292</sup> Ordinarily, personal moral and religious beliefs are insufficient to challenge a member for cause.<sup>293</sup> When a member expresses the “capacity to hear a case based on the four corners of the law and as instructed by the military judge,” that member is presumed to have the ability to fairly and impartially hear the case and follow the military judge’s instructions.<sup>294</sup>

*Voir dire* after DADT’s repeal may very well impact the command climate for an entire unit based on the open nature of a court-martial.<sup>295</sup>

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- MEM: I feel that it is morally wrong. It is against what I believe as a Christian and I do have some strong opinions against it.
- MJ: You notice . . . on the [charge sheet] that the word “*homosexual*” is not there?
- MEM: Yes, sir.
- MJ: But there is male on male sexual touching alleged.
- MEM: Yes, sir.
- MJ: Let’s say we get to sentencing and the accused is convicted of some or all of the [offenses]. . . . Let’s talk about these offenses involving indecent assault and the forcible sodomy. If it got to that point in the trial and the accused was convicted of some or all of those offenses, do you think you could fairly consider the full range of punishments?
- MEM: Yes, sir.
- MJ: Do you think you could honestly consider not discharging the accused even with that kind of conviction?
- MEM: I would have a hard time with that, sir.
- MJ: Could you consider it though?
- MEM: Yes, sir.
- MJ: After hearing the entire case, you wouldn’t [categorically] exclude that?
- MEM: No, sir.
- MJ: Now understanding there may be administrative . . . consequences and we all know those, but as a court member, that’s not your concern. Do you understand that?
- MEM: Yes, sir.

*Elfayoumi*, 66 M.J. at 355 (emphasis added).

<sup>292</sup> *Id.* at 356.

<sup>293</sup> *Id.* at 357 (“The law anticipates this human condition. Thus, the question is not whether they have views about certain kinds of conduct and inclinations regarding punishment, but whether they can put their views aside and judge each particular case on its own merits and the law. . . .”).

<sup>294</sup> *Id.*

<sup>295</sup> MCM, *supra* note 19, R.C.M. 806 (“Except as otherwise provided in this rule, courts-martial *shall* be open to the public.”) (emphasis added).

Currently, those expressing personal or religious opposition to homosexuality are essentially stating beliefs that are congruent with the military's DADT policy.<sup>296</sup> By reflecting aspects of existing law, the members' position reiterates the military's policy that "homosexuality is incompatible with military service."<sup>297</sup> After repeal of this policy, those very panel members will have personal and moral religious beliefs that exist in stark contrast to the military's official position. A panel member who shares her opposition to the new policy under oath, and who is personally or religiously opposed to homosexuality, will be forced to choose between disclosing an opinion that appears discriminatory and contradictory to military policy, providing an equivocal answer, or rationalizing a politically-correct response that may conceal the whole truth. Because of the public nature of military courts-martial, closing the court-martial to save face will not likely be a viable option.<sup>298</sup>

Assuming that a court-martial member would answer questions about homosexuality honestly, and that the court-martial would remain open, there is great potential for negative effects resulting from public disclosure of a member's personal, moral, and religious beliefs. Generally, military panels are composed of senior officer and enlisted servicemembers, many of whom hold leadership positions.<sup>299</sup> Junior servicemembers, who desire to abide by the military's new policy, may view the policy as a triumph in antidiscrimination and expect their commanders to uphold the Army's official positions. These servicemembers may be surprised or offended to learn about the divergence between a leader's closely-held beliefs and military initiatives.

For example, consider the situation where two panel members sit on the same case with one in the supervisory chain of the other. The junior

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<sup>296</sup> A panel member's opposition to homosexuality is not at odds with the military's policy concerning homosexuality in the armed forces. *See generally* 10 U.S.C. § 654 (2006) (DADT).

<sup>297</sup> *Id.* § 654(a).

<sup>298</sup> *See* United States v. Short, 41 M.J. 42, 43 (C.M.A. 1994) ("The right to an open and public court-martial is not absolute, however, and a court-martial can be closed to the public . . . . Nonetheless, 'exclusion must be used sparingly with the emphasis always toward a public trial.'" (citing United States v. Grunden, 2 M.J. 116, 120 (C.M.A. 1977)). *See also* MCM, *supra* note 19, R.C.M. 806.

<sup>299</sup> UCMJ art 25(d)(2) (2008) ("When convening a court-martial, the convening authority shall detail as members thereof such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament.").

member is personally opposed to homosexuality, while the senior member is homosexual. The senior member hears the junior member disclose moral and religious opposition to homosexuality. Although the junior member is the most successful and talented officer in the organization, this experience leads the senior member to downgrade the junior member’s officer evaluation report, subtly through mediocre comments. Additionally, word about the junior officer’s personal beliefs becomes public knowledge within his unit based on shared observations from the bailiffs, escorts, and viewers in the gallery. Other homosexual soldiers become upset upon knowing the junior officer’s personal beliefs, causing mounting tension within the unit. As a result of these combined factors, the command climate within the unit deteriorates. Homosexual Soldiers avoid the junior officer for fear that he is homophobic and will penalize them, ironically, in much the same way he was penalized by his rater. Evidence of this dissatisfaction appears in command climate surveys, disregard for the junior officer’s orders, and speculative gossip perpetuated about the junior officer.

The previous example is only one way in which *voir dire* could negatively impact a command climate in the aftermath of a repeal of DADT. At the very outset, policymakers must determine whether the military can withstand the consequences of open homosexual service. If the answer is affirmative, will any precautions or protections exist to prevent *voir dire* from fractionalizing military units and perpetuating a sense of distrust, homophobia, or a hostile environment for both homosexual servicemembers and opponents of repeal who undergo inquiry? Must the military judge and counsel be required to inquire into each member’s sexual preference at the outset of cases in order to address these types of issues, or will selected panel members be required to disclose their sexual preference on panel questionnaires in the absence of the existing prohibition? These are precisely the types of questions required by the constitutional right to a fair trial. Worse yet, any distraction and concern caused by simple answers to the most basic questions about one’s beliefs will only be multiplied as additional questions are propounded on the same issue.

#### IX. Marital Privilege and Military Rule of Evidence 504

Although no legislation explicitly applies DOMA to the military, at the recent Armed Service Committee Hearings, Representative Howard P. “Buck” McKeon, the ranking Republican on the House Armed

Services Committee, along with several other political representatives, debated whether DOMA would extensively limit the military's ability to provide benefits to gay spouses.<sup>300</sup> While Secretary Gates declined to comment on whether DOMA would apply, supporting this discussion, Mr. Austin Nimocks, a lawyer for the Alliance Defense Fund, explained, "It's most likely under the current scenario that the military would follow DOMA because the marriage license held by a same-sex couple is a state-conferred right and not a federal-conferred right."<sup>301</sup> Because DOMA provides federal definitions for "marriage"<sup>302</sup> and "spouse,"<sup>303</sup> a servicemember's same-sex marriage would likely be eligible for federal benefits predicated upon a state-recognized relationship.<sup>304</sup> The DOMA was enacted precisely to prevent this type of result.<sup>305</sup>

The application of DOMA to same-sex marriages also raises significant concerns regarding MRE 504's provisions on marital privilege. Although MRE 504 has neither explicitly applied nor rejected DOMA's definition of marriage, DOMA applies to all federal laws,<sup>306</sup> defining "marriage" as "a legal union exclusively between one man and one woman."<sup>307</sup> It further defines a spouse as "a husband or wife of the opposite sex."<sup>308</sup> By restricting the definition of marriage and spouse, DOMA prohibits same-sex partners from receiving over 1138 federal benefits normally derived from a marriage under federal law.<sup>309</sup> One

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<sup>300</sup> See Rowan Scarborough, *Group Wants Same Military Benefits for Gay Spouses*, Mar. 8, 2010, available at <http://www.washingtontimes.com/news/2010/mar/08/group-wants-same-military-benefits-for-gay-spouses//print/> (discussing comments by Rep. McKeon regarding a potentially "wide diversity of benefits between legally married heterosexual couples and families and legally married gay couples and families").

<sup>301</sup> *Id.*

<sup>302</sup> "Marriage" under DOMA is defined as the "legal union exclusively between one man and one woman." 1 U.S.C. § 7 (2006).

<sup>303</sup> "Spouse" under DOMA is defined as "a husband or a wife of the opposite sex." *Id.*

<sup>304</sup> In enacting DOMA, Congress supported three underlying rationales: (1) protecting the "institution of marriage," (2) the birth of children to heterosexual married couples, and (3) state sovereignty. H.R. REP. NO. 664 (1996), reprinted in 1996 U.S.C.C.A.N. at 2905, 2916, 2920.

<sup>305</sup> *Id.*

<sup>306</sup> 1 U.S.C. § 7.

<sup>307</sup> *Id.*

<sup>308</sup> *Id.*

<sup>309</sup> See *The Economics of Equal Marriage*, The National Organization for Women (June 2009), available at [http://www.now.org/issues/marriage/marriage\\_economics\\_factsheet.pdf](http://www.now.org/issues/marriage/marriage_economics_factsheet.pdf) (last visited Apr. 2, 2010).

such benefit is marital privilege.<sup>310</sup> This is an important evidentiary consideration.

As an exception to the general rule that all relevant evidence is admissible at courts-martial,<sup>311</sup> the spousal privileges provided by MRE 504(a) and (b)(1) solely exist to protect and preserve the confidence and trust involved in a recognized marital relationship.<sup>312</sup> This rule provides two distinct privileges to protect the marital relationship.<sup>313</sup> First, under MRE 504(a), a legally married person has the right to refuse to testify against a spouse about private information exchanged during the marital relationship.<sup>314</sup> To invoke this privilege, a valid marriage must exist at the time of trial.<sup>315</sup> Upon proof of a valid marriage, the witness-spouse decides whether to testify against the accused spouse.<sup>316</sup> The second privilege contained in MRE 504 protects confidential communications made during a valid marriage.<sup>317</sup> Under this provision, one spouse may prevent the other spouse from testifying about such communications made during a valid marriage, even after the termination of the marital relationship.<sup>318</sup> Ironically nowhere in the text of the rule is a valid marriage defined.<sup>319</sup>

If DOMA is applicable to the military, then repeal of DADT may adversely affect the application of privileges provided for under MRE 504(a) and (b)(1). The federal definitions in DOMA could preclude application of marital privileges to same-sex couples because “marriage” and “spouse” are defined in a manner only applicable to heterosexual relationships.<sup>320</sup> Furthermore, military courts cannot simply redefine terminology or create a similar privilege for same-sex couples because it is the President—not members of the military justice system—who has the authority to create a new privilege.<sup>321</sup> Therefore, if DOMA remains

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<sup>310</sup> *Id.*

<sup>311</sup> *See* United States v. Custis, 65 M.J. 366, 370–71 (C.A.A.F. 2007).

<sup>312</sup> *See id.* at 371.

<sup>313</sup> MCM, *supra* note 19, MIL. R. EVID. 504.

<sup>314</sup> *Id.* MIL. R. EVID. 504(a).

<sup>315</sup> *Id.*

<sup>316</sup> *Id.*

<sup>317</sup> *Id.* MIL. R. EVID. 504(b).

<sup>318</sup> *See* United States v. McCollum, 53 M.J. 323, 337 (C.A.A.F. 2003).

<sup>319</sup> *See generally* MCM, *supra* note 19, MIL. R. EVID. 504.

<sup>320</sup> *See supra* notes 298–300 and accompanying text.

<sup>321</sup> *See* United States v. Custis, 65 M.J. at 372. *See also* McCollum, 53 M.J. at 342 (holding that the question of whether an exception to a particular privilege applies “is a legal policy question best addressed by the political and policy-making elements of the

in effect after a repeal of DADT, servicemembers practicing open homosexuality in a same-sex marriage may be unable to invoke privilege under MRE 504(a) or (b)(1).

An oft-neglected concern related to same-sex spouses is the problem of domestic violence and spousal abuse. In 2006, several studies conducted by the National Coalition Against Domestic Violence revealed twelve major cities across the United States in which there were reports of 3534 cases of domestic violence between same-sex couples (including incidents ranging from verbal and physical abuse to sexual assault).<sup>322</sup> In comparison, in Fiscal Year 2007, out of 708,178 military couples, domestic abuse reports surfaced in 15,260 cases referred to the Department of Defense Family Advocacy Program.<sup>323</sup> One may infer from these reports that, in the wake of a repeal of DADT, some incidence of crime between same-sex couples is likely, whether or not these couples are married or involved in another kind of same-sex relationship. When cases involving same-sex marriages are brought to courts-martial, MRE 504's lack of clarification on privileges could substantially impact the evidence at trial as well as the marital relationship. Over the past seven years alone, MRE 504 has resurfaced in litigation five times before the military's highest court, reflecting the complexity of these evidentiary issues, even on matters of heterosexual spousal privilege.<sup>324</sup>

If DOMA is repealed and a new privilege is created for same-sex marriages, civil unions, and other same-sex partnerships, the resulting impact may prove equally as disruptive to the military justice system. The privileges under MRE 504 "reflect a delicate balance between

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government"). *See also* United States v. Rodriguez, 54 M.J. 156, 160-61 (C.A.A.F. 2000) (recognizing the scope and limitations on those privileges not specified in the Military Rules of Evidence rest with the President, and not the courts).

<sup>322</sup> *See* KIM FOUNTAIN & AVY SKOLNIK, NATIONAL COALITION ANTI-VIOLENCE PROGRAM REPORT (2007), [http://www.ncavp.org/common/document\\_files/Reports/files/Reports/2006NationalDVReport\(Final\).pdf](http://www.ncavp.org/common/document_files/Reports/files/Reports/2006NationalDVReport(Final).pdf). The twelve cities covered in this report were Tucson, San Francisco, New York, Denver, Los Angeles, Chicago, Boston, Minneapolis, Kansas City, Columbus, Philadelphia, and Houston. *Id.*

<sup>323</sup> *See* Information Paper, Child Abuse and Domestic Abuse Data Trends from Fiscal Year 1998 to Fiscal Year 2007, available at [http://www.militaryhomefront.dod.mil/portal/page/mhf/MHF/MHF\\_DETAIL\\_0?current\\_id=20.20.60.70.0.0.0.0.0](http://www.militaryhomefront.dod.mil/portal/page/mhf/MHF/MHF_DETAIL_0?current_id=20.20.60.70.0.0.0.0.0) (last visited Apr. 3, 2010).

<sup>324</sup> *See, e.g.,* United States v. Durbin, 68 M.J. 271 (C.A.A.F. 2010); United States v. Custis, 65 M.J. 366 (C.A.A.F. 2007); United States v. McCollum, 58 M.J. 323 (C.A.A.F. 2003).

competing interests: the desire to admit helpful evidence at trial and the public’s interest in protecting certain relationships or information.”<sup>325</sup> However, MRE 504 is far more restrictive than federal marital privilege, suggesting that the intent behind MRE 504 was to minimize the amount and type of evidence withheld from the trier-of-fact.<sup>326</sup> Because the privileges listed under MRE 504 are an exception to the type of evidence a military courts-martial may consider, expanding the scope of the privilege to cover same-sex partnerships may drastically reduce the amount of evidence available at courts-martial. This may also cause military courts-martial to spend substantially more time evaluating the status of personal relationships rather than the criminal allegations.

The most disturbing result of creating a privilege similar to MRE 504(a) is the potential for unwanted disclosures. Even prior to the current hearings on the repeal of DADT, “outing” of a homosexual servicemember by a “jilted lover” has caused extreme discomfort with the military leadership opposed to open homosexuality in the military.<sup>327</sup> Because, under MRE 504(a), the holder of the privilege is the witness-spouse and not the accused, in certain cases,<sup>328</sup> recognition of a new privilege might allow a same-sex partner to intentionally expose an accused’s homosexual practices, even in instances when the accused makes a conscious decision to conceal his or her sexual orientation.

The military’s prohibitions on the open practice of homosexuality has prevented military courts from addressing whether same-sex marriages, civil unions, or other same-sex partnerships are entitled to the privileges provided for under MRE 504. Based on DOMA’s limitations and the military courts’ inability to create new privileges, it is unlikely that military courts will apply the privileges contained in MRE 504 to same-sex relationships unless the President provides a specific privilege for same-sex marriages.<sup>329</sup> Therefore, if DOMA is applied to the

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<sup>325</sup> STEPHEN A. SALTZBURG ET AL., *MILITARY EVIDENTIARY FOUNDATIONS* 304 (4th ed. 2007).

<sup>326</sup> *See* *United States v. James*, 63 M.J. 217, 220 (C.A.A.F. 2006) (holding that the rules of statutory construction require analysis of the Military Rules of Evidence in particular, rather than in general).

<sup>327</sup> *See* Dan Popkey, *Gay Boise Air Force Pilot “Outed” by False Accusation*, *IdahoStatesman.com*, Aug. 23, 2009, available at <http://www.idahostatesman.com/2009/08/23/874410/gay-boise-air-force-pilot-outed.html> (last visited Mar. 28, 2010) (“Secretary of Defense Gates is voicing misgivings about discharging personnel identified by third parties with questionable motives.”).

<sup>328</sup> MCM, *supra* note 19, MIL. R. EVID. 504.

<sup>329</sup> *See supra* note 317 and accompanying text.

military, and if it remains the federal law, repealing DADT without addressing such shortfalls could severely limit the application of evidentiary privileges under MRE 504.

## X. Military Criminal Statutes

### A. Adultery

Repeal of DADT may pose problems for commanders and courts wishing to apply the adultery statute because of the anatomical differences between men and women. Because adulterous behavior potentially impacts the cohesion, morale, and readiness of a military unit by devaluing the institution of marriage and the military family,<sup>330</sup> commanders may punish these acts if they are prejudicial to good order and discipline or service discrediting.<sup>331</sup> As Article 134 provides, the offense of adultery criminalizes sexual intercourse between a married person and another person who is not the lawful spouse.<sup>332</sup>

If DOMA is applicable to the military and remains in force after the repeal of DADT, those servicemembers practicing open homosexuality and engaging in adulterous acts might evade punishment for adulterous acts as they are currently defined. In proving the crime of adultery, the Government must establish that “the accused or the other person was married to someone else.”<sup>333</sup> However, in a definition of marriage, such as the one in DOMA, same-sex relationships would be excluded from the statute’s reach.<sup>334</sup> Imagine a commander faced with a homosexual Soldier engaged in adulterous acts with the knowledge of the unit. The offending Soldier is legally married to another male in the state of Massachusetts. Although the commander wants to prefer charges for adultery, he cannot because the military does not recognize the Soldier’s marriage to another male absent a new legislative enactment. Inevitably, this type of result may create significant problems for unit morale, especially by perpetuating an unequal standard that punishes heterosexual Soldiers for engaging in nearly identical conduct.

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<sup>330</sup> See, e.g., *United States v. Green*, 39 M.J. 606 (A.C.M.R. 1994) (holding that acts of adultery in the barracks were prejudicial to good order and discipline).

<sup>331</sup> See, e.g., *Solorio v. United States*, 483 U.S. 435, 452–55 (1987).

<sup>332</sup> See UCMJ art. 134 (2008).

<sup>333</sup> *Id.*

<sup>334</sup> See 1 U.S.C. § 7 (2006). See also *supra* notes 298–300 and accompanying text.

Even if DOMA is repealed in the wake of DADT’s repeal, the manner in which federal law distinguishes between same-sex marriage, civil unions, and other same-sex partnerships may prove troublesome. Civil unions and domestic partnerships are defined differently from state to state.<sup>335</sup> A domestic partnership, as defined by one state, may be accorded virtually every benefit as another state’s same-sex civil union, while a domestic partnership in another state may be entitled to very limited benefits.<sup>336</sup> Specifically, if policymakers treat civil unions differently from other same-sex partnerships, adulterous acts occurring outside those partnerships could still fail to meet the elements of adultery. This result would create separate standards for similar homosexual relationships, perpetuating fundamental concerns of fairness. In certain cases, there is at least a possibility that different standards for homosexual adultery could encourage homosexual partners to forum-shop for a state that would accord military financial benefits while evading the culpability that would accrue for adulterous conduct.<sup>337</sup>

Regardless of the federal definition of marriage, determining the sexual act necessary to commit adultery will be problematic in the wake of DADT’s repeal. To prove adultery, the Government must currently establish “[t]hat the accused wrongfully had sexual intercourse with a certain person.”<sup>338</sup> However, sexual intercourse is not defined under the offense of adultery.<sup>339</sup> In fact, the only definition for sexual intercourse is located under the previous version of Article 120, providing for “any penetration, however slight, of the female sex organ by the penis.”<sup>340</sup> By this definition, sexual intercourse cannot refer to homosexual sex because it requires the coupling of a “female sex organ” and a “penis.”<sup>341</sup>

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<sup>335</sup> See McLaughlin, *supra* note 218, at 150.

<sup>336</sup> See Human Rights Campaign, Questions About Same-Sex Marriage, available at <http://www.hrc.org/issues/5517.htm> (last visited Apr. 2, 2010) (“Domestic partner laws have been enacted in California, Maine, Hawaii, Oregon, Washington and the District of Columbia. The benefits conferred by these laws vary; some offer access to family health insurance, others confer co-parenting rights. Some offer a broad range of rights similar to civil unions.”).

<sup>337</sup> As addressed by the author in this section, concerns about adulterous acts have also been raised in military cases addressing heterosexuals.

<sup>338</sup> UCMJ art. 134 (2008).

<sup>339</sup> See *id.*

<sup>340</sup> *Id.* art. 120, amended by National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 552, 119 Stat. 3136, 3256. Article 120 was previously known as “Rape and carnal knowledge” and addressed forcible sexual intercourse. *Id.* The current Article 120 redefines sexual intercourse as a sexual act. UCMJ art. 120.

<sup>341</sup> *Id.*

Unless sexual intercourse is redefined, only adulterous acts of heterosexual intercourse will be punishable under the current offense of adultery.

Even though homosexual acts do not meet definitional requirements of adultery, some may argue that the General Article 134 provides a means to charge the adulterous acts of homosexuals involved in same-sex relationships.<sup>342</sup> While the General Article 134 sometimes permits analogies to defined crimes for non-enumerated criminal conduct, it cannot be said that the UCMJ is silent on such conduct.<sup>343</sup> While the UCMJ defines “sexual acts” to include a penis inserted into a vagina,<sup>344</sup> Article 120 further expands the definition of sexual acts to reach either “contact between the penis and the vulva” or “penetration, however slight, of the genital opening.”<sup>345</sup> Article 120 further defines “sexual contact” as “intentional touching . . . of the genitalia, anus, groin, breast, inner thigh, or buttocks.”<sup>346</sup> With incongruous definitions smattered among different UCMJ articles, it becomes far more difficult to resolve the question of punishments for homosexual adulterous behavior.

To highlight the problem of inconsistent standards, consider that one of the servicemembers in each of the following examples is involved in a same-sex marriage and further that the related conduct is prejudicial to the good order and discipline of a unit. In the first scenario, a homosexual male servicemember uses his penis to penetrate another male servicemember’s anus. In the second scenario, a lesbian servicemember uses her fingers and another device to penetrate another female’s vagina. In the third scenario, a bisexual male servicemember uses his penis to penetrate another female servicemember’s vagina, making contact with the vulva. In the fourth scenario, a homosexual male servicemember engages in fellatio on another male servicemember.<sup>347</sup> In the fifth scenario, a lesbian servicemember gives fellatio to another female. Each of these examples demonstrates how the gender of the servicemember could potentially result in a different result

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<sup>342</sup> Cf., Kesler, *supra* note 128, at 334 (making a similar argument regarding polygamy and bigamy).

<sup>343</sup> See generally Major Howard H. Hoega, III, *Flying Without a Net: United States v. Medina & Its Implications for Article 134 Practice*, ARMY. LAW., June 2008, at 37.

<sup>344</sup> UCMJ art. 120.

<sup>345</sup> *Id.*

<sup>346</sup> *Id.*

<sup>347</sup> Such conduct is currently criminalized under Article 120 and Article 125. *Id.* art. 120; *id.* art. 125.

under the current crime of adultery. In the first scenario, penetration of the anus by the penis is a sexual contact, and not sexual intercourse.<sup>348</sup> In the second scenario, penetration of the vagina by a finger or another device constitutes a sexual act and not a sexual intercourse.<sup>349</sup> In the third scenario, penetration of a vagina by a penis is the very definition of sexual intercourse.<sup>350</sup> In the fourth and fifth scenarios, fellatio and cunnilingus comprise sexual contact<sup>351</sup> as well as sodomy.<sup>352</sup>

In light of these examples, adulterous acts by homosexuals may not be punishable under the current crime of adultery. Using the most recent definitions provided in Article 120, acts of homosexual sex—such as anal sex—are sexual contacts or sodomy, and not sexual acts.<sup>353</sup> Hence, by virtue of the offender’s gender and anatomy, homosexual acts outside the union lead to potentially different results. Redefining adultery to include sexual contact is just as troublesome. Additionally, criminalizing sexual contact between homosexuals for the purpose of the crime of adultery would subject homosexuals to criminal punishment for a less serious act than the crime of heterosexual adultery; with heterosexual adultery acts of sexual contact are not sufficient to prove adultery.<sup>354</sup> Amending the crime of adultery to include sexual contact instead of sexual intercourse, therefore, would completely change the scope of acts punished under this crime.

To permit different standards for ostensibly the same conduct, which would hold females or males less culpable based on anatomical differences promotes a result that marriage is a less important institution

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<sup>348</sup> *Id.* art. 120a(t)(2) (“Sexual contact means the intentional touching, either directly or through the clothing, of the . . . anus . . . of another person . . . with the intent to . . . arouse or gratify the sexual desire of any person.”).

<sup>349</sup> *Id.* art. 120a(t)(1)(B) (“Sexual act means the penetration, however slight, of the genital opening of another by a hand or a finger or an object . . . with the intent to . . . arouse or gratify the sexual desire of any person.”).

<sup>350</sup> *Id.* art. 120a(t)(1)(A) (“Sexual act means contact between the penis and the vulva. . . however slight.”).

<sup>351</sup> *Id.* art. 120a(t)(2) (“Sexual contact means the intentional touching, either directly or through the clothing, of the . . . genitalia. . . of another person . . . with the intent to . . . arouse or gratify the sexual desire of any person.”).

<sup>352</sup> *Id.* art. 125. *See also* *United States v. Henderson*, 34 M.J. 174 (1992) (holding that Article 125(a) includes acts of fellatio). Although *Henderson* dealt with consensual acts of heterosexual fellatio, years before the decision in *Lawrence*, the court stated that fellatio “fell within the scope of Article 125. *Id.*”

<sup>353</sup> *See supra* notes 347–52 and accompanying text.

<sup>354</sup> *See United States v. Williams*, 25 M.J. 854 (A.F.C.M.R. 1988), *pet. denied*, 27 M.J. 166 (C.M.A. 1988).

for some servicemembers than for others. Moreover, on the issue of marital sanctity, an entirely separate concern arises in relation to lesbian reproductive rights.

It is generally the case that lesbian couples desire to raise children over the course of long-term relationships.<sup>355</sup> Because it is physically impossible for two women to impregnate one another without the involvement of male sperm, debates now rage in LGBT communities about how lesbian couples should bear children. Although artificial insemination is a possible avenue to impregnation, the scholarship surrounding lesbian parenting reveals that many lesbian mothers desire to know and involve the donor in aspects of the child's life, sometimes like an uncle.<sup>356</sup> In some cases, because of concerns about privacy, or for other reasons, lesbian couples turn to gay male friends to accomplish the task, oftentimes through intercourse rather than a medical professional.<sup>357</sup> In the military, more than other environments, it is a very real possibility that lesbian servicemembers will enlist male Soldiers in the act of impregnation.<sup>358</sup> Exemplifying the position that the involvement of donors usually depends on "what's available,"<sup>359</sup> policymakers should address the concern of extramarital sexual intercourse for the purpose of impregnation and whether restrictions on these practices would interfere with the reproductive rights of lesbian servicemembers involved in unions or marriages.

Proponents of repealing DADT may argue that the concerns regarding adultery are unfounded because adultery occurs frequently among heterosexual servicemembers, and it is rarely prosecuted at courts-martial. This argument fails to address two key points. First, the military justice system, and the commanders responsible for it, must have

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<sup>355</sup> Heather Conrad & Kate Colwell, *Creating Lesbian Families*, in *DYKE LIFE*, *supra* note 119, at 149, 152 (Karla Jay ed., 1995) ("Getting pregnant is often the first choice of lesbians who want children, but it can be a complex process.").

<sup>356</sup> *Id.* at 153 (describing benefits of using a "known" versus an "unknown" donor).

<sup>357</sup> *Id.* at 155 (addressing complex situations that arise where the "sperm does not go through a doctor"); *id.* ("Some lesbians have gay friends who can be approached as potential donors, and ads in the gay press looking for sperm donors are another popular route.").

<sup>358</sup> An incentive for straight servicemembers might be the pleasure of intercourse rather than depositing their sperm into a Petri dish, a fact that many lesbians desirous of children would surely capitalize on.

<sup>359</sup> Conrad & Colwell, *supra* note 355, at 155 ("Sometimes the choice of donors can be made on philosophical principle, but often it comes down to pragmatic decisions about what's available.").

the ability to adequately deal with instances of misconduct that directly impact the morale, welfare, and discipline of a unit.<sup>360</sup> If same-sex marriages, civil unions, and other same-sex partnerships are not held to the same standard as heterosexual marriages, then commanders lack the ability to deal with potentially similar criminal acts in a like manner. This inability to address heterosexual and homosexual adultery in a similar manner may cause commanders to question the value of punishing *any* acts of adultery even when detrimental to the morale, welfare, and discipline of a unit. Unequal treatment by commanders toward servicemembers may also increase the number of congressional inquiries or other types of complaints, causing the military leadership to spend more time justifying its decisions than on preparing its servicemembers to perform their mission.

The argument that repealing DADT will not impact the offense of adultery also fails to consider that the concept of monogamy in homosexual relationships is sometimes different than in heterosexual relationships.<sup>361</sup> Several studies indicate that same-sex marriages, civil unions, and other same-sex partnerships have a much higher incidence of infidelity and promiscuity.<sup>362</sup> While multiple sexual liaisons can be seen as a detriment on grounds of loyalty to one’s partner, they can simultaneously be seen as a celebration of one’s sexual orientation.<sup>363</sup> Consider the account of a married man and woman regarding the meaning of their extramarital liaisons:

In the years before their marriage, Lori had a serious relationship with another woman, and Steven with another man. Their marriage now is a home invention that they describe as “body-fluid monogamous.” In conversation, they discuss condoms as matter-of-factly as the weather. Lori has an ongoing sexual relationship with another man and is looking for another woman; Steven has a friendship with a man that is sometime sexual. Lori says “At the time that I was coming out I was more interested in men, and now I’m more interested in women.” Steven is “much more interested” in men right now. He still has sex with his wife, but he

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<sup>360</sup> See generally UCMJ art. 134 (2008).

<sup>361</sup> See DAVID H. DEMO ET AL., HANDBOOK OF FAMILY DIVERSITY 73 (2000).

<sup>362</sup> See *id.* at 74–80.

<sup>363</sup> *Id.*

now identifies himself as gay, though he calls himself a “once and future bisexual.”<sup>364</sup>

While, certainly, no set standard applies to a given homosexual couple, the prominence of these practices in gay, lesbian, and bisexual culture requires serious consideration.

Ultimately, if DADT is repealed and the military recognizes same-sex marriage, military commanders may have a need to hold servicemembers accountable for these adulterous acts, especially when they directly impact the morale, welfare, and discipline of a unit.<sup>365</sup> Unequal treatment by commanders toward servicemembers may increase the dissension among unit members and detract from those servicemembers performing their assigned duties.

#### B. Bigamy and Polygamy

Although bigamy and polygamy—both of which relate to marriage of one person with multiple spouses—have been used “interchangeably” in various state criminal statutes,<sup>366</sup> “technical differences” exist between the two terms.<sup>367</sup> “Bigamy” generally defines entrance “into a marriage with one person while still legally married to another,”<sup>368</sup> while “polygamy” generally defines “marriage in which a spouse of either sex may have more than one mate at the same time.”<sup>369</sup> Polygamy, differs from bigamy in that the spouses and children of a polygamous relationship often form one family, whereas the spouses married to a bigamist are likely unaware of the multiple marriages.<sup>370</sup> Under Article 134, the offense of bigamy criminalizes wrongfully marrying two spouses at the same time if the conduct is prejudicial to the good order and discipline of the unit or service discrediting.<sup>371</sup> Although the

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<sup>364</sup> John Leland et al., *Bisexuality Emerges as a New Sexual Identity*, in *BISEXUALITY IN THE UNITED STATES* 560–61 (Paula C. Rodriguez Rust, ed. 2000).

<sup>365</sup> See generally UCMJ art. 134.

<sup>366</sup> Ryan White, Note, *Two Sides of Polygamy*, 11 J. L. FAM. STUD. 447, 449 (2009).

<sup>367</sup> Timothy K. Clark, Note, *Criminal Law and Procedure: A Child Bigamy Amendment*, 2004 UTAH L. REV. 278, 279 (2004).

<sup>368</sup> MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 120 (11th ed. 2003).

<sup>369</sup> *Id.* at 962.

<sup>370</sup> See DAVID P. MCWHIRTER & ANDREW M. MATTISON, *THE MALE COUPLE: HOW THE MALE RELATIONSHIP DEVELOPS* 8 (1985).

<sup>371</sup> UCMJ art. 134 (2008).

criminal act of polygamy is not explicitly covered under the UCMJ, polygamy is a federal crime and most likely punishable under the general Article 134.<sup>372</sup>

In contemplating these acts, similar to the problem for adultery, the version of bigamy prohibited by the UCMJ requires a “lawful spouse” and that “the accused wrongfully married another person.”<sup>373</sup> Because DOMA does not recognize a same-sex marriage as a valid marriage or the persons involved in those same-sex partnerships as spouses, a servicemember could have multiple same-sex partnerships without technically committing the offense of bigamy. Also similar to adultery, the reasoning for prohibition of both bigamy and polygamy arises from the need to preserve the sanctity of a marital union. After all, multiple simultaneous marriages have been recognized as an assault on the virtues of marriage since 1788, when such acts were punishable, even by death.<sup>374</sup>

Repealing DADT may pose significant problems in the military by inviting conduct amounting to bigamy and polygamy. If DOMA is applicable to the military after DADT’s repeal, persons engaged in multiple same-sex marriages could not be charged for bigamy as it is currently defined. The repeal of DADT creates concerns of bigamy and polygamy because multiple sexual relationships are often central to homosexual practice.<sup>375</sup> Importantly, because most states have defense of marriage statutes, preventing the recognition of same sex marriages and unions among different states, homosexuals can easily enter into unions and/or marriages to different partners in different geographic

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<sup>372</sup> See *id.* art. 134 (cl. 3).

<sup>373</sup> *Id.* art. 134 (defining adultery).

<sup>374</sup> See *Reynolds v. United States*, 98 U.S. 145, 165 (1879) (observing further “we think it may safely be said that there never has been a time in any state of the Union when polygamy has not been an offence against society . . .”).

<sup>375</sup> See MARJORIE GARBER, *BISEXUALITY AND THE EROTICISM OF EVERYDAY LIFE* 480 (2000):

To me the special pleasure in a threesome wasn’t in me screwing one and then the other, but that all three people were interrelated. It was especially exciting if the two women had homosexual relations. By the way, none of the girls had a homosexual history. Our threesomes were an introduction for all of them. For anyone, getting close to your erotic nature involves homosexuality. I never had a triangle with another man. I almost did back in those days, but I realized my prejudice against it.

locations with practically no threat of civil criminal prosecution for conduct that would be criminal in heterosexual relationships.<sup>376</sup> This conduct is worthy of attention because homosexual marriage or civil unions, if recognized by the military, will potentially result in multiple financial and other incentives. As highlighted in the illuminating chapter of *Dyke Life*, “Lesbian Marriage Ceremonies: I do,” author Kitty Tsui identifies various “entitlements” of marriage, potentially including,

. . . foster care advantages, custody and visitation rights for nonbiological parents, and divorce protection . . . health insurance coverage . . . [t]he sharing of Social Security benefits, veterans’ benefits, and inheritance (barring a prenuptial agreement) . . . legal protections for hospital visitation privileges, survivorship benefits, and housing rights . . . the ability to invoke immunity from testifying against a spouse . . . residency in the United States [for a foreigner who marries a citizen] . . . and [the ability to] apply for priority citizenship.<sup>377</sup>

Given the many windfalls that could result solely from the act of marriage, it is foreseeable that openly practicing LGBT servicemembers might attempt to avail themselves of marriage or civil union benefits more than once, evident in the existing problem of “sham” or “convenience” marriages.<sup>378</sup>

Whether bigamy or polygamy could be charged under the General Article 134 would depend on the military’s recognition of same-sex marriage, civil unions, and domestic partnership equivalents of heterosexual marriage. A decision not to recognize same-sex marriage would remove it from the ambit of bigamy prohibitions, permitting a servicemember to have multiple same-sex partnership arrangements. In such a case, this behavior could only be punished if it became known throughout the unit or caused others to view the military in a more negative light.

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<sup>376</sup> *E.g.*, DAVID RAYSIDE, QUEER INCLUSIONS, CONTINENTAL DIVISIONS: PUBLIC RECOGNITION OF SEXUAL DIVERSITY IN CANADA AND THE UNITED STATES 148 (2008) (“By the time of the 2004 election, thirty-eight states had defense of marriage statutes on the books denying recognition to same-sex marriages performed elsewhere.”).

<sup>377</sup> Tsui, *supra* note 119, at 115.

<sup>378</sup> *E.g.*, *United States v. Phillips*, 32 M.J. 268, 270 (C.A.A.F. 2000) (addressing the connection between homosexuality and “sham” marriages).

As in the case of adultery, a byproduct of DADT’s repeal may be the promotion of bigamy and polygamy. Here, the military’s tolerance of open homosexuality and same-sex marriages or partnerships would remove the rationale for prohibiting the same conduct among heterosexual married couples. While advocates for gay marriage criticize this notion, challenging such arguments as the byproduct of uninformed homophobia,<sup>379</sup> the concern is supported by recent events in Europe. In 2001, the Netherlands became one of the first countries to permit same-sex marriages and civil unions.<sup>380</sup> Just four years later, the same county permitted the first civil union of three people, in direct contrast to prohibitions on bigamy and polygamy.<sup>381</sup> The rationale provided for this unprecedented development was the fact that relationships defined by homosexual civil unions were not sanctioned marriages, and, therefore, were not eligible for treatment as polygamy or bigamy.<sup>382</sup> Similar arguments pervaded the polygamy trial of Tom Green, a “self-proclaimed ‘fundamentalist Mormon’” who was sentenced to six years confinement for the crimes of bigamy and child rape. In Green’s trial, supporters of Green’s right to be “married” to five different women and father twenty-nine children defended his acts on much the same basis in the Utah criminal courts as advocates for same-sex marriage have in courtrooms across the United States.<sup>383</sup>

If policymakers repeal DADT on the rationale that the private lives of servicemembers will not measurably impact the military mission, it will be difficult for them to prevent servicemembers from marrying or entering civil unions with multiple consenting partners. The incentives for such behavior may be too tempting for entrepreneurial gay couples to ignore, especially if they perceive that resulting benefits might represent backpay for the costs of suppressing their sexuality while serving under DADT. Despite arguments that homosexual bigamy and polygamy should be permitted, it is hard to fathom how a commander could punish a heterosexual servicemember for marrying two people, but simultaneously allow a homosexual servicemember to have multiple civil unions. Even considering the objective of political correctness, the negative and fractionalizing impact on military units, disrespect for the

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<sup>379</sup> See EMBSER-HERBERT, *supra* note 134, at 34.

<sup>380</sup> See Paul Belien, *First Trio “Married” in the Netherlands*, BRUSSELS J., Sept. 27 2005, at 11.

<sup>381</sup> *Id.*

<sup>382</sup> *Id.*

<sup>383</sup> See Emily J. Duncan, *The Positive Effects of Legalizing Polygamy: “Love is Many Splendored Thing,”* 15 DUKE J GENDER L. & POL’Y 315, 330 (2008).

sanctity of martial unions, and negative public perception of the military would weigh heavily against such allowances.

### C. Wrongful Cohabitation

Another offense prohibited by Article 134 is the crime of wrongful cohabitation, which requires the Government to establish that, although unmarried, two servicemembers are living “together as husband and wife.”<sup>384</sup> Unlike the crime of adultery, no requirement exists for an actual marriage.<sup>385</sup> Although infrequently prosecuted at courts-martial, the crime of wrongful cohabitation remains important to maintaining good order and discipline within the military. As the Air Force Court of Criminal Appeals explained, cohabitation can be wrongful in military settings in certain circumstances because, “knowledge or problems associated with [an accused’s] cohabitation with a woman not his wife [could] impact good order and discipline in the unit or bring discredit on the Air Force.”<sup>386</sup>

Unless DOMA is repealed in conjunction with DADT, cohabitation between same-sex partners could create incentives for wrongful cohabitation. Like the crimes of adultery and bigamy, wrongful cohabitation would not be chargeable in same-sex partnerships because it requires the Government to establish the partners acted as “husband and wife.”<sup>387</sup> Repeal of DADT with the allowance for same-sex partners to cohabit would result in some conduct amounting to wrongful cohabitation, especially in situations where sexual relationships develop between same-sex roommates. By allowing same-sex partners to reside together and receive benefits without a formal marriage, some unmarried heterosexual servicemembers may demand similar treatment, which would be a crime under military law.

Without clarifying the interplay between repeal of DADT, different forms of homosexual unions short of marriage, and eligibility for various benefits, obtaining financial benefits without a formal marriage for some homosexual servicemembers may simply amount to living in a

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<sup>384</sup> UCMJ art. 134 (2008).

<sup>385</sup> *Id.*

<sup>386</sup> *United States v. Bristol*, No. 36956, 2009 CCA WL16204436 (A.F. Ct. Crim. App. 11 June 2009) (unpublished).

<sup>387</sup> *See generally supra* Part X.A, B, & C.

partnership-like arrangement, making it difficult to distinguish wrongful cohabitation from sincere partnerships. If the military allows same-sex servicemembers to cohabit with less than formalized marriage, it is unclear the extent to which this conduct will impact unmarried homosexual servicemembers who are involved in long-term committed relationships. Without detailed studies of whether and how the military might afford benefits to same-sex marriages, civil unions, and domestic partnerships—similar to BAH fraud cases—a hasty repeal of DADT will limit the military’s ability to prevent fraud. Same-sex cohabitation, held-out as a spousal relationship, will ultimately raise issues of wrongful cohabitation and create the potential for widespread and systemic abuses.

## XI. Other Policy Considerations

### A. Analogies Between Repeal of DADT and Racial Integration are Misplaced

The debates surrounding repeal of DADT often include analogies between homosexuals and African-Americans. Advocates of repeal point to the military’s experience with racial integration in the 1950s as a model for the inclusion of open homosexuals.<sup>388</sup> The fact that these efforts worked, despite fears that racial integration would fail (mainly based on similar concerns over shared living arrangements) foreshadows the success of DADT repeal, they argue.<sup>389</sup> Although the analogy represents wishful thinking and highlights attributes of the military’s forward-thinking during times of cross-racial angst in America, it is entirely misplaced.

In considering this faulty analogy between race and sexual preference, policymakers must keep three important facts in mind. First, the analogy fails because it draws no distinction between immutable

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<sup>388</sup> See, e.g., Kesler, *supra* note 128, at 300–01, 336–61. See also FRANK, *supra* note 34, at 61 (“Racial integration was a challenge, but not an impossibility. In fact, desegregation was ordered and implemented *even though* it cause enormous problems with cohesion, morale, and discipline.”); BELKIN & BATEMAN, *supra* note 103, at 83 (“I believe that in the short run, issues and processes of integration would arise that would be similar to those encountered in the integration of African-American men in the past.”); COMMANDER ARTHUR M. BROWN, DON’T ASK, DON’ TELL: INEVITABLE REPEAL 11 (2008) (quoting President William J. Clinton’s comparison between the challenges of DADT and “racial integration of the military”).

<sup>389</sup> See Kesler, *supra* note 128, at 300–01, 336–61.

characteristics at birth, such as the color of one's skin, and premeditated acts over which a person has control. Perhaps Professor Stephen Saltzburg addressed this issue best during the congressional hearings regarding open homosexuality in the military:

There is a difference; and that is that sexual orientation does go to the core of one's being. It does influence most of us in the kinds of actions that we want to take and activities that we want to engage in. And I think anyone who would deny that is denying what psychologists and psychiatrists and sociologists tell us about human motivation.<sup>390</sup>

Aside from the involuntary nature of, perhaps, one's identity and inner feelings of affinity for the same sex, homosexual behavior is purely the result of choice.<sup>391</sup> If one can be a heterosexual and yet simultaneously abstain from sexual activity, then one's sexuality is an entirely separate issue from physical action. The great number of virgins in society tend to prove this point, including those who are adolescent and prepubescent and those who elect not to engage in sexual activity, even after they have achieved the age of maturity.<sup>392</sup>

Second, living together with members of different races does not necessarily involve exposure to particular sexual practices or behaviors. Nor does it involve a religious or moral component the way homosexuality does. Making these assumptions about race, as DADT opponents often do, requires these advocates to adopt a prejudiced and stereotypical view.<sup>393</sup> While I too have suggested that one should not equate homosexuality with particular sexual acts,<sup>394</sup> any authorization of homosexual acts or marriages in the armed forces raises a unique set of

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<sup>390</sup> Professor Stephen Saltzburg, Testimony at 1993 Congressional Hearings on Impact of Homosexuality in the Armed Forces (June 22, 1993), *available at* <http://dnt.stanford.edu/regulations/HomosexualityDebate.html> (highlighting the difference in this debate regarding prior integration of racial minorities and the potential integration of homosexuals).

<sup>391</sup> CHANDLER BURR, *A SEPARATE CREATION: THE SEARCH FOR BIOLOGICAL ORIGINS OF SEXUAL ORIENTATION* 249–52 (1996).

<sup>392</sup> *See, e.g.*, HUNTER, *supra* note 45, at 29; Stephanie A. Sanders & June Machover Reinisch, *Would You Say You "had sex" If . . . ?*, 281 J. AM. MED. ASS'N 275, 276 (1999).

<sup>393</sup> *See, e.g.*, Kesler, *supra* note 128, 300–01, 336–61. *See also* FRANK, *supra* note 34, at 161–62.

<sup>394</sup> *See supra* Part I.

considerations for shared communal environments, including showers and sleeping bunks, that do not arise in the context of racial integration.

With permission to engage in homosexual acts and to conduct open homosexual romances—including kissing, fondling, flirting, and other courting behaviors—to the extent that these activities occur in the presence of heterosexual servicemembers, such actions may be offensive and invasive to heterosexuals precisely because they relate to *acts* rather than one’s personal identity.<sup>395</sup> Some heterosexuals, who have moral or religious opposition to homosexuality object to homosexual conduct, not how a person self-identifies. These heterosexuals may feel particularly vulnerable or compromised whenever they sleep or expose their bodies during the course of normal living arrangements, not because the person in the same room self-identifies as gay or lesbian, but rather because that person is permitted to engage in homosexual acts, which are separate from their innermost affinity.

Third, comparisons to racial integration in the 1950s are extremely limited because these early experiments in military society occurred during a lull in international armed conflict.<sup>396</sup> The Second World War had come to an end<sup>397</sup> and the Korean War would not come about for two years.<sup>398</sup> In America, this time period was considered to be one of economic growth, as post-war industries profited and veterans used their college and housing benefits in unprecedented numbers.<sup>399</sup> Consequently, the military, during this time, had the opportunity to incrementally integrate the services and to evaluate changes that might be necessary. Even though President Truman gave the directive to integrate African Americans in 1948, it was not until 1953 that all Army units had completely desegregated.<sup>400</sup> Presently, we have neither the luxury of time nor the luxury of international stability. A common sentiment, even from those in the military who would wish to eliminate DADT, is that such efforts should wait until a time when it is possible to

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<sup>395</sup> See Gregory M. Herek, *Gender Gaps in Public Opinion About Lesbians and Gay Men*, 66 PUB. OPINION Q. 40, 41–66 (2002).

<sup>396</sup> Charlie C. Moskos, Jr., *Racial Integration in the Armed Forces*, 72 AM. J. SOC. 132, 132–35 (1976). President Truman issued his executive order to integrate African Americans into the armed forces on 28 July 1948. *Id.*

<sup>397</sup> *Id.*

<sup>398</sup> The Korean War began on 25 June 1950 and ended on 27 July 1953. *Id.*

<sup>399</sup> See generally Richard E. Schumann, *Compensation from World War II through the Great Society*, COMPENSATION & WORKING CONDITIONS (Fall 2001), available at <http://www.bls.gov/opub/cwc/cm20030124ar04p1.htm>.

<sup>400</sup> Moskos, *supra* note 396, at 132–35.

evaluate the success of incremental changes. Soldiers have deployed multiple times since 2001, rates of Posttraumatic Stress Disorder and suicide among servicemembers have hit record numbers,<sup>401</sup> and conflicts in the Middle East will continue for some time, one cannot say that times now are similar to the 1950s, when military racial integration occurred. Such analogies lack a basis in fact.

#### B. Analogies to the Partial Integration of Women in the Armed Forces are Also Misplaced

Opponents of DADT not only cite to racial integration but also gender integration as the basis for predicting the success of DADT's repeal. To this end, it is important to recognize that the military is not completely gender-integrated. Aside from the fact that women are still prohibited from serving in several areas within the combat arms branches,<sup>402</sup> there are no housing plans in which women and men shower together or sleep in the same bunks. Even on the larger Naval submarines, where female junior officers are now able to serve, living arrangements have been segregated to the point that women have separate berthing and bunking areas, as well as the additional requirement that female officers must be assigned in pairs for duty.<sup>403</sup>

For those who would point to combat and other environments in which women and men have served in closer proximity than the past, they should consider the consequences of these arrangements, which tend to support keeping DADT in place. In recent years, the number of unwanted sexual comments, advances, and assaults have skyrocketed to the point where the Army has actually implemented a "bystander

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<sup>401</sup> See Captain Evan R. Seamone, *Attorneys as First-Responders: Recognizing the Destructive Nature of Posttraumatic Stress Disorder on the Combat Veteran's Legal Decision-Making Process*, 202 MIL. L. REV. 144, 153–155 (2009) (discussing rising PTSD diagnoses).

<sup>402</sup> See U.S. DEP'T OF ARMY, PAM. 611-21, MILITARY OCCUPATIONAL CLASSIFICATION AND STRUCTURE ¶ 2-13 (22 Jan. 2007) (women are precluded from serving in infantry, armor, special forces, cannon field artillery, short-range air defense artillery, and in units below brigade level whose primary mission is ground combat).

<sup>403</sup> See David Kerley & Luis Martinez, *Navy to Lift Ban on Women Serving Aboard Submarines*, Feb. 23, 2010, available at <http://abcnews.go.com/Politics/navy-end-ban-women-serving-aboard-submarines-congress/story?id=9921378> (last visited Mar. 31, 2010).

intervention” program called “my duty” reiterating the need for intervention by witnesses to sexual harassment and assault.<sup>404</sup>

Whereas in 2007, the number of sexual assaults against women in the military was 1355,<sup>405</sup> only two years later, the number rose to 2302,<sup>406</sup> with an increase of thirty-eight same-sex sexual assaults.<sup>407</sup> Furthermore, expert researchers fear that the reported incidents, though staggering, only represent the tip of the sexual assault iceberg. As much as opponents would wish to deny it, the allowance of homosexual flirting and dating in relations between Soldiers of the same sex—up to and including gay marriage—will expand the types of situations which fuel sexual harassment and sexual assault. This is a recurring lesson provided by the military’s experience with *partial* gender integration. Consequently, whether opponents of DADT compare homosexual conduct to race or womanhood, both of these arguments confuse the issue of identity and acts and improperly play on the notions of equality that many Americans hold near and dear to their hearts.

### C. Statistics on Homosexual Discharges from the Military are Misleading

Almost universally, opponents of DADT cite “staggering” statistics on discharge of active duty personnel under DADT as a basis for claiming the loss of qualified and experienced personnel.<sup>408</sup> These statistics fail to support the assertions of DADT opponents for a number of reasons. First, actual statistics indicate that the military discharges far less servicemembers for homosexuality than those urging repeal suggest.<sup>409</sup> From 1994 to 2003, military discharges for homosexual conduct or statements encompassed approximately 0.37 percent of the total discharges in the armed forces.<sup>410</sup> From 2004 to 2008, the same types of

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<sup>404</sup> See My Duty, available at <http://myduty.mil/> (last visited Apr. 14, 2010).

<sup>405</sup> See 2007 DoD SAPR REPORT, *supra* note 272, at 32.

<sup>406</sup> See 2009 DoD SAPR REPORT, *supra* note 106, at 89.

<sup>407</sup> See *supra* notes 268–70 and accompanying text.

<sup>408</sup> See FRANK, *supra* note 34, at 169.

<sup>409</sup> See CTR. FOR MIL. READINESS, FALSE “NATIONAL SECURITY” ARGUMENT FOR GAYS IN THE MILITARY: SMALL NUMBER OF DISCHARGES DO NOT JUSTIFY REPEAL OF 1993 (Nov 1, 2009), <http://www.cmrlink.org/HMilitary.asp?docID=360>.

<sup>410</sup> *Id.*

discharges comprised less than one percent of the total number of discharges for the armed forces.<sup>411</sup>

From 1993 to 2008, discharges for reasons other than homosexuality contributed to the loss of significantly more servicemembers.<sup>412</sup> Compared to discharges for homosexuality, discharges for drug use were 7 times more frequent, discharges for serious offenses were 4.4 times more frequent, discharges for overweight conditions were 4.3 times more frequent, discharges for pregnancy were 3.3 times more frequent, and discharges for parenthood were 2.6 times more frequent.<sup>413</sup> From 1980 to 2008, discharges due to homosexuality accounted for only 0.063 percent of the total discharges for the Armed Forces, with the most occurring in 1982 at 0.095 percent, and the least occurring in 1994 at 0.038 percent.<sup>414</sup>

The second reason to discount opponents' use of statistics is the large proportion of separations that resulted from voluntary admissions by the discharged homosexual servicemembers.<sup>415</sup> In fact, each year, over half the discharges for open homosexuality were attributable to voluntary admissions.<sup>416</sup> Within this group of discharges, some ostensibly include heterosexual servicemembers who used voluntary claims of homosexuality as a reason to evade their military commitments, especially with looming deployment dates. The military has fielded widespread concerns about fraudulent claims of homosexuality for these purposes, especially because persons discharged under DADT, who have not met their enlistment obligations, must be discharged under honorable conditions.<sup>417</sup> Ultimately, these realities of discharges under DADT make opponents' arguments far less compelling, and should not be adopted without careful scrutiny when evaluating bases for repeal.

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<sup>411</sup> *Id.*

<sup>412</sup> *Id.*

<sup>413</sup> *Id.*

<sup>414</sup> *Id.*

<sup>415</sup> See FRANK, *supra* note 34, at 192–93. Professor Frank infers that many “voluntary” admissions are forced out of servicemembers and that many servicemembers fear for their life when they make admissions. *Id.* However, other advocates of repeal acknowledge that a voluntary admission of homosexuality is “the fastest way to avoid further military commitment and receive an honorable discharge.” Colonel Om Prakash, *The Efficacy of “Don’t Ask, Don’t Tell,”* 55 JOINT FORCE Q. 88, 89–91 (2009) (discussing the necessity of repealing DADT).

<sup>416</sup> See Prakash, *supra* note 415, at 90.

<sup>417</sup> *Id.* See also Captain Chad C. Carter & Major Antony Barone Kolenc, “Don’t Ask, Don’t Tell:” *Has the Policy Met Its Goals*, 31 U. DAYTON L. REV. 10–15 (2006).

## XII. Concluding Remarks

Currently, Secretary Gates has established a panel, led by Defense Department General Counsel Jeh Johnson and U.S. Army Europe Commander, General Carter Ham, to explore how the armed services might implement the integration of openly gay personnel in the event DADT is repealed.<sup>418</sup> In the interim, on 25 March 2010, Secretary Gates announced immediate changes to DADT, reserving the initiation of investigations concerning allegedly homosexual servicemembers to general and flag officers, as well as the requirement that credible evidence from third parties be taken under oath.<sup>419</sup> Additionally, the new changes provided that confidential disclosures concerning sexual orientation made to attorneys, psychotherapists, doctors, and clergy, would now be protected, even though rules of evidence do not normally apply to administrative investigations.<sup>420</sup> During the press conference announcing the new rules, Secretary Gates made it clear that the military’s review is about the “implement[ation]” of DADT’s repeal, not whether repeal should be initiated.”<sup>421</sup>

In this article, discussions of how and when to repeal DADT have only scratched the surface of possible financial, social, and military implications. Esteemed military leaders, such as Admiral Mullen and General David Petraeus, have publicly acknowledged support for repeal,<sup>422</sup> while over 1100 retired flag and general officers from all branches and levels of experience have signed a letter urging President Obama to reconsider his support for the repeal of DADT.<sup>423</sup> And, 1LT

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<sup>418</sup> See Leo Shane III, *Gates: Panel has One Year to Plan for End to “Don’t Ask, Don’t Tell,”* STARS & STRIPES, Feb. 3, 2010, available at <http://www.stripes.com/article.asp?section=104&article=67741>.

<sup>419</sup> See Thom Shanker, *Military to Revise “Don’t Ask, Don’t Tell” Rules*, N.Y. TIMES, Mar. 25, 2010, at A19.

<sup>420</sup> *Id.*

<sup>421</sup> Spencer Ackerman, *Gates Sharply Limits “Don’t Ask, Don’t Tell,”* MINN. INDEP., Mar. 25, 2010, available at <http://minnesotaindependent.com/56770/gates-sharply-limits-dont-ask-dont-tell>.

<sup>422</sup> See Jason Linkins, *David Petraeus on DADT: “The Time Has Come,”* Mar. 16, 2010, available at [http://www.huffingtonpost.com/2010/03/16/david-petraeus-on-dadt-th\\_n\\_500928.html](http://www.huffingtonpost.com/2010/03/16/david-petraeus-on-dadt-th_n_500928.html) (last visited Mar. 29, 2010).

<sup>423</sup> See Posting of Letter from Flag and General Officers for the Military on Opposition to the Repeal of 10 U.S.C. § 654 (“Don’t Ask, Don’t Tell”), Mar. 31, 2009, available at <http://www.flagandgeneralofficersforthemilitary.com> (last visited Mar. 29, 2010). Currently, advocates for repeal of DADT have publicly criticized this letter, stating that it is “peppered with inconsistencies and errors” and contains “a number of scandals and controversies associated with members of this list which indicate gross failures of

Choi continues to advocate for prompt repeal, when he is not preparing for trial.

Often, 1LT Choi, whose experiences protesting DADT introduced many issues surrounding this article, references the West Point Cadet Prayer during his rallies.<sup>424</sup> This prayer, which has been a staple of the cadet experience since it was written in 1920, asks not only for the blessing of “never [being] content with a half truth when the whole can be won,” but, moreover, to always “choose the harder right instead of the easier wrong.”<sup>425</sup> The Cadet Prayer is appropriate for the conclusion of this article. To ensure that the military maintains focus on its current wartime missions, the decision to repeal DADT requires choosing the “harder right over the easier wrong.” For our elected leadership, this choice for the welfare of our entire armed forces may include selecting a particular course of action that appears unfair to homosexual servicemembers or in opposition to campaign promises. For homosexual servicemembers, it may mean the ability to serve without benefits for partners. For heterosexual servicemembers, it may mean stifling strong feelings about the morality of homosexuality to accord proper respect to fellow servicemembers. Undoubtedly, the hard choice may not be the most popular.

Simply put, now is not the time to repeal all aspects of DADT instantaneously and simultaneously. If repeal is to occur, this Nation cannot afford for it to occur haphazardly. All servicemembers, whether homosexual, heterosexual, bisexual, or transgender, deserve and depend on the military and elected leadership to make the best decisions for the entire armed forces, not just a select group of servicemembers, or simply to serve the ends of political correctness. It is critical to analyze the

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judgment and leadership by some of its members.” *See also* Servicemembers United Newswire, New Report Raises Doubts About Flag Officer Letter Supporting DADT, Mar. 9, 2010, *available at* <http://www.sdgl.com/causes/2010/03/09/new-report-raises-doubts-about-flag-officer-letter-supporting-dadt> (last visited 29 Mar. 2010). However, these criticisms address roughly 200 out of the 1163 signatories. *Id.*

<sup>424</sup> *See* 1LT Dan Choi’s biography, *available at* <http://www.ltdanchoi.com/bio.html> (last visited Mar. 29, 2010). *See also* Christina Caron, Dan Choi Explains “Why I Cannot Stay Quiet,” May 13, 2009, *available at* <http://abcnews.go.com/US/story?id=7568742&page=1> (last visited Mar. 29, 2010).

<sup>425</sup> Colonel (Retired) Clayton E. Wheat was the head Chaplain and English Department professor at West Point from 1918 to 1926. *See* JAMES P. MOORE, JR., PRAYER IN AMERICA: A SPIRITUAL HISTORY OF OUR NATION 245–46 (2007). A complete version of the West Point Cadet Prayer is *available at* <http://www.usma.edu/chaplain/cadetprayer.htm> (last visited Mar. 31, 2010).

potential impacts of repeal and, only with that knowledge in hand, should Congress cast a decisive vote. Arguing that repeal must occur now because DADT seems unfair ignores the potential ramifications that haphazard decisions and impulsive actions could impose on the military. In addition, one must remember that many aspects of military service, including restrictions on heterosexual servicemembers, are permissible despite perceptions that they do not reflect societal practice or seem unfair.

The integration of open homosexuality in the military will not be successful unless and until this debate encompasses the realities of everyday life in the military. This expanded focus calls for professional debate of the tough issues, like the sexual acts in which homosexuals normally engage and behaviors unique to the homosexual community. When discussions begin, the leadership must not become engulfed in a philosophical or emotional debate about homosexuality in society, but must, instead, discuss the actual impact that repeal of DADT will have on military servicemembers and, especially, the combat effectiveness of our armed forces. Name-calling, lack of respect for command authority, and refusal to candidly address the potential detrimental effects of repeal will result in a caustic atmosphere that erodes the cohesion needed to maintain good order and discipline.

As alluded to by Washington Irving in *Tales of a Traveler*, a collection of essays and short stories from 1824, repealing DADT without intensely analyzing its impacts will result in new “bruises” for the military.<sup>426</sup> Those urging repeal should ask themselves, what if repeal of the policy results in far more than a simple bruise? What if it severs the very lifelines of *esprit de corps* and unit cohesion? What then? The answer is simple: Until the Nation’s leadership can implement DADT’s repeal without inflicting more strain on an already thinly-stretched force, DADT’s provisions on acts and marriage should remain unchanged.

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<sup>426</sup> IRVING, *supra* note 1, at xi.

**SERVING WITH INTEGRITY: THE RATIONALE FOR THE  
REPEAL OF “DON’T ASK, DON’T TELL” AND ITS BAN ON  
ACKNOWLEDGED HOMOSEXUALS IN THE ARMED FORCES**

MAJOR LAURA R. KESLER\*

*“I will end ‘don’t ask-don’t tell.’”*

—President Barack H. Obama<sup>1</sup>

*“The question before us is not whether the military is  
prepared to make this change, but how we best prepare  
for it.”*

—Joint Chiefs of Staff Chairman Admiral Mike Mullen<sup>2</sup>

*“I am straight, but I’m not narrow.”*

—Congresswoman Carol Shae-Porter<sup>3</sup>

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<sup>1</sup> Sheryl Stolberg, *Obama Pledges Again to End ‘Don’t Ask, Don’t Tell’*, N.Y. TIMES, Oct. 10, 2009, at A24 (quoting President Obama in an October 2009 speech).

<sup>2</sup> Editorial, *Gates: Pentagon Preparing Repeal of ‘Don’t Ask, Don’t Tell’ Policy*, CNN, Feb. 2, 2010, <http://www.cnn.com/2010/POLITICS/02/02/gays.military/index.html> (quoting Joint Chiefs of Staff Chairman Admiral Mike Mullen).

<sup>3</sup> Steve Ralls, *Straight but Not Narrow in the House*, HUFFINGTON POST, Jul. 23, 2008, [http://www.huffingtonpost.com/steve-ralls/straight-but-not-narrow-i\\_b\\_114650.html](http://www.huffingtonpost.com/steve-ralls/straight-but-not-narrow-i_b_114650.html) (quoting Congresswoman Carol Shae-Porter in a 2008 hearing on Don’t Ask, Don’t Tell).

## I. Introduction

On 1 April 2003, an elite group comprised of Army Rangers, Army Special Forces, and Navy Seals rescued injured prisoner of war Private First Class Jessica Lynch.<sup>4</sup> Although military spokespeople explained aspects of the daring rescue operation that had been broadcast to millions of American viewers, most members of the public never knew that one of the Rangers participating in the operation—Sergeant Brian Hughes—was gay.<sup>5</sup> A Yale-educated Soldier who joined the military out of a sense of duty to his country, Hughes rose to the rank of sergeant in only three years and participated in numerous combat missions in Afghanistan and Iraq.<sup>6</sup> Despite his successful and honorable first term of service, Hughes reported that he left the military because it became too painful for him to constantly hide his sexual orientation under “Don’t Ask, Don’t Tell.”<sup>7</sup> For Hughes, military service meant living a lie. It also precluded his partner from accessing support networks upon which heterosexual servicemembers and their loved ones commonly rely, and ones he surely required.<sup>8</sup> When he left the Army, Hughes’ institutional knowledge and talent left with him—to the detriment of his unit, its mission, and the country.<sup>9</sup>

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<sup>4</sup> E.g., Editorial, *Safe—GIs Rescue POW Teen Jessica—Battle for Karbala Rages as U.S. Drives to Baghdad*, N.Y. POST, Apr. 2, 2003, at 1; Editorial, *POW Rescue a Rare Feat*, CHI. TRIB., Apr. 3, 2003, at 8.

<sup>5</sup> NATHANIEL FRANK, UNFRIENDLY FIRE: HOW THE GAY BAN UNDERMINES THE MILITARY AND WEAKENS AMERICA 205 (2009).

<sup>6</sup> *Id.* at 205. Brian Hughes, *Gays Have Served Honorably in the War on Terror*, WALL ST. J., May 21, 2009, at A17.

<sup>7</sup> Jay Blotcher, *Life After Iraq*, ADVOCATE, Nov. 9, 2004, at 25; FRANK, *supra* note 5, at 205.

<sup>8</sup> *Id.* at 7. Unlike the spouses of heterosexual servicemembers, who enjoy access to family support networks, health care services, legal assistance, and casualty affairs assistance, partners of gay servicemembers must bear the stresses of military life and deployments alone and in secret, and are denied all these essential services. See, e.g., IN THEIR BOOTS: SILENT PARTNERS (2009), available at [http://www.intheirboots.com/itb/index.php?option=com\\_content&view=article&id=85&Itemid=149](http://www.intheirboots.com/itb/index.php?option=com_content&view=article&id=85&Itemid=149) (last visited Apr. 12, 2010) (examining the experiences of partners of homosexual deployed servicemembers).

<sup>9</sup> Brian Hughes, *Gays Have Served Honorably in the War on Terror*, WALL ST. J., May 21, 2009 at A17, <http://online.wsj.com/article/SB124286225508241195.html>. See also Bryan Bender, *Policy on Gays Seen Hurting Military, Others with Same Skills are Recalled*, BOSTON GLOBE, July 9, 2004, at A3 (asserting that critical jobs left unfilled due to the discharge of gays, lesbians, and bisexuals [GLB] have had to be filled by former servicemembers recalled to active duty).

An estimated 66,000 gays, lesbians, and bisexuals (GLB) are currently serving the American military.<sup>10</sup> Many of them, like Sergeant Hughes, find it difficult to bear the heavy burdens of “Don’t Ask, Don’t Tell” (DADT), which is a federal statute and military policy prohibiting recruiters from asking individuals about their sexual orientation and preventing GLB servicemembers from revealing their sexual orientation through word or deed.<sup>11</sup> Don’t Ask, Don’t Tell bans GLB servicemembers from (1) engaging in homosexual acts, (2) stating that they are homosexual, or (3) marrying a person of the same sex.<sup>12</sup> Underlying the statute, 10 U.S.C. § 654, is the proposition that allowing the service of individuals who have a “propensity or intent to engage in homosexual acts [will] create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.”<sup>13</sup>

Despite its stated rationale, DADT has come under fire in recent years by active duty servicemembers,<sup>14</sup> civilians, veterans,<sup>15</sup> and political and military leaders, some of whom were involved in its very

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<sup>10</sup> Brendan McGarry, *Scholar: About 66,000 Gays Are in Military*, MIL. TIMES, Jan. 27, 2010, [http://www.militarytimes.com/news/2010/01/military\\_gays\\_inservice\\_012710w/](http://www.militarytimes.com/news/2010/01/military_gays_inservice_012710w/); see also, Gary Gates, *Gay Men and Lesbians in the U.S. Military: Estimates from Census 2000*, URBAN INST., Sept. 28, 2004, <http://www.urban.org/publications/411069.html> (providing an earlier estimate of 65,000, based on the 2000 Census).

<sup>11</sup> Policy Concerning Homosexuality in the Armed Forces, 10 U.S.C. § 654 (2006), available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=browse\\_usc&do cid=Cite:+10USC654](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=browse_usc&do cid=Cite:+10USC654) (last visited Feb. 20, 2010).

<sup>12</sup> *Id.* § 654.

<sup>13</sup> *Id.* § 654(a)(15).

<sup>14</sup> See, e.g., Captain Tim Hsia, “*Don’t Ask, Don’t Tell: Don’t Keep*,” N.Y. TIMES, Jan. 27, 2010, <http://atwar.blogs.nytimes.com/2010/01/27/dont-ask-dont-tell-dont-keep/> (discussing an active duty infantry officer’s observations as the negative impact DADT has on the military); Craig Whitlock & Greg Jaffe, *Let Gays Serve Openly in Military*, WASH. POST, Feb. 3, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/02/02/AR2010020200251.html?sid=ST2010020201834> (citing the opinion of an active duty military officer that the presence of acknowledged GLB troops will not be a “big deal” among the majors he is serving with or with most junior soldiers because today’s military has “become accustomed to the idea that gays have served honorably alongside us for some time”).

<sup>15</sup> E.g., Editorial, *Former Joint Chiefs Chairman: Time to Include Gay Troops*, CNN, Jan. 30, 2007, <http://www.cnn.com/2007/US/01/30/pysk.shalikashvili/index.html> [hereinafter Former Chairman] (discussing former Chairman of the Joint Chief of Staff John Shalikashvili’s belief that the presence of acknowledged GLBs will not undermine the efficacy of the Armed Forces); Erica Demarest, *Gay Veterans Share stories, Advocate Repeal of “Don’t Ask, Don’t Tell,”* available at <http://news.medill.northwestern.edu/chicago/news.aspx?id=153428&print=1> (last visited Nov. 23, 2009).

implementation in 1993.<sup>16</sup> Current military leaders publicly dispute the policy rationale that has supported DADT since the early 90s.<sup>17</sup> Gay, lesbian, and bisexual combat veterans returning from deployments have publicly “come out of the closet,” providing testimony about their experiences that many members of Congress have considered with great interest.<sup>18</sup> Moreover, public support for lifting the ban, even among political conservatives, is high,<sup>19</sup> prompting legislation in support of

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<sup>16</sup> See, e.g., FRANK, *supra* note 5, at 115–17. General Mintor Alexander, U.S. Army [Ret.], who led the Army’s DADT advisory group in 1993, recalls it had no empirical data on which to base its recommendation but recommended implementing the ban anyway. Their advice, he recalls, was based on fears and subjective data. Alexander now believes the ban is harmful to military readiness and morale and should be repealed. *Id.* See also *id.* at 122–23 (discussing Navy Rear Admiral John Hutson’s involvement with DADT’s development in 1992, and his recollection that, “the decisions were based on nothing. It wasn’t empirical, it wasn’t studied,” and “[n]o one had the moral courage to stand up say, let’s step back, think it through. . .”). See also Editorial, *Time to Review Policy on Gays in the US Military*, REUTERS, July 5, 2009 at 1, <http://www.reuters.com/article/topNews/idUSTRE5641A920090705> (discussing General (ret.) Colin Powell’s assertion in 2009 that “a lot has changed” since 1993 and that the ban should be reconsidered); Former Chairman, *supra* note 15 (discussing former Chairman of the Joint Chief of Staff John Shalikashvili’s change of heart as to the presence of acknowledged GLBs in the military).

<sup>17</sup> E.g., Admiral Mike Mullen, *My View on Don’t Ask, Don’t Tell* (Feb. 3, 2010), <http://www.jcs.mil/newsarticle.aspx?ID=221>; Rick Maze, *McHugh: Army Can Handle Lift of Gay Ban*, ARMY TIMES, Oct. 29, 2009, [http://www.armytimes.com/news/2009/10/army\\_mchugh\\_dadt\\_102709w/](http://www.armytimes.com/news/2009/10/army_mchugh_dadt_102709w/) (discussing Secretary of the Army John McHugh’s recent statement that lifting the ban will likely not cause turmoil and that the Army has a history of successfully taking on similar issues); Colonel Om Prakash, U.S. Air Force, *The Efficacy of “Don’t Ask, Don’t Tell,”* 55 JOINT FORCES Q. 88, 93 (2009), [http://www.ndu.edu/inss/Press/jfq\\_pages/editions/i55/14.pdf](http://www.ndu.edu/inss/Press/jfq_pages/editions/i55/14.pdf).

<sup>18</sup> Deb Price, *Help Military by Letting Gays Serve Openly*, DETROIT NEWS, July 28, 2008 at A13 (discussing Eric Alva, a gay former Marine staff sergeant who was the first servicemember wounded in the Iraq war); David Welna, *Congress Revisits Military’s Policy on Gays*, NPR, July 24, 2008, <http://www.npr.org/templates/story/story.php?storyId=92864149>.

<sup>19</sup> Lymari Morales, *Conservatives Shift in Favor of Openly Gay Servicemembers*, Gallup (Jun. 5, 2009), <http://www.gallup.com/poll/120764/Conservatives-Shift-Favor-Openly-Gay-Service-Members.aspx> (last visited Mar. 2, 2010); Aaron Belkin, *Don’t Ask, Don’t Tell: Does the Gay Ban Undermine the Military’s Reputation?*, 34 ARMED FORCES & SOC’Y 276, 278 (2007) (discussing: [a] eight national polls administered by five different polling organizations, all indicating that between fifty-eight and seventy-nine percent of the public believes gays should be permitted to serve openly, [b] a Fox News poll indicating that fifty-five percent of Republicans believe gays should be able to serve openly, and [c] Gallop poll results indicating that ninety-one percent of young adults believe gays should be able to serve openly); *id.* at 285 (discussing a 2006 survey of 545 troops who had served in Iraq and Afghanistan, 73% of whom indicated they were comfortable interacting with gays and lesbians; also discussing the findings of a 2000 study conducted by Major John W. Bricknell of the Naval Postgraduate School,

repeal at both the House and Senate levels.<sup>20</sup> Even the Commander-in-Chief has pledged to eliminate the policy based on its detrimental effects.<sup>21</sup> Given these significant concerns and ideological shifts, many contend, as does this author, that all three prongs of the ban against acknowledged GLB personnel should be lifted immediately and in their entirety.

This article explores considerations pertinent to the debate surrounding DADT that—until recently—have been largely ignored within the military community. It highlights research demonstrating that that, despite fears and arguments to the contrary, America's military is well-suited to handle the integration of acknowledged GLB servicemembers and will successfully adapt to their inclusion.<sup>22</sup> In fact, when the ban is lifted, military readiness will likely increase and our Armed Forces will be better and stronger for it.<sup>23</sup> This article also provides counterarguments and information pertinent to the most common assertions made by DADT's proponents.

Part II of this article discusses DADT's cost in terms of talent, experience, and fiscal losses, and addresses the illusory disconnect

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indicating that from 1994 to 1999, the percentage of U.S. Navy officers who felt uncomfortable in the presence of homosexuals decreased from 57.8% to 36.4%); Rick Maze, *Obama Restates Plans: Leave Iraq, End Gay Ban*, ARMY TIMES, Jan. 29, 2010, [http://www.armytimes.com/news/2010/01/military\\_state\\_of\\_the\\_union\\_012710w/](http://www.armytimes.com/news/2010/01/military_state_of_the_union_012710w/) (discussing widespread, bipartisan political support for DADT's repeal).

<sup>20</sup> Military Readiness Enhancement Act of 2009, H.R. 1283, 111th Cong. (1st Sess. 2009), available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111\\_cong\\_bills&docid=f:h1283ih.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h1283ih.txt.pdf) (last visited Mar. 2, 2009); Kevin Nix, *History Made as Sen. Lieberman Introduces "Don't Ask, Don't Tell" Repeal Bill* (Mar. 3, 2010), <http://www.sldn.org/news/archives/history-made-as-sen.-lieberman-introduces-dont-ask-dont-tell-repeal-bi/>.

<sup>21</sup> Ed Hornick, *Activists Praise Obama's "Don't Ask, Don't Tell" Repeal Pledge*, CNN, Jan. 28, 2010, <http://www.cnn.com/2010/POLITICS/01/28/obama.dadt.react/index.html>.

<sup>22</sup> Because Don't Ask, Don't Tell (DADT) does not address transgendered individuals, they are outside the scope of this article. It should be noted, however, that such individuals serve in some of our allied countries, including the United Kingdom. See, e.g., *Gays in the Military: The UK and US Compared*, BBC, Feb. 2, 2010, <http://news.bbc.co.uk/2/hi/8493888.stm>.

<sup>23</sup> See, e.g., Kayla Webley, *A Brief History of Gays in the Military*, TIME, Feb. 2, 2010, <http://www.time.com/time/nation/article/0,8599,1958246,00.html> (discussing former Chairman of the Joint Chiefs of Staff John Shalikashvili's belief that America's Armed Forces will be stronger and more cohesive if DADT is repealed); *"Don't Ask, Don't Tell" To Get Senate Committee Review*, CNN, July 27, 2009, <http://www.cnn.com/2009/POLITICS/07/27/gay.military/index.html> (discussing Senator Kirsten Gillibrand's position that repealing DADT will increase America's military strength).

between homosexual identity and homosexual conduct. While many of DADT’s proponents suggest that homosexuality is merely a feeling that need not be realized with sexual acts, the consequence of such a narrow interpretation is the reduction of GLBs to asexual beings and the requirement for a norm of celibacy that perpetuates the lies and unhealthy suppression that necessitate DADT’s repeal in the first place. Here, it will be shown that the right to express one’s sexual orientation must encompass the right to share a physical level of intimacy with another person, as such expression is inextricably linked to and a necessary component of personal identity.

Part III clarifies the limited scope of DADT’s repeal. While homosexuality and bisexuality clearly fall within the prohibitions of DADT and will be affected by its repeal, transgenderism does not. Infusion of the issue of transgender rights serves only to muddy the waters surrounding DADT’s repeal and to present an exaggerated and misleading analysis of the issues. While at some point, the discussions surrounding DADT’s repeal may assist in resolving matters unique to transgender personnel, medical and mental health professionals will need to be consulted on such matters given the clinical classifications that govern their service. Furthermore, policies—separate and distinct from DADT—will have to be changed.

Having discussed the limits on the policy considerations raised by DADT’s repeal, Part IV considers the connection that DADT’s proponents claim exists between legislative action required for repeal and additional administrative action that might be required to effectuate it.<sup>24</sup> Part V demonstrates that, contrary to such claims, DADT’s repeal will not require significant changes to housing accommodations or financial benefits. While some housing policies may eventually require revision to recognize gay marriages, no such changes will be required unless and until the Defense of Marriage Act (DOMA)<sup>25</sup> is repealed.

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<sup>24</sup> Some proponents of DADT, for example, claim its repeal will “necessarily require administrative action to provide Basic Housing and other allowances for homosexual married couples” as well as “separate living and bathing facilities for heterosexual men, heterosexual women, gay men, lesbians, bisexual men, bisexual women, and potentially transgender men and women.” Major Sherilyn A. Bunn, *Straight Talk: The Implications of Repealing “Don’t Ask, Don’t Tell” and the Rationale for Preserving Aspects of the Current Policy*, 203 MIL. L. REV. 207, 226, 230 (2010).

<sup>25</sup> Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996). The DOMA precludes the Federal Government from recognizing state-sanctioned same-sex marriages and civil unions. *Id.*

Furthermore, it is not necessary to provide separate quarters or to make structural changes to barracks to accommodate the presence of acknowledged GLB servicemembers.

Part VI discusses lessons learned from American paramilitary organizations and foreign militaries, demonstrating that repeal can be implemented with no disruption to current military operations. Although policymakers may be considering instituting a phased repeal that will take place over the course of months or years, the experience of many countries with militaries and cultures similar to ours reveals the tremendous success of instantaneous repeal even when implemented over protests similar to those being made by DADT's proponents. The latter portion of Part VI focuses on legal considerations that are unique to the United States.

Part VII addresses the DOMA and state marriage laws pertinent to DADT's repeal. Next, Part VIII addresses constitutional considerations in the wake of *Lawrence v. Texas*<sup>26</sup> and military precedents recognizing the right to privately engage in consensual homosexual acts. Part IX addresses evidentiary considerations unique to the marital privilege in the Military Rules of Evidence. Part X discusses the application of various provisions of the Uniform Code of Military Justice (UCMJ) and addresses changes that should be considered should both DADT and DOMA be repealed. Parts XI and XII reveal the striking similarities between the military's exclusion of acknowledged GLBs and its historical exclusion of African-Americans and women. A bird's eye perspective of the interrelated concerns surrounding the exclusion of acknowledged GLBs from military service favors DADT's swift and complete repeal, rather than procrastination, which will only serve to widen the divide between supporters and opponents of repeal. Not only do we owe this to our military members, but also the many members of the American public, who require a unified fighting force.

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<sup>26</sup> 539 U.S. 588 (2003).

## II. The Potential Scope of Repeal: DADT Should be Repealed in its Entirety

### A. Cost of the Ban

A starting point for determining the scope of DADT’s repeal is consideration of the ban’s cost. Since its implementation in 1993, more than 12,500 homosexual servicemembers, including nearly 800 mission-critical troops, fifty-nine Arabic linguists, and nine Farsi linguists, have been discharged under DADT, costing taxpayers more than \$400 million.<sup>27</sup> Perhaps more significant than the monetary cost, however, is the loss of experience, training, and talent as each troop discharged under the ban leaves military service.<sup>28</sup>

Examples of servicemembers who have been affected by the ban include Lieutenant Colonel (LTC) Fehrenbach, an active duty Air Force F-15 pilot with eighteen years’ experience who is currently facing discharge under DADT after military leaders found out he is gay.<sup>29</sup> Lieutenant Colonel Fehrenbach has flown numerous combat missions in Iraq and Afghanistan, is the recipient of nine air medals, including one for heroism under fire, and was handpicked to patrol Washington D.C.’s airspace after the terrorist attacks of 11 September 2001. If discharged,

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<sup>27</sup> Press Release, Congressman Jim Moran (8th District of Virginia), ‘Don’t Ask, Don’t Tell’ Letter Sent to President Obama (Jun. 22, 2009), *available at* [http://moran.house.gov/list/press/va08\\_moran/DADTObama.shtml](http://moran.house.gov/list/press/va08_moran/DADTObama.shtml) (asserting that the ban needlessly costs the nation by reducing the number of specialists trained to combat urgent national security threats); *see also* UNITED STATES GOV’T ACCOUNTABILITY OFF., FINANCIAL COSTS AND LOSS OF CRITICAL SKILLS DUE TO DOD’S HOMOSEXUAL CONDUCT POLICY CANNOT BE COMPLETELY ESTIMATED 3 (Feb 2005) [hereinafter GAO FINANCIAL COSTS], *available at* <http://www.gao.gov/new.items/d05299.pdf> (stating the total cost of the ban cannot be completely estimated because cost data on investigations, counseling, discharge reviews, and other related actions is not tracked).

<sup>28</sup> Alan K. Simpson, *Bigotry that Hurts Our Military*, WASH. POST, Mar. 14, 2007, *available at* <http://www.washingtonpost.com/wp-dyn/content/article/2007/03/13/AR2007031301507.html> (discussing shortage of linguists and other troops needed to perform required missions); UNIV. OF CAL., MICHAEL D. PALM CENTER, REPORT OF THE GENERAL/FLAG OFFICERS’ STUDY GROUP 2 (2008) [hereinafter GENERAL/FLAG OFFICERS’ STUDY GROUP], *available at* <http://www.palmcenter.org/system/files/NEWDESIGNFlagOfficersBookle071808.pdf>. This study, conducted by a “nonpartisan national study group comprised of retired General/Flag Officers from different branches of service,” found that DADT has caused the military to lose talented GLB servicemembers, and recommends its repeal. *Id.* at 1–2.

<sup>29</sup> Steve Vogel, *Decorated Airman Anxiously Awaits New Policy on Gays*, WASH. POST, August 3, 2009, [www.washingtonpost.com/wp-dyn/content/article/2009/08/02/AR2009080202152.html](http://www.washingtonpost.com/wp-dyn/content/article/2009/08/02/AR2009080202152.html).

he will be unable to retire and will lose medical benefits and nearly \$50,000 a year in retirement pay.<sup>30</sup> More significantly, the military will lose the benefit of his heroism, combat experience, and technical expertise. Former Army combat engineer Robert Stout is another such servicemember.<sup>31</sup> After sustaining injuries from a grenade blast in Iraq in 2004, Stout was medically evacuated to Landstuhl, and while recovering, publicly acknowledged his sexual orientation. As a result of his admission, he was denied the opportunity to reenlist.<sup>32</sup> Finally, DADT is costing us troops like Alex Nicholson, a former Army human intelligence collector and Arabic linguist who was discharged under DADT when his sexual orientation was discovered by military leaders in his chain of command.<sup>33</sup> Repealing DADT will allow America's Armed Forces to reap the talent and experience of these and other similarly qualified GLB servicemembers, many of whom are combat-tested and serve in critical job specialties, including doctors, nurses, infantrymen, linguists, and military intelligence specialists.<sup>34</sup>

#### B. The Ban Should Be Lifted in its Entirety

The overwhelming majority of psychological and psychiatric literature and research indicate that that sexual orientation is not a choice and is formed early on in a child's life pursuant to a myriad of factors including biological and environmental ones.<sup>35</sup> According to the

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<sup>30</sup> *Id.*

<sup>31</sup> FRANK, *supra* note 5, at 206.

<sup>32</sup> *Id.*

<sup>33</sup> *Alex Nicholson: Talking About 'Don't Ask, Don't Tell,'* NPR, June 16, 2009, <http://www.npr.org/templates/story/story.php?storyId=105443003>.

<sup>34</sup> Simpson, *supra* note 28; UNITED STATES GENERAL ACCOUNTING OFFICE, FINANCIAL COSTS AND LOSS OF CRITICAL SKILLS DUE TO DOD'S HOMOSEXUAL CONDUCT POLICY CANNOT BE COMPLETELY ESTIMATED 4 (Feb 2005) [hereinafter GENERAL ACCOUNTING OFFICE, FINANCIAL COSTS OF BAN CANNOT BE COMPLETELY ESTIMATED], *available at* <http://www.gao.gov/new.items/d05299.pdf>.

<sup>35</sup> *See, e.g.,* Am. Psychol. Ass'n, Sexual Orientation and Homosexuality, *available at* <http://www.apa.org/helpcenter/sexual-orientation.aspx> (last visited Apr. 10, 2010) [hereinafter Psychological Association Orientation] ("Most scientists today agree that sexual orientation is most likely the result of a complex interaction of environmental, cognitive, and biological factors. In most people, sexual orientation is shaped at an early age."). Am. Psychiatric Ass'n, Let's Talk Facts About Sexual Orientation, *available at* <http://www.healthyminds.org/Document-Library/Brochure-Library/Lets-Talk-Facts-Sexual-Orientation.aspx> [hereinafter Psychiatric Association Orientation] (last visited Apr. 10, 2010) (observing "[s]tudies have suggested that both genetic and non-genetic factors" determine each person's sexual orientation).

American Psychological Association, for example, “human beings cannot choose to be either gay or straight,” and sexual orientation is not a “conscious choice that can be voluntarily changed.”<sup>36</sup> The American Psychiatric Association similarly contends that “sexual orientation is determined for most people early in life, or even before birth,” “is not likely to change,” and that any “efforts to try to force an individual to change his or her orientation are very likely to be unsuccessful.”<sup>37</sup> The American Academy of Pediatrics, American Counseling Association, and National Association of Social Workers have taken similar positions, and contend that reparative therapy (therapy designed to eliminate same-sex desires) is not only ineffective but harmful and unhealthy to the patients going through it.<sup>38</sup>

While homosexuality can be defined in many ways to touch upon individual beliefs or the practices of an entire community,<sup>39</sup> the thread linking all definitions is sexual attraction to members of the same sex.<sup>40</sup> It is important to note that there is a distinction between sexual orientation and sexual identity: “Whereas sexual orientation has to do with sexual dispositions, sexual fantasies, sexual desires, and sexual behaviors, sexual identity has to do with what one identifies oneself to be.”<sup>41</sup> Proponents of DADT fail to appreciate this distinction and would rather focus on concepts that exist purely within the mental construct. They likewise fail to appreciate the fact that without the ability to engage in romantic and sexual relationships, GLB servicemembers are forced to either (a) suppress their emotional and physical needs and serve as asexual beings with lives devoid of the emotional and sexual connections that heterosexual servicemembers enjoy, or (b) engage in same-sex relationships but shroud themselves in lies and secrecy in all aspects of their military lives.

Some may suggest, for example, that homosexual acts are no more integral to GLBs than is the wearing of a Yarmulke by Jews or the act of

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<sup>36</sup> Psychological Association Orientation, *supra* note 35.

<sup>37</sup> *Id.*

<sup>38</sup> See, e.g., Pacific Sch. of Religion, Professional Organization Statements, <http://www.clgs.org/resources/professional-organization-stmts> (last visited Apr. 10, 2010) (containing links to the official statements of these organizations in relation to reparative therapy).

<sup>39</sup> SKI HUNTER, COMING OUT AND DISCLOSURES: LGBT PERSONS ACROSS THE LIFESPAN 28–29 (2007).

<sup>40</sup> Stanford Encyclopedia of Philosophy, Homosexuality (Nov. 29, 2006), <http://plato.stanford.edu/entries/homosexuality/>.

<sup>41</sup> HUNTER, *supra* note 39, at 27.

facing Mecca by Muslims.<sup>42</sup> In the religious context, however, consider whether one can truly express Judaism if he has no ability to partake in Shabbat or celebrate Passover, Christianity if he has no ability to be baptized or celebrate Christmas, or Islam if he is denied the ability to pray five times a day and face Mecca while doing so.<sup>43</sup> Although Jews, Christians, and Muslims may elect to practice their religions in different ways, a person cannot reasonably express his religious beliefs unless he has the freedom to act on his innermost spiritual beliefs with a wide range of religious practices. While the military, along with the Federal and state governments, prohibits certain religious practices (proselytizing, for example, is prohibited in the Armed Forces,<sup>44</sup> as is any act of religious expression that violates criminal laws), such prohibitions are narrowly tailored, and military and civilian personnel alike have, for the most part, the right to openly acknowledge and practice their faith.<sup>45</sup>

In the realm of love and sexuality, the link between one's sexual orientation and his ability to acknowledge and express it is no different. For example, while inappropriate expressions of heterosexuals' sexual orientation are prohibited (sexually inappropriate comments and gestures, for example, are prohibited by regulations pertaining to sexual harassment, and acts of sexual expression that violate criminal laws are not permitted), heterosexual troops are free to acknowledge their orientation and do so on a regular basis in both word (e.g., acknowledging that they have a spouse or significant other who may need assistance or information during unit deployments) and deed (e.g., displaying family photos on desks, lockers, and computer monitors; bringing their spouses or significant others to deployment and promotion ceremonies). Gay, lesbian, and bisexual servicemembers must be permitted to acknowledge and express their sexual orientation in the same way as heterosexual servicemembers. The consequence of artificially erecting a barrier to any otherwise lawful act, including marriage—which is the ultimate consummation of one's emotional and sexual bond—would only increase DADT's negative consequences and

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<sup>42</sup> See, e.g., Bunn, *supra* note 24, at 218–19.

<sup>43</sup> FRANK, *supra* note 5, at xviii (making a similar analogy and asking, “Is a policy that bars people who engage in homosexual behavior not a policy that bars homosexuals?”).

<sup>44</sup> Bunn, *supra* note 24, at 219.

<sup>45</sup> See, e.g., Michelle Roberts, *Sikh Captain Graduates: Tejdeep Singh Rattan is First Sikh U.S. Army Officer in Decades*, HUFFINGTON POST, Mar. 22, 2010, [http://www.huffingtonpost.com/2010/03/23/sikh-army-captain-graduat\\_n\\_509294.html](http://www.huffingtonpost.com/2010/03/23/sikh-army-captain-graduat_n_509294.html); Def. Equal Opportunity Mgmt. Inst., *Religious Accommodation in the U.S. Military*, <http://www.deomi.org/diversitymgmt/RelAccomMilitary.cfm>.

propel GLB servicemembers deeper into a climate of dishonesty, inferiority, and prejudice.

Proponents of DADT assert that advocates of its repeal have artificially “cropped” the debate to avoid discussions of homosexual practices.<sup>46</sup> This is incorrect. Many of the books, articles, and public discussions supporting DADT’s repeal describe in great detail how its prohibitions against same-sex acts restrict a wide variety of both sexual and non-sexual acts in which GLBs and heterosexuals alike engage, and point out that this is one of the primary reasons it should be repealed.<sup>47</sup> Moreover, many of the cited “homosexual practices” are, in reality, sexual acts in which many heterosexuals similarly engage with members of the opposite sex. Many heterosexuals, for example, engage in oral sex,<sup>48</sup> anal sex,<sup>49</sup> and sometimes non-traditional sex acts such as rough sex, sadomasochism (S/M), bondage, and fetish sex.<sup>50</sup> Some

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<sup>46</sup> Bunn, *supra* note 24, at 216.

<sup>47</sup> See, e.g., *Out in Military*: “*Not the Time*” (CNN television broadcast Feb. 2, 2010), available at <http://www.cnn.com/video/#/video/politics/2010/02/02/gays.in.military.debate.cnn?hpt=C2> (showing Dr. Nathaniel Frank and Tony Perkins debating various issues surrounding DADT and discussing the act of sodomy on national television in 2010); Sharra E. Greer et al., “*Rum, Sodomy, and the Lash*”: *What the Military Thrives On and How It Affects Legal Recruitment and Law Schools*, 14 DUKE. J. GENDER L. & POL’Y 1143, 1156–9 (2007) (comments of Sharra E. Gerrer, Dir. of Law and Pol’y for the Servicemembers’ Legal Defense Network) (discussing sodomy in a public conference regarding DADT in 2007).

<sup>48</sup> See, e.g., Discovery Health, Sexual Health Center: Oral Sex, available at <http://health.discovery.com/centers/sex/sexpedia/oral-sex.html> (last visited Apr. 7, 2010) (“Some people incorrectly think that cunnilingus and fellatio are homosexual acts . . . .”); *id.* (“While homosexual couples do engage in oral sex, so do a majority of heterosexual couples. The activity itself is neither homosexual nor heterosexual.”); Joyce Abma et al. The National Survey of Family Growth, available at [www.cdc.gov/nchs/ppt/duc2006/abma\\_26.ppt](http://www.cdc.gov/nchs/ppt/duc2006/abma_26.ppt) (last visited May 10, 2010) (reporting, on slide 45, the results of a 2002 which revealed that 90% of male and 88% of female respondents, aged 25–44, had engaged in oral sex with someone of the opposite sex that year).

<sup>49</sup> See, e.g., Discovery Health, Sexual Health Center: Anal Sex, available at <http://health.discovery.com/centers/sex/sexpedia/analsex.html> (last visited Apr. 7, 2010) (“[M]any people, regardless of sexual orientation, regard [anal sex] as a legitimate form of sexual expression and as one of the fulfilling ways in which people can express their desire and affection for each other.”); Abma et al., *supra* note 48 (reporting, on slide 32, the results of a 2002 study which revealed that 40% of male and 35% of female respondents, aged 25–44, engaged in anal sex with someone of the opposite sex that year); Editorial, *The Bottom Line*, N.Y. MAG., Dec. 31, 2006, <http://nymag.com/nightlife/mating/25988/> (reporting that anal sex has become an increasingly popular form of sexual expression between heterosexuals).

<sup>50</sup> See, e.g., ALEX COMFORT, *THE JOY OF SEX* 81, 136–81 (30th ed. 2002) (describing various forms of heterosexual non-traditional sexual activity, including rough sex,

heterosexuals also use sex toys<sup>51</sup> and view pornography.<sup>52</sup> One has only to look at today's headlines to find examples of heterosexuals who participate or are interested in these types of sexual activities.<sup>53</sup> None of these forms of sexual expression are exclusive to GLBs—some of whom do not participate in any of these acts outside of oral sex and mutual masturbation.<sup>54</sup> Moreover, some segments of the American population consider some or all of these practices to be commonplace.<sup>55</sup> While a

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bondage, discipline, mutual masturbation, and the use of sex toys); Brian Alexander, *One Preacher's Message: Have Hotter Sex*, MSNBC, Dec. 4, 2006, <http://www.msnbc.msn.com/id/13834042/> (discussing the fact that some married Christian couples engage in oral sex, anal sex, mutual masturbation, and various forms of non-traditional sexual); Bonnie Erbe, Opinion, *Evangelical Churches Push Kinky New Sex Challenges—But For Married Couples Only*, U.S. NEWS & WORLD REP., Feb. 25, 2009, <http://www.usnews.com/blogs/erbe/2009/02/25/evangelical-churches-push-kinky-new-sex-challenges--but-for-married-couples-only.html> (discussing evangelical churches that advocate “risqué” sex within the context of marriage); PATRICK CALIFIA, *SENSUOUS MAGIC: A GUIDE TO S/M FOR ADVENTUROUS COUPLES*, at vii–viii (2001) (describing how the “SM/D&S/B&D/fetish/leather/kink community includes people of all genders and sexual orientations”).

<sup>51</sup> See, e.g., Susan Seliger, *Why Women Lose Interest in Sex—and 10 Tips to Rekindle Desire*, GOOD HOUSEKEEPING, <http://www.goodhousekeeping.com/family/marriage-sex/women-sexual-desire-0307> (discussing the use of sex toys in rekindling passion in marriages); Editorial, *The Joy of Christian Sex Toys*, NPR, Mar. 21, 2008, <http://www.npr.org/templates/story/story.php?storyId=18975616> (discussing the use and purchase of sex toys by Christians).

<sup>52</sup> See, e.g., Seliger, *supra* note 51 (discussing the use of pornography in rekindling passion in a marriage); Cindy Chupack, *Pornophobic? The Dish About Dirty Movies*, OPRAH MAG., Jan. 15, 2008, <http://www.oprah.com/relationships/Do-Women-Watch-Porn> (discussing the fact that some heterosexual married couples enjoy watching pornography).

<sup>53</sup> See, e.g., Ruth Marcus, *RNC Staffer at Strip Club Was . . . a Woman*, WASH. POST, Mar. 31, 2010, [http://voices.washingtonpost.com/postpartisan/2010/03/rnc\\_staffer\\_at\\_strip\\_club\\_wasa.html](http://voices.washingtonpost.com/postpartisan/2010/03/rnc_staffer_at_strip_club_wasa.html) (discussing a recent visit by a group of Republican National Committee Young Eagle program donors to a club in which performers acted depict bondage and sadomasochistic scenes).

<sup>54</sup> See, e.g., Ramon Johnson, *Ramon's Gay Life Blog*, Myth: All Gay Men Have Anal Sex (Apr. 12, 2008), <http://gaylife.about.com/b/2008/04/12/myth-all-gay-men-enjoy-anal-sex.htm> (stating that there are many ways gay men can be intimate with each other without having anal sex); Ramon Johnson, *Gay Men and Intercrural or Non-Penetrative Sex*, available at <http://gaylife.about.com/od/gaysexadvice/g/intercruralsex.htm> (last visited Apr. 11, 2010) (discussing non-penetrative gay sex); JANEL L. CARROLL, *SEXUALITY NOW: EMBRACING DIVERSITY* 271 (3d ed. 2010) (2007) (citing to the results of a 1994 study indicating that not all gay men engage in anal sex). The two most common methods of gay sex are fellatio and mutual masturbation, not anal sex. *Id.*

<sup>55</sup> See, e.g., Brian Alexander, *Sexual Exploration Goes Mainstream*, MSNBC, Dec. 1, 2006, [http://www.msnbc.msn.com/id/14061675/ns/health-sexual\\_health/](http://www.msnbc.msn.com/id/14061675/ns/health-sexual_health/); Carrie Haymore, *Sadomasochism: The Pleasure of Pain*, 15 UNDERGRADUATE J. PSYCHOL. 50 (2002), <http://www.psych.uncc.edu/UJOP2002.pdf> (asserting that, despite the negative

few of these behaviors among heterosexuals may be illegal in the military,<sup>56</sup> troops are not usually prosecuted for them absent aggravating circumstances.<sup>57</sup> It is, in fact, the policy of the Criminal Investigation Command not to investigate illegal consensual acts (aside from statutory rape), even though such acts would constitute felonies under the UCMJ.<sup>58</sup> Such matters are considered conduct more appropriate for disposition at the command level, precisely because so many heterosexuals are now engaging in these activities that it would overwhelm law enforcement to investigate all of them.

Finally, concerns by proponents of DADT that its repeal will open the door to unwanted same-sex propositions, displays of homosexual pornography, inappropriate genital exposure, and exposure to the intimate details of all homosexual relationships,<sup>59</sup> fail to recognize that military administrative regulations and criminal statutes govern all such acts and subject those who commit them to adverse action and sometimes criminal punishment. Any servicemember—heterosexual or GLB—who makes an unwanted sexual proposition, displays pornography to another, inappropriately exposes his genitals, or publically discusses intimate details of his sexual relationships, subjects himself to sexual harassment complaints, adverse administrative action, and in some cases, criminal prosecution.<sup>60</sup> Furthermore, making sexual

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myths some associate with sadomasochism, “researches agree that sadomasochistic desires and activities are normal, albeit not socially prominent, components of sexual functioning.”). Some heterosexuals commonly engage in oral sex, anal sex, and unconventional sexual acts such as spanking and role-playing. *Id.* at 53.

<sup>56</sup> Consensual oral and anal sex, for example, are prohibited by the Uniform Code of Military Justice. UCMJ art. 134 (2008).

<sup>57</sup> Aggravating factors such as adultery, sexual activity with a subordinate or a minor, or sexual activity in a non-private location, all subject servicemembers to criminal and administrative liability even when the underlying sexual activity in itself, would not.

<sup>58</sup> See U.S. DEP’T OF ARMY, REG. 195-2, CRIMINAL INVESTIGATION ACTIVITIES ¶ 3-3(a)(8), at 6 (15 May 2009) (“The USACID and the installation law enforcement activity will not normally initiate an investigation into adult private consensual misconduct where such misconduct is the only offense involved. The offenses will be reported to the appropriate commander.”).

<sup>59</sup> See, e.g., Bunn, *supra* note 24, at 212, 219–20.

<sup>60</sup> See, e.g., U.S. DEP’T OF ARMY, REG. 600-20, ARMY COMMAND POLICY chs. 7 & 8 (18 Mar. 2008) [hereinafter AR 600-20] (discussing the prevention of sexual harassment and assault). “Sexual harassment is a form of gender discrimination that involves unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature.” *Id.* para. 7-4(a). Sexual harassment can be verbal, nonverbal, or consist of physical contact. *Id.* para. 7-5. “Hostile environment sexual harassment occurs when a person is subjected to offensive, unwanted, an unsolicited comments and behavior of a sexual nature that . . . creates and intimidating, hostile, or offensive working

comments, whistling in a sexually suggestive manner, using terms of endearment, blowing kisses, winking, licking one's lips in a suggestive manner, staring, "undressing someone with one's eyes," bumping, grabbing, and providing unsolicited back or neck rubs are all explicitly prohibited forms of sexual harassment under Army Regulation 600-20.<sup>61</sup> Military prohibitions against sexual harassment apply to all troops, twenty-four hours, seven days per week, both on and off-post, and in the barracks.<sup>62</sup>

### III. Matters of Inclusiveness: Repeal of DADT Only Applies to Gays, Lesbians, and Bisexuals

Because DADT only prohibits acknowledged GLB personnel from serving in the Armed Forces, it is only these personnel who will be granted the right to serve alongside heterosexuals if Congress repeals the ban. While proponents of DADT assert that repeal will open the floodgates to transgender personnel, this contention is incorrect in that it confuses gender identify with sexual orientation.<sup>63</sup> Unlike heterosexuality and homosexuality, which relate to a person's sexual orientation, transgenderism relates to a person's identity as a male or a female, and implicates a range of medical and psychological diagnoses.<sup>64</sup> As recognized in other publications, Gender Identity Disorder (GID) is governed by military medical regulations, not the DADT policy and statute, and is based on scientific and psychological factors rather than moral judgments.<sup>65</sup> Transgender personnel are barred from military

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environment." *Id.* para. 7-6(b). See also U.S. Army, Sexual Assault Prevention and Response Program, available at <http://www.sexualassault.ary.mil/content/faqs.cfm> (last visited Apr. 11, 2010).

<sup>61</sup> AR 600-20, *supra* note 60, para. 7-5.

<sup>62</sup> See, e.g., *id.* para. 7-6(b) ("If these behaviors unreasonably interfere with . . . performance, regardless of whether the harasser and the victim are in the same workplace, then the environment is classified as hostile.").

<sup>63</sup> Boulder County Pub. Health, Definition of Terms and Concepts Related to Sex, Gender, and Sexual Orientation, available at <http://www.bouldercounty.org/health/Comm.hlth/safezone/LGBTIQ/definitions.htm> (last visited Apr. 7, 2010) (discussing the difference between sexual orientation and gender identity).

<sup>64</sup> E.g., WebMD, Sexual Health Center: Gender Identity Disorder, available at <http://www.webmd.com/sex/gender-identity-disorder> (last visited Apr. 7, 2010); Norman Spack, Transgenderism, available at [http://www.lahey.org/NewsPubs/Publications/Ethics/JournalFall2005/Journal\\_Fall2005\\_Feature.asp](http://www.lahey.org/NewsPubs/Publications/Ethics/JournalFall2005/Journal_Fall2005_Feature.asp) (last visited Apr. 7, 2010).

<sup>65</sup> Bunn, *supra* note 24, at 222–23. See also Servicemembers Legal Defense Network, Transgender Service Members, available at <http://www.sldn.org/page/Website/Fact%20Sheets/Transgender%20Service%20Members.pdf> (last visited Mar. 27, 2010).

service not by DADT’s restrictions but by medical regulations, and will therefore continue to be precluded from service even when DADT is repealed. Assertions to the contrary are not only misplaced, but refuted by transgender personnel themselves, as well as the staunchest advocates of repeal.<sup>66</sup>

#### IV. Successful Repeal of DADT is not Dependent on Non-Legislative Policy Changes

Supporters of DADT assert that its repeal will be too difficult and complex to accomplish without first instituting numerous administrative measures, such as benefit adjustments and allocation of financial entitlements, and without constructing “gay, bisexual, and/or transgender housing facilities.”<sup>67</sup> Such assertions, however, are overly-broad and misleading. The inclusion of transgendered personnel in the debate over DADT, for example, is a red herring because, as previously discussed, such personnel are precluded from military service by medical regulations and by diagnosis of GID—not based on DADT’s ban against acknowledged GLBs. Even if DADT is repealed, transgender personnel will not be permitted to serve in the military, and their inclusion in this debate serves only to muddy the waters.

Likewise, the claim that DADT’s repeal will unduly burden commanders and senior non-commissioned officers by forcing them to deal with billeting and privacy issues is similarly misleading in that it fails to recognize that such issues are already a routine and mandatory part of their leadership responsibilities. According to Major General (Ret.) Dennis Laich, these issues “are dealt with by first line supervisors, every day, in all branches of service as to heterosexual troops already,” as reflected by Army command policies and Army regulations alike.<sup>68</sup>

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<sup>66</sup> Paula M. Neira, RN, Esq., Lieutenant, USNR (1985–1991) is one such individual. Lieutenant Neira is a post-operative transgender nurse, lawyer, U.S. Naval Academy graduate, and Navy combat veteran. As such, she is an advocate of DADT’s repeal but states its repeal will not affect the military ban against transgender personnel because these individuals are precluded from service based on medical and mental health regulations, not by DADT. Telephone Interview with Paula M. Neira, Registered Nurse, member of the Maryland Bar, and Servicemembers Legal Defense Network governing board member (Apr. 8, 2010).

<sup>67</sup> Bunn, *supra* note 24, at 226–27, 230.

<sup>68</sup> Telephone Interview with Major Gen. (Ret.) Dennis Laich, U.S. Army Reserve (Apr. 14, 2010). *See, e.g.*, Command Policy Memorandum from Lieutenant General Robert W. Cone, Commander, Headquarters, III Corps and Fort Hood, to III Corps and Fort Hood

Military leaders already address these issues concerning heterosexual servicemembers on a regular basis. More significantly, the military has successfully contended with similar concerns in the past, when African-Americans<sup>69</sup> and women<sup>70</sup> were integrated into regular military units and service academies. Although inclusion of these groups required policy changes, their integration was not postponed until the changes had first been completely identified, resolved, or instituted.

As discussed in great detail in Part XI of this article, the emotions and heated arguments surrounding military racial integration in particular were even greater than that which now surrounds the repeal of DADT. Billeting and privacy issues, and related effects on military readiness, were among the primary reasons cited in opposition to integration of

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leaders, subject: Single Soldier Quarters Living Standards (2 Nov. 2009), *available at* <http://pao.hood.army.mil/leaders/policies/corps/CSM-02.pdf> (providing detailed instructions regarding the housing of single troops Fort Hood and factors leaders must consider when making room assignments). These instructions include various factors and considerations. *E.g.*, *id.* (explaining that the “chain of command has an inherent responsibility to ensure proper living standards . . . and must be involved to the degree necessary,” all the while ensuring that “[t]here are no arbitrary limits to this involvement . . .”); *id.* (charging leaders with the responsibility of clearly defining and reinforcing “single Soldier living standards); *id.* (providing that “[r]ooms may be arranged to allow . . . Soldiers a degree of personal freedom . . .”); *id.* (prohibiting the display of “[p]ictures that show male or female genitalia”); *id.* (prohibiting residents from having overnight guests of either gender). *See also* U.S. DEP’T OF ARMY, REG. 600-20, ARMY COMMAND POLICY para. 4-4 to 4-6 (30 Nov. 2009) (discussing leadership responsibilities regarding Soldier conduct, unit order, and the exercise of military authority). In all cases, commanders must ensure that Soldiers who fail to maintain their housing areas properly are corrected. *Id.* para. 4-6(b).

<sup>69</sup> President Truman ordered the military to integrate African-Americans in 1948. Exec. Order No. 9981, 13 Fed. Reg. 4313 (July 26, 1948). Although it was initiated in 1948, it took several years for military racial integration to be carried out. Jim Garamone, *Historian Charts Six Decades of Racial Integration in U.S. Military* (July 23, 2008), *available at* <http://www.defense.gov/news/newsarticle.aspx?id=50560>. Issues surrounding military racial integration had to be resolved during the course of the Korean War, which began in 1950. *See, e.g.*, PBS, *Chronology of U.S. Military Actions and Wars*, *available at* <http://www.pbs.org/wgbh/amex/warletters/timeline/timeline3.html> (last visited Mar. 27, 2010).

<sup>70</sup> *See, e.g.*, Linda S. Murnane, *Legal Impediments to Service: Women in the Military and the Rule of Law*, 14 DUKE J. GENDER L. & POL’Y 1061, 1065 (2007) (discussing policies regarding pregnancy, pay, entitlements, dependent benefits, and promotion policies that have all changed in order to better accommodate female troops); Juanita M. Firestone, *Sexist Ideology and the Evaluation Criteria Used to Assess Women’s Integration into the Army*, 3 POPULATION RES. & POL’Y Rev. 77 (1984) (discussing issues pertinent to the integration of women into the Army).

African-Americans and women by those seeking their exclusion.<sup>71</sup> These challenges did not, however, prove to be insurmountable or to reduce military effectiveness, nor did the military wait to integrate African-Americans or women until the issues were first completely resolved. Issues surrounding racial integration were still being resolved while America was fighting in the Korean War.<sup>72</sup> Additionally, issues surrounding the inclusion of female servicemembers have incrementally continued to be resolved through the present day.<sup>73</sup> Despite housing, privacy, and other concerns involving the inclusion of both groups, the military has successfully adapted, and is a stronger fighting force because of the integrated service of both groups.<sup>74</sup>

Finally, the assertion that DADT’s repeal will create complicated fiscal issues in terms of housing benefits is also misleading, for three

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<sup>71</sup> See, e.g., RAND, NATIONAL DEFENSE RESEARCH, SEXUAL ORIENTATION AND U.S. MILITARY PERSONNEL POLICY: OPTIONS AND ASSESSMENT 160 (1993) [hereinafter RAND SEXUAL ORIENTATION POLICY], [http://www.rand.org/pubs/monograph\\_reports/2009/MR323part1.pdf](http://www.rand.org/pubs/monograph_reports/2009/MR323part1.pdf) (stating that in the 1940s and 1950s, many white Americans “responded with visceral revulsion to the idea of close physical contact with blacks”). It was feared that quartering “whites and blacks together” in the Armed Forces, and forcing “compulsory interracial associations” would create tension, disrupt work, distract military personnel, impair morale, and undermine unit cohesion and readiness. *Id.* at 172.

<sup>72</sup> Military units were still undergoing integration during the Korean War. See, e.g., Integrating the Armed Forces, available at <http://www.digitalhistory.uh.edu/historyonline/integrating> (last visited May 7, 2010). In units that were integrated, troops “were able to function effectively in all sorts of situations, even in the most demanding battlefield situations, and even if the individuals involved has not experienced prior social integration.” RAND SEXUAL ORIENTATION POLICY, *supra* note 71, at xxi.

<sup>73</sup> See, e.g., Michelle Tsai, *Do Female Soldiers Get Any Privacy?*, SLATE, Mar. 22, 2007, <http://www.slate.com/id/2162464/fr/rss/> (describing a variety of situations and locations around the world in which male and female troops are quartered together and the creative solutions they use to create privacy in shared sleeping quarters; also describing how they deal with conditions in certain missions, e.g., convoys, that require them to urinate in each others’ presence, with little to no privacy); Steven Lee Myers, *Women at Arms: Living and Fighting Alongside Men, and Fitting In*, N.Y. TIMES, Aug. 16, 2009, [http://www.nytimes.com/2009/08/17/us/17women.html?\\_r=2&nl=todaysheadlines&emc=a1](http://www.nytimes.com/2009/08/17/us/17women.html?_r=2&nl=todaysheadlines&emc=a1) (discussing the challenges commanders face at remote military outposts in Iraq and Afghanistan, including housing and privacy issues and the need to provide female troops with access to gynecological care, especially since female and male troops sometimes share sleeping quarters and have little to no privacy). Other issues, such as “harassment, bias, hardship, even sexual relations,” are, according to at least one deployed non-commissioned officer, “a matter of discipline, maturity, and professionalism, rather than an argument for separating the sexes.” *Id.*

<sup>74</sup> See, e.g., U.S. Army, Information Paper: Army Workforce Diversity, available at [http://www.army.mil/aps/08/information\\_papers/sustain/Diversity.html](http://www.army.mil/aps/08/information_papers/sustain/Diversity.html) (last visited Apr. 11, 2010) (asserting that the Army “draws strength from its ethnic and cultural diversity”).

reasons. First, unless and until DOMA is repealed or changed, the military will be precluded from recognizing state-sanctioned same-sex marriages and therefore precluded from providing related housing and financial benefits to GLB couples. Second, marriage can occur among any number of heterosexual couples in the military, without limitation. Third, and related to the second point, preexisting budgeting considerations must accommodate for an unlimited number of marriages based on the number of troops serving, regardless of whether the marriages are heterosexual or homosexual. As a result of these last two points, GLB marriages require no special budgetary considerations because the potential for marriage by all single troops currently serving has presumably been factored into the approved budget for national defense. This author is unaware of any Department of Defense or service-specific policies restricting marriage to only a certain numerical percentage of troops currently serving. Furthermore, benefits now accorded to heterosexual marriage are automatically conferred based on the act of marriage, regardless of couples' reasons for getting married. Absent fraud, heterosexual couples are permitted to marry for a wide variety of reasons (e.g., the financial benefits and stability that come with marriage or as a solution for dealing with unplanned pregnancy), some having little or nothing to do with love.<sup>75</sup> In sum, because the financial benefits of marriage are often a motivating factor for heterosexual couples, nothing should preclude the same considerations among GLB couples.

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<sup>75</sup> See, e.g., DAVID KNOX & CAROLINE SCHACHT, CHOICES IN RELATIONSHIPS: AN INTRODUCTION TO MARRIAGE AND THE FAMILY 207–09 (10th ed. 2010) (discussing various reasons for marriage, including economic security and parenthood); Editorial, *View Poll Results: Should the USMC Implement a Marriage Class for E-5 and Below?*, MIL. TIMES, <http://militarytimes.com/forum/showthread.php?1559611-Marriage-For-E-5-And-Below-USmc> (last visited Apr. 11, 2010) (discussing military marriages based on unanticipated pregnancies and other factors); Tanya Von Essen Robinette, *Top 3 Reasons Not to Get Married in Your Twenties*, CHARLOTTESVILLE EXAMINER (Va.), Nov. 9, 2009, <http://www.examiner.com/x-28716-San-Jose-Twenty-something-Relationships-Examiner~y2009m11d9-Top-3-reasons-not-to-get-married-in-your-twenties> (discussing pregnancy and other factors used by some couples as the basis for marriage).

## V. No Additional Accommodations Are Required for the Successful Repeal of DADT

### A. Repeal Will Not Necessitate Structural Changes

Proponents of DADT suggest that repeal of DADT necessitates total reconfiguration of military barracks and showers and the physical separation of GLBs. This assertion, however, totally disregards the fact that tens of thousands of GLB servicemembers are now—today—living, showering, working, and socializing with heterosexual servicemembers, without incident.<sup>76</sup> Civilian employees, contractors and troops from allied countries—any of whom may be acknowledged GLBs<sup>77</sup>—also share quarters, showers, and workplaces with U.S. troops.<sup>78</sup> Likewise, GLB civilians who share the use of civilian and military gyms across the world already shower with heterosexual servicemembers.<sup>79</sup> Such an

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<sup>76</sup> McGarry, *supra* note 10 (reporting that there are an estimated 66,000 GLB troops currently serving in the Armed Forces).

<sup>77</sup> See, e.g., U.S. DEP’T OF DEF., DIR. 1020.02, DIVERSITY MANAGEMENT AND EQUAL OPPORTUNITY (EO) IN THE DEPARTMENT OF DEFENSE 1 (5 Feb. 2009), [http://www.deomi.org/EOAdvisorToolkit/documents/DoD\\_Directive102002p.pdf](http://www.deomi.org/EOAdvisorToolkit/documents/DoD_Directive102002p.pdf) (prohibiting military departments and combatant commands from discriminating against civilian employees on the basis of sexual orientation); UNIV. OF CAL., MICHAEL D. PALM CTR., GAYS IN FOREIGN MILITARIES 2010: A GLOBAL PRIMER 136 (Feb. 2010) [hereinafter FOREIGN MILITARIES 2010], <http://www.palmcenter.org/files/GaysinForeignMilitaryes2010.pdf> (identifying allied countries which permit GLBs to serve, including Britain, Canada, Australia, and Israel).

<sup>78</sup> This occurs, for example, at the Combined Readiness Center (CRC) at Fort Benning, GA, where deploying Soldiers, civilians, and allied troops share living quarters and open bay showers. Interview with Lieutenant Colonel Nigel Heppenstall, U.K. Army Legal Servs., U.K. Army, at the U.S. Army Legal Ctr. & Sch., Charlottesville, Va. (Mar. 2, 2010) [hereinafter Heppenstall Interview] (describing his experiences at CRC when assigned to the 101st Airborne Division as a British exchange officer); CONUS REPLACEMENT CENTER DEPLOYMENT INFORMATION PACKET 15 (Sept. 28, 2009) [https://www.benning.army.mil/crc/content/CRCmissions\\_deployment.htm](https://www.benning.army.mil/crc/content/CRCmissions_deployment.htm) [hereinafter CONUS INFORMATION PACKET] (describing how military and civilians are housed in the same billets). This practice also occurs at deployment locations, where U.S. troops sometimes share the same rooms and showers with troops from foreign militaries which allow GLBs to serve. Interview with Lieutenant Commander Theron R. Korsak, Joint Operational Law Navy Liaison, at the U.S. Army Legal Center & School, Charlottesville, VA (Mar. 2, 2010) (describing his experiences in Afghanistan, where he shared a room and shower facilities with troops from Canada).

<sup>79</sup> This author is unaware of the existence of any gym that provides separate shower and locker room facilities for acknowledged GLBs, including civilian gyms for which the military contracts for servicemember use. Furthermore, military gyms that allow certain civilian employees to use facilities also do not now provide separate shower/locker room for those employees who may be acknowledged GLBs.

assertion fails to recognize the success of existing housing arrangements, and implicitly presumes that post-repeal homosexual acts could freely take place anywhere at any time without being subject to the rules and regulations that govern barracks life. Current provisions of the UCMJ, military regulations, and command policies, including prohibitions on sexual harassment—which pertain to conduct both in and out of the barracks and community showers—prohibit the most feared scenarios.<sup>80</sup>

Supporters of DADT suggest that if DADT is repealed, servicemembers who are religiously opposed to homosexual practices and who are forced to reside in the barracks may be forced to view or tolerate gay pornography and acts. This claim fails to recognize that these activities are governed by various, overlapping statutes and regulations that apply equally to servicemembers regardless of their gender or sexual orientation. None of these regulations require drastic changes in order to adequately govern misconduct by acknowledged GLB servicemembers who live in the barracks with heterosexual servicemembers. Furthermore, in deployed environments, where sexual conduct is even more restricted, existing policies regulate and prohibit the types of concerns voiced by opponents of repeal.<sup>81</sup> Additionally, in such environments, most servicemembers are more concerned about staying alive than with sexual activity.<sup>82</sup>

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<sup>80</sup> See, e.g., AR 600-20, *supra* note 60, paras. 7-5 & 7-6(b). In deployed areas, particularly, personnel of all genders and sexual orientations are regularly precluded from an even wider range of sexually-related activities, such as the private possession and viewing of any form of pornography. See, e.g., Headquarters, Multi-National Corps-Iraq, Gen. Order No. 1 (4 Apr. 2009), *available at* [http://www.tac.usace.army.mil/deploymentcenter/tac\\_docs/GO-1.pdf](http://www.tac.usace.army.mil/deploymentcenter/tac_docs/GO-1.pdf). Violations of AR 600-20 and Gen. Order No. 1 are punishable under the Uniform Code of Military Justice. UCMJ art. 92 (2008).

<sup>81</sup> Pornography of all types, for example, is prohibited in many deployed areas. See, e.g., Gen. Order No. 1, *supra* note 80. See also sources cited *supra* note 68.

<sup>82</sup> See, e.g., Letter from a Mountain Soldier, MSNBC, *available at* [http://www.msnbc.msn.com/id/35571422/ns/msnbc\\_tv-rachel\\_maddow\\_show](http://www.msnbc.msn.com/id/35571422/ns/msnbc_tv-rachel_maddow_show) (last visited Mar. 2, 2010) (stating that despite his sexual orientation, the only thing the author—an active duty officer currently serving in Afghanistan—thinks about while showering in group showers is getting clean and getting out). This letter was originally posted on 15 February 2010 on the U.S. Army's 10th Mountain Division website, in response to a question from Major General James Terry. Posting from Mountain Soldier (fwd) to "Don't Ask, Don't Tell," *available at* <http://www.taskforcemountain.com/mountain-sound-off/19/4047-qdont-ask-dont-tellq> (Feb. 15, 2010, 12:42). See also Hughes, *supra* note 9 (stating that, despite his sexual orientation, there was "nothing remotely sexual" about having to share showers or quarters with fellow male troops during his deployment to Afghanistan).

## B. Medical Considerations

### 1. DADT Reduces the Quality of Medical Care for GLB Troops

Although GLB servicemembers have access to medical and mental health care systems, their ability to fully use these services is limited because service providers sometimes report evidence of their clients’ homosexuality to commanders or note it in records to which commanders have access.<sup>83</sup> According to the American Medical Association (AMA), DADT impedes honest and open patient-physician communication, leading to poorer healthcare.<sup>84</sup> Without assurances of confidentiality, GLBs are not free to seek medical or psychological care without putting themselves at risk for discovery. This creates an unhealthy and potentially dangerous situation for them and their loved ones. For instance, GLB troops whose personal relationships are unraveling due to the stress of multiple deployments, may refuse to seek help because doing so will likely result in exposure of their sexual orientation. Although recent limitations on DADT appear to address medical and mental health confidentiality, such protections are untested.<sup>85</sup>

Multiple deployments put tremendous stress on servicemembers and their families,<sup>86</sup> including those who are GLB. According to the Chairman of the Joint Chiefs of Staff, Admiral Mike Mullen, the key to effectively dealing with this is “getting people who need [mental health care] to seek [it] without fear that it will damage their reputation or

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<sup>83</sup> GENERAL/FLAG OFFICERS’ STUDY GROUP, *supra* note 28, at 7 (describing how DADT prevents some GLB troops from obtaining psychological care, medical care, and religious counseling).

<sup>84</sup> AM. MED. ASS’N RESIDENT AND FELLOW SEC., RESOLUTION 1: MEDICAL CONFIDENTIALITY IN “DON’T ASK, DON’T TELL” (Nov. 2009), <http://www.ama-assn.org/ama1/pub/upload/mm/16/i-09-soa.pdf> (indicating the AMA’s support for the repeal of DADT).

<sup>85</sup> See, e.g., Leo Shane III, *Changes in DADT Enforcement Could Leave Outed Troops in the Ranks*, STARS & STRIPES, Mar. 26, 2010, <http://www.stripes.com/article.asp?section=104&article=68912>.

<sup>86</sup> Press Release, Donna Miles, U.S. Department of Defense Military Health System, Mullen Encourages Troops to Seek Mental Health Care When Needed (Feb. 10, 2009), <http://www.health.mil/Press/Release.aspx?ID=541>; Campbell Robertson & Ray Rivera, *Strain of Military Service Meets Resolve to Carry On*, N.Y. TIMES, Dec. 2, 2009, at A15; Kimberly Hefling, *Increase in Suicide Rate of Veterans Noted*, ARMY TIMES, Jan. 12, 2010, [http://www.armytimes.com/news/2010/01/ap\\_vet\\_suicide\\_011110/](http://www.armytimes.com/news/2010/01/ap_vet_suicide_011110/) (discussing the fact that the Army’s suicide rate reached an all-time high in 2009, and that there has been a 25% increase in the suicide rate of Army veterans aged 18–29).

military career.”<sup>87</sup> Enabling GLB troops to communicate fully and honestly with physical and mental health care providers will contribute to their physical, mental, and emotional health, thereby strengthening our Armed Forces.

2. *The Presence of GLB Servicemembers Has Not Been Shown to Affect the Rate of Sexually Transmitted Diseases Within the Military*

Proponents of DADT claim that its repeal will affect military medical readiness because acknowledged GLB servicemembers will increase AIDS, other sexually transmitted diseases, and physical injuries within the military. The estimated 66,000 GLBs already serving, however, have not had this effect.<sup>88</sup> Some may claim that GLBs engage in promiscuous sex, sex with “multiple partners,” acts of “penile-anal, mouth-penile . . . hand-anile” and “mouth-anal” contact, S/M, and “intense genital penetration,” and that the presence of acknowledged GLBs will affect military medical readiness in the wake of DADT’s repeal.<sup>89</sup> This argument is misplaced though because it relies on overarching stereotypes that have no proven basis for all GLBs or those already serving in the military. This rhetoric completely ignores the fact that many GLBs do not engage in such acts<sup>90</sup> while many heterosexuals do. Heterosexuals, including those in the military, sometimes engage in promiscuous sex, sex with multiple partners, oral sex, anal sex, and S/M, the very same behaviors often criticized and mischaracterized as predominantly homosexual.<sup>91</sup>

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<sup>87</sup> Donna Miles, Mullen Encourages Troops to Seek Mental Health Care When Needed, U.S. Department of Defense (Feb. 9, 2009), <http://www.defense.gov/news/newsarticle.aspx?id=53012>; Sergeant First Class Michael J. Carden, Mullen Voices Concern with Military Suicide Rate, Joint Chiefs of Staff, Jan. 13, 2010, <http://www.jcs.mil/newsarticle.aspx?id=208> (discussing the growing problem of suicide within the military community, the toll multiple deployments have taken on troops and their families, and the need to take care of them).

<sup>88</sup> Bunn, *supra* note 24, at 231–35.

<sup>89</sup> *Id.* at 232.

<sup>90</sup> Many GLBs, for example, elect not to engage in sexually promiscuous behavior or partner swapping—instead electing to marry and remain in monogamous long-term relationships—as evidenced by the current civil rights movement for the GLB right to marry. Similarly, not all gay men engage in anal sex. JUNE M. REINISCH & RUTH BEASLEY, THE KINSEY INSTITUTE NEW REPORT ON SEX 137 (1991) (citing to the results of a study on the issue). See also CARROLL, *supra* note 54, at 271 (citing to the results of a 1994 study indicating that not all gay men engage in anal sex). The two most common methods of gay sex are fellatio and mutual masturbation, not anal sex. *Id.*

<sup>91</sup> *Supra* Part II.B.

The military has always contended with the threat of sexually transmitted diseases and sexual injuries apart from the issue of homosexuality. Many heterosexual troops historically frequented prostitutes and, today, continue to engage in sexually promiscuous behaviors that expose them to a variety of dangerous and deadly communicable diseases, including Acquired Immune Deficiency Syndrome (AIDS), Syphilis, Chlamydia, Gonorrhea, and other illnesses.<sup>92</sup> As a result of the various sexual activities of all servicemembers—male and female, gay, and straight—the military has implemented extensive preventative education programs and mandates routine Human Immunodeficiency Virus (HIV) testing to prevent the spread of sexually transmitted diseases and to identify and treat those who contract them.<sup>93</sup> These programs keep America’s troops in healthy fighting condition and will continue to do so when DADT is repealed. Just as the military does not, based on these medical concerns, preclude military service for the thousands of GLBs currently servicing in silence, neither should it preclude their service based on a choice to acknowledge sexual orientation and live free from the burden of secret, hidden, double lives.

## VI. The Experience of American Paramilitary Organizations and Westernized Foreign Militaries Supports Repeal of DADT

### A. GLBs in American Paramilitary Organizations

Many American paramilitary organizations—including the Federal Bureau of Investigation, Central Intelligence Agency, municipal fire and police departments, and Department of Defense (DoD) contractors—currently allow acknowledged GLB individuals to serve in their organizations.<sup>94</sup> While there are clearly differences between civilian and

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<sup>92</sup> See, e.g., Choe Sang-Hun, *Ex-Prostitutes Say South Korea and U.S. Enabled Sex Trade Near Bases*, N.Y. TIMES, Jan. 7, 2009, [http://www.nytimes.com/2009/200901/08/world/asia/08korea.html?\\_r=1](http://www.nytimes.com/2009/200901/08/world/asia/08korea.html?_r=1); MARILYN E. HEGARTY, VICTORY GIRLS, KHAKI-WACKIES, AND PATRIOTUTES 28, 33 (2008); Staff Sergeant Kathleen T. Rhem, *STDs Still a Real Threat, Even at Home* (May 31, 2000), available at <http://www.defense.gov/news/newsarticle.aspx?id=45172>.

<sup>93</sup> See, e.g., U.S. DEP’T OF DEF., INSTR. 6485.01, HUMAN IMMUNODEFICIENCY VIRUS para. 6 (17 Oct. 2006) (mandating HIV testing at various intervals); U.S. DEP’T OF DEF., DIR. 6485.01, HUMAN IMMUNODEFICIENCY VIRUS-1 (HIV-1) (19 Mar. 1991).

<sup>94</sup> Central Intelligence Agency (CIA), Application Process, <https://www.cia.gov/careers/application-process/index.html#Clearance> (last visited Mar. 7, 2010) (stating that the CIA “does not discriminate on the basis of . . . sexual orientation”); Fed. Bureau of

military organizations, such as better control over privacy in the paramilitary workplace, and different missions and operational approaches,<sup>95</sup> the paramilitary experiences are both pertinent and instructive to the U.S. military in two important ways.

First, despite the differences above, these organizations share many similarities with military units: They conduct hazardous and potentially life-threatening training and operations, rely on a high degree of teamwork, have hierarchical structures with a well-defined chain of command, and feature shared locker rooms, showering facilities, and living space with minimal privacy.<sup>96</sup> Many members of these paramilitary organizations even “have a military background and share values held by military servicemembers.”<sup>97</sup> A 1993 study observed that some of these organizations emphasize traditional family values and conservative religious beliefs, much like segments of the Armed Forces.<sup>98</sup> Despite the presence of openly gay personnel in their ranks, close quarters, and intense missions, however, researchers found no known homosexual assaults and far fewer problematic incidents involving homosexual employees than those involving “heterosexual men harassing women.”<sup>99</sup>

Second, members of paramilitary organizations—including those who are acknowledged GLBs—currently serve with American troops in carrying out many official duties. Many U.S. servicemembers work side-by-side with paramilitary employees, any number of whom may be GLB, at locations throughout the world, sometimes sharing the very same quarters and shower facilities,<sup>100</sup> with no reported problems associated with such living arrangements.

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Investigation (FBI), Diversity, *available at* <http://www.fbijobs.gov/1114.asp> (stating that the FBI employee selection process is done “without regard to . . . sexual orientation”); U.S. GEN. ACCOUNTING OFF., DOD’S POLICY ON HOMOSEXUALITY 6 (1992) [hereinafter GAO HOMOSEXUALITY POLICY], <http://archive.gao.gov/d33t10/146980.pdf> (stating that since the 1970s, police and fire departments have increasingly hired GLB personnel and adopted policies prohibiting discrimination based on sexual orientation); RAND, SEXUAL ORIENTATION AND U.S. MILITARY PERSONNEL POLICY, *supra* note 71, at 106.

<sup>95</sup> RAND SEXUAL ORIENTATION POLICY, *supra* note 71, at 108, 157.

<sup>96</sup> *Id.* at 108.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 117.

<sup>99</sup> *Id.* at 18.

<sup>100</sup> *See supra* note 78 (discussing the observations of Lieutenant Colonel Heppenstall and military policies regarding shared housing in CONUS).

## B. GLBs in the Armed Forces of Westernized Foreign Nations

At least twenty-five nations allow homosexuals to serve openly in their Armed Forces, including the United Kingdom.<sup>101</sup> Although the United States military is—by virtue of its size, missions, structure, and worldwide deployments—different from the military forces of other nations, it shares with them a concern for military effectiveness, the well-being of its servicemembers, and the need to minimize stressors within the ranks.<sup>102</sup> Like American forces, many of these foreign militaries are hierarchical, conduct life-threatening missions, rely on teamwork, discipline, and unit cohesion, and require servicemembers to share locker rooms, shower facilities, and quarters with minimal privacy. Some nations once banned GLBs from military service based the same rationale underlying DADT.<sup>103</sup> This is significant because (a) as is the case with American paramilitary organizations, the subsequent presence of acknowledged GLB personnel within their ranks has been relatively problem-free, with no negative impact on unit cohesion or military effectiveness, and (b) these nations deploy, serve alongside, and sometimes share quarters and showers with American troops in a broad spectrum of operations and locations.<sup>104</sup>

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<sup>101</sup> PALM CTR. GAYS IN FOREIGN MILITARIES 2010, *supra* note 77, at 135. Nations allowing acknowledged GLBs to serve in the military include Australia, Austria, Canada, France, Germany, Ireland, Israel, Italy, Lithuania, Netherlands, New Zealand, Norway, South Africa, Spain, Sweden, Switzerland, and the United Kingdom. *Id.*

<sup>102</sup> RAND, SEXUAL ORIENTATION AND U.S. MILITARY PERSONNEL POLICY, *supra* note 71, at 65.

<sup>103</sup> *See, e.g., id.* at 75 (stating that, prior to 1992, GLBs were banned from Canadian military service based on the belief that homosexuality is incompatible with military service); *id.* at 100 (stating that Britain’s former ban was based on claims that homosexuality undermines cohesion and good military order; undermines recruiting, and interferes with bonding); PALM CTR., GAYS IN FOREIGN MILITARIES 2010, *supra* note 77, at 2.

<sup>104</sup> PALM CTR., GAYS IN FOREIGN MILITARIES 2010, *supra* note 77, at 2–3 (observing how allied nations that lifted similar bans have experienced improved command climates and no negative impact on morale, recruitment, retention, readiness, or overall combat effectiveness); CAPTAIN M. SUHRE, CHANGING THE DEPARTMENT OF DEFENSE’S POLICY ON HOMOSEXUALS 9–10 (Feb. 19, 2008) (unpublished research paper), <http://www.dtic.mil/cgiibin/GetTRDoc?AD=ADA508994&Location=U2&doc=GetTRDoc.pdf> (discussing the fact that U.S. forces deploy with foreign troops and American civilians, any of whom may be acknowledged GLB). Heppenstall Interview, *supra* note 78 (stating that he shared a room and shower facilities with a U.S. military officer while deployed to Afghanistan); Interview with Lieutenant Commander Theron R. Korsak, Joint Operational Law Navy Liaison, in Charlottesville, Va. (Mar. 2, 2010) (stating that he shared rooms, tents, and shower facilities with Canadian officers and enlisted troops while deployed to Afghanistan).

Proponents of DADT discount the value of examining other countries' experiences and suggest that America's Armed Forces did not become the strong fighting force they now are by following the practices of foreign nations.<sup>105</sup> Consideration of other countries' experiences is vital, however, not as a basis for uninformed duplication of policies, but as direct evidence of the successful integration of acknowledged GLBs in military organizations with structures, cultures, values, and concerns similar to our own.<sup>106</sup> Foreign experiences provide the only existing evidence of this kind and signal that the U.S. military will successfully adapt to the repeal of DADT.

### 1. *United Kingdom*

While there are certainly differences between the United Kingdom and the United States, cultural, moral, and military similarities between the two make the United Kingdom's experience relevant to DADT's repeal. For instance, while the U.K. is significantly smaller than the United States in terms of land mass, population, and number of military troops, its religious, educational, and health demographics are strikingly similar to ours.<sup>107</sup> Like the United States, it has four national military

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<sup>105</sup> See, e.g., Elaine Donnelly, *Foreign Militaries Are Not Role Models for U.S.*, Oct. 12, 2009, <http://cmrlink.org/HMilitary.asp?docID=357> (urging readers to disregard the experiences of the United Kingdom because it "demonstrated fundamental differences with American culture" when it "capitulat[ed]" to a court order forcing its military forces to allow GLBs to serve); Captain L.S. Christian, Jr., *Military Gay Ban Revisited: Is Our Military Ready for Change?* (Feb. 20, 2009) (unpublished research paper), available at <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA509883&Location=U2&doc=GetTRDoc.pdf>.

<sup>106</sup> American military leaders routinely study the experiences of foreign countries when analyzing and studying military issues. See, e.g., Ctr. for Law & Mil. Operations (CLAMO), *Mission*, <https://www.jagcnet.army.mil/8525751D00557EFF/0/DF50565CF3AB391D852574A2004C3A7B?opendocument> (last visited Apr. 19, 2010) (discussing the CLAMO's mission of collecting and synthesizing "data relating to legal issues arising in military operations" and describing the CLAMO as a "multinational legal center"). Although policies have been successfully instituted in foreign militaries, this does not guarantee their successful implementation in America's Armed Forces. Telephone Interview with Dr. Donald P. Wright, Chief of Research and Publ'ns, U.S. Army Combat Studies Inst. (Apr. 19, 2010). The success of such policies, however, still provides crucial insight on pivotal issues and aids in their analysis. *Id.* ("If we can learn tactical lessons from foreign militaries, we can learn policy lessons as well.")

<sup>107</sup> In terms of religion, both nations are predominantly Christian. U.S. Central Intelligence Agency, *The World Factbook: United Kingdom*, available at <https://www.cia.gov/library/publications/the-world-factbook/geos/uk.html> [hereinafter *CIA Factbook U.K.*] (last visited Mar. 3, 2010); U.S. Central Intelligence Agency, *The*

organizations—an Army, Air Force, Navy, and Marine Corps (the Marines fall under the Navy, much as they do in the United States).<sup>108</sup> Like America’s Armed Forces, the United Kingdom’s military is comprised of all-volunteer troops who view their service as a profession.<sup>109</sup> The United Kingdom’s armed forces are “strong, voluntary, and combat tested” and train, deploy, conduct joint missions, and sometimes share living quarters with American forces.<sup>110</sup> Most significantly, the United Kingdom has a history, like the United States, of banning gays from military service based on the same reasons cited in support of DADT.

Prior to January 2000, gays were completely banned from military service.<sup>111</sup> Unlike other European countries, the United Kingdom’s societal and military opposition to homosexuals was framed in terms of morality, and was just as strong—if not stronger—than it has been in the United States.<sup>112</sup> Troops who engaged in homosexual behavior risked not only being administratively discharged, but criminally charged with “‘conduct prejudicial to good order or discipline’ or ‘scandalous conduct by officers.’”<sup>113</sup> Heterosexual troops were expected to “inform on anyone they suspected of being gay” and gay troops who chose to serve did so in secret.<sup>114</sup> They were required to lie “to close friends and

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World Factbook: United States, [hereinafter CIA Factbook U.S.], available at <https://www.cia.gov/library/publications/the-world-factbook/geos/us.html> (detailed information on the United States). In the United States, approximately 20% of churchgoers attend church on a weekly basis. N. Am. Mission Bd., Special Report: The American Church in Crisis, available at <http://www.namb.net/site/apps/nl/content3.asp?c=9qKILUOzEpH&b=1594355&ct=2350673> (last visited Mar. 4, 2010). In Britain, approximately 10% of churchgoers attend church on a weekly basis. Religion in the United Kingdom (July 5, 2007), available at <http://www.vexen.co.uk/UK/religion.html>.

<sup>108</sup> CIA Factbook U.K., *supra* note 107; *see also* CIA Factbook U.S., *supra* note 107 (providing detailed information on the United States).

<sup>109</sup> RAND SEXUAL ORIENTATION POLICY, *supra* note 71, at 71.

<sup>110</sup> FRANK, *supra* note 5, at 142.

<sup>111</sup> Terri Judd, *How the Forces Finally Learnt to Take Pride*, INDEP., July 27, 2009, <http://www.independent.co.uk/news/uk/home-news/how-the-forces-finally-learnt-to-take-pride-1762057.html>.

<sup>112</sup> RAND SEXUAL ORIENTATION POLICY, *supra* note 71, at 73 (stating that unlike the citizens of other European nations studied, those in the United Kingdom, like many in the United States, view homosexuality in terms of morality, and that many British GLBs have historically been more uncomfortable than Americans in terms of revealing their sexual orientation).

<sup>113</sup> FRANK, *supra* note 5, at 142; RAND SEXUAL ORIENTATION POLICY, *supra* note 71, at 100–01.

<sup>114</sup> Judd, *supra* note 111.

bosses,” lived in constant fear of the Special Investigation Branch, and worried about losing their careers, income, and retirement.<sup>115</sup>

In support of its ban, United Kingdom’s military and political leaders made the same arguments and voiced the same concerns that have been offered by proponents of DADT, including privacy, morality, and the belief that homosexuals were deviant carriers of sexually transmitted diseases.<sup>116</sup> In the 1990s, military leaders and military courts rejected challenges to the ban based on the widely-held belief that heterosexual Soldiers disliked gays and that allowing gays to serve would “undermine cohesion and threaten recruitment.”<sup>117</sup> The British Ministry of Defense asserted that homosexuality was offensive and detrimental to discipline, morale, and unit effectiveness, a sentiment publicly echoed in the media by at least one retired British general.<sup>118</sup> Proponents of the ban cited the results of a 1996 poll of 13,500 troops, in which two-thirds of respondents indicated they would refuse to serve with gays.<sup>119</sup> The sentiment of some U.K. servicemembers was a fear that “they would get raped in their beds” following repeal of the ban.<sup>120</sup> According to one officer, “the thought of two men dancing at a mess function was more than some people could cope with.”<sup>121</sup> Despite these concerns, the European Court of Human Rights agreed to hear a 1999 case challenging the United Kingdom’s ban on gays, and ultimately ruled that the ban violated the European Convention (to which the United Kingdom is a party). It was only then, based on a judicial ruling, that the United Kingdom lifted its ban.<sup>122</sup>

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<sup>115</sup> *Id.*

<sup>116</sup> PALM CTR., GAYS IN FOREIGN MILITARIES 2010, *supra* note 77, at 9–11; RAND SEXUAL ORIENTATION POLICY, *supra* note 71, at 73 (discussing the fact that the United Kingdom, unlike other European nations, has historically viewed homosexuality as a moral issue); FRANK, *supra* note 5, at 142, 146.

<sup>117</sup> RAND SEXUAL ORIENTATION POLICY, *supra* note 71, at 100 (stating that “[m]any of the arguments put forward by the United Kingdom military establishment against allowing homosexuals to serve are similar to those used in the United States” and that “it is claimed that homosexuality undermines cohesion and good military order . . . recruiting . . . and interferes with confidence building and bonding in small groups”); FRANK, *supra* note 5, at 143.

<sup>118</sup> FRANK, *supra* note 5, at 142.

<sup>119</sup> *Id.* at 147.

<sup>120</sup> Judd, *supra* note 111.

<sup>121</sup> *Id.*

<sup>122</sup> Editorial, *Britain Ends Ban on Gays in Military*, DESERET NEWS, Jan. 13, 2000, at A4, <http://news.google.com/newspapers?id=n7ERAAAIBAJ&sjid=ee0DAAAIBAJ&pg=2365,682540&dq=uk+history+gays+in+military&hl=en>.

When the United Kingdom lifted its ban, “none of the [predicted] crisis in recruitment, retention, resignations, morale, cohesion, readiness, or ‘operational effectiveness’ came to pass.”<sup>123</sup> Contrary to the assertion that the ban’s repeal led to resignations that significantly impacted the U.K.’s armed forces,<sup>124</sup> current reports indicate that no widespread spate of resignations or any significant impact occurred.<sup>125</sup> In an internal review conducted more than two years after the ban’s repeal, a government official found that, although not all troops approved of the new policy, its implementation was successful and caused “no real problems of harassment or victimization.”<sup>126</sup> Navy commanders reported that “the problems initially perceived have not been encountered,” and Air Force leaders reported there was “no tangible impact on operational effectiveness, team cohesion, or service life generally.”<sup>127</sup> Army leaders commented that the new policy caused no significant changes.<sup>128</sup> The British Government, instead, found it to be a “solid achievement” with a “marked lack of reaction.”<sup>129</sup> Assistant Chief of the Navy Staff, Rear-Admiral James Burnell-Nugent, reported that while some did not welcome the ban’s repeal, it did not cause “any degree of difficulty.”<sup>130</sup>

Contrary to the dire, drastic predictions made by proponents of its ban, United Kingdom troops experienced less anxiety about gays than predicted, greater openness in their interactions with one another, and increased access to recruiting pools at schools and universities that had previously excluded recruiters from their campuses.<sup>131</sup> According to a study conducted by the Ministry of Defence, servicemembers “demonstrated a mature and pragmatic approach,” with no reported incidents of homosexuals harassing heterosexuals and no negative impact

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<sup>123</sup> FRANK, *supra* note 5, at 145.

<sup>124</sup> Bunn, *supra* note 24, at 238.

<sup>125</sup> PALM CTR., GAYS IN FOREIGN MILITARIES 2010, *supra* note 77, at 35.

<sup>126</sup> U.K. MINISTRY OF DEF. SERVICE PERSONNEL BOARD, TRI-SERVICE REVIEW OF THE ARMED FORCES POLICY ON HOMOSEXUALITY AND CODE OF SOCIAL CONDUCT (Dec. 2002) [hereinafter U.K. MINISTRY OF DEF.] (on file with author). The author wishes to thank Dr. Nathaniel Frank for providing a copy of this report. For additional information regarding reports pertaining to the United Kingdom’s post-2000 policy on GLBs in the military, see Aaron Belkin, *DADT: Is the Gay Ban Based on Military Necessity?*, 33 PARAMETERS 108, 111 (2003).

<sup>127</sup> U.K. MINISTRY OF DEF., *supra* note 126.

<sup>128</sup> *Id.*

<sup>129</sup> Belkin, *supra* note 126, at 111 (citing to a British Government report).

<sup>130</sup> *Id.*

<sup>131</sup> FRANK, *supra* note 5, at 145.

on recruiting.<sup>132</sup> Accordingly, former leading proponents of the ban have since conceded that its repeal did not damage the Armed Forces.<sup>133</sup>

## 2. *Canada and Australia*

Like the United States and United Kingdom, Canada and Australia historically banned gays from serving in the military based largely on moral beliefs as to the nature of homosexuality.<sup>134</sup> Prior to repeal of the Canadian ban, Canadian troops who suspected peers of being gay were required to report their suspicion to their chain of command.<sup>135</sup> Sixty-two percent of Canadian troops surveyed indicated they would refuse to share sleeping and shower areas with GLBs and forty-five percent said they would refuse to work with or for a GLB Soldier if the ban was lifted.<sup>136</sup> In line with these opinions, researchers predicted that the presence of GLBs would cause a “serious decrease in operational effectiveness.”<sup>137</sup> Even after the ban was lifted, the Department of National Defence continued arguing for its reinstatement, claiming that the presence of openly gay troops violated the privacy rights of others and put military morale, discipline, recruiting, and medical fitness at risk.<sup>138</sup> In Australia, alike, spokesmen for the country’s largest veterans’ group similarly opposed repeal of its ban, citing risks to morale and military performance.<sup>139</sup> Australian military officers threatened to resign if forced to serve with gays,<sup>140</sup> voicing vehement opposition to gay troops based on concerns over unit cohesion, military effectiveness, and the spread of AIDS through battlefield blood transfusions.<sup>141</sup>

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<sup>132</sup> *Id.*

<sup>133</sup> Belkin, *supra* note 126, at 111 (based on interviews of 104 experts from the United Kingdom, Canada, Israel, and Australia and a review of 662 related documents and articles).

<sup>134</sup> RAND SEXUAL ORIENTATION POLICY, *supra* note 71, at 73 (documenting how Canada, the United Kingdom, and the United States all share this similarity).

<sup>135</sup> U.S. GEN. ACCOUNTING OFF., HOMOSEXUALS IN THE MILITARY: POLICIES AND PRACTICES OF FOREIGN COUNTRIES 29 (June 1993) [hereinafter GAO FOREIGN COUNTRY PRACTICES], <http://archive.gao.gov/t2pbat5/149440.pdf>. There is a typographical error in the pagination of the online report with two pages numbered “29.” This citation refers to the second of these two pages.

<sup>136</sup> PALM CTR., GAYS IN FOREIGN MILITARIES 2010, *supra* note 77, at 51.

<sup>137</sup> *Id.* at 15.

<sup>138</sup> FRANK, *supra* note 5, at 138.

<sup>139</sup> Belkin, *supra* note 126, at 111.

<sup>140</sup> *Id.* at 110.

<sup>141</sup> PALM CTR., GAYS IN FOREIGN MILITARIES 2010, *supra* note 77, at 17.

When the bans against gays were lifted in both countries in 1992, however, none of these dreadful predictions materialized.<sup>142</sup> A comprehensive study conducted in 2000 by the Palm Center at the University of California, Santa Barbara, assessed the effect of openly gay troops in Canada, Australia, Israel, and the United Kingdom. The study found no reported reduction in military cohesion, recruitment, or retention in any of their military organizations, nor any reported increase in HIV rates.<sup>143</sup> A Canadian military assessment stated that, “despite all the anxiety that existed . . . about the change in policy, here’s what the indicators show—no effect.”<sup>144</sup> Similarly, Australian military and defense officials reported that repeal of the ban was accepted in “true military tradition,”<sup>145</sup> resulting in “an absolute non-event.”<sup>146</sup> According to Bronwen Grey, an Australian Defence Ministry official, “There was no increase in complaints about gay people or by gay people. There was no known increase in fights, on a ship, or in Army units. . . . The recruitment figures didn’t alter.”<sup>147</sup>

While some may assert that Australian military forces are too different from American forces for any valid comparison to be drawn, highlighting how, in 2008, the Australian Navy “completely shut down to provide a two month break for Christmas,”<sup>148</sup> this comment is based on an overly-broad misstatement of fact. While the Australian Navy did go to minimal manning for a two-month period over Christmas of that year, it did not completely shut down. Australia’s naval ships and submarines that had been serving on deployments continued with their missions during this time, and the remaining non-mission essential navy vessels maintained crews of sailors on board to man them.<sup>149</sup> The Navy furthermore maintained all of its operational taskings and emergency

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<sup>142</sup> FRANK, *supra* note 5, at 148; RAND SEXUAL ORIENTATION POLICY, *supra* note 71, at 73 (implementing the change in policy in Canada did not pose any major problems); PALM CTR., GAYS IN FOREIGN MILITARIES 2010, *supra* note 77, at 2, 6.

<sup>143</sup> FRANK, *supra* note 5, at 148; Belkin, *supra* note 126, at 109–1.1

<sup>144</sup> *Id.* at 147 (citing to an assessment conducted by a bureau of the Canadian military).

<sup>145</sup> Belkin, *supra* note 126, at 110 (quoting Professor Hugh Smith, an academic expert on homosexuality in the Australian military).

<sup>146</sup> *Id.* (quoting Australian Commodore R.W. Gates [the equivalent of a one-star admiral]).

<sup>147</sup> *Id.*

<sup>148</sup> Bunn, *supra* note 24, at 243.

<sup>149</sup> Editorial, *Australia’s Navy Is Awarded a Two-Month Christmas Holiday*, DAILY MAIL ONLINE, Nov. 18, 2008, <http://www.dailymail.co.uk/news/article-1086984/Australias-navy-awarded-month-Christmas-holiday--pay.html>.

standby requirements.<sup>150</sup> It should be noted that American military troops, too, are sometimes granted extensive blocks of paid, uncharged administrative time off—for a month or longer, in some cases—such as the uncharged leave granted to troops redeploying from tours in Afghanistan.<sup>151</sup> Additionally, American units also typically go down to minimal manning, sometimes taking block leave, over the Christmas holiday.<sup>152</sup>

### 3. Israel

Despite its conscription-based military force, Israel, too, has struggled with the issue of gays in the military. Although recruiting is not a significant issue within the Israeli Army (all citizens, with few exceptions, are required to serve), retention, operational effectiveness, and unit morale and cohesion are, as Israel is reportedly the most battle-tested, experienced army in the world.<sup>153</sup> Although Israel has had no outright ban against GLBs in the military, they were, until recently, typically dismissed because many commanders believed homosexuality rendered them incompatible with military service.<sup>154</sup> Traditional Jewish religious thought considers homosexuality to be an “egregious sin,” and

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<sup>150</sup> Adrian Crawford, *Navy Personnel Deserve Time Off*, AUST. BROADCASTING CORP., Nov. 18, 2008, <http://www.abc.net.au/news/stories/2008/11/18/2423225.htm>.

<sup>151</sup> William H. McMichael, *A New Deployment Compensation Plan*, ARMY TIMES, Apr. 20, 2007, [http://www.armytimes.com/news/2007/04/military\\_deploymentpay\\_leave\\_070418w/](http://www.armytimes.com/news/2007/04/military_deploymentpay_leave_070418w/).

<sup>152</sup> See, e.g., Luke Waack, *Holiday Block Leave Begins*, GUIDON, Dec. 20, 2007, [http://www.myguidon.com/index.php?option=com\\_content&task=view&id=6201](http://www.myguidon.com/index.php?option=com_content&task=view&id=6201) (describing the exodus of more than 6500 Soldiers from Fort Leonard Wood in December 2007 during “Holiday Block Leave,” and stating that block leave allows personnel to spend the holiday season with their families); Don Kramer, *Soldier Train on New Strykers* (June 27, 2008), available at <http://www.army.mil/-news/2008/06/27/10429-soldiers-train-on-new-strykers/> (discussing a break in a Stryker battalion’s operational tempo during holiday block leave); Major T.G. Taylor, *Ivy Division: Forward Deployed, Preparing to Deploy*, NEWS BLAZE, Oct. 6, 2008, <http://newsblaze.com/story/20081006070242zmil.nb/topstory.html> (discussing an infantry brigade’s scheduled holiday block leave).

<sup>153</sup> RAND SEXUAL ORIENTATION POLICY, *supra* note 71, at 85–97 (discussing conscription, and the fact that Israel’s defense forces have “unparalleled” warfighting experience based on its involvement, since 1948, in at least four major wars, countless major operations against hostile enemies, and more recent occupation of the West Bank and Gaza strip); Joseph Fitchett, *And Interwoven with Civil Life: An Army Forged by Wars*, N.Y. TIMES, Apr. 29, 1998, <http://www.nytimes.com/1998/04/29/news/29iht-isdef.t.html?pagewanted=1> (asserting that no army forces are as battle-tested as Israel’s).

<sup>154</sup> FRANK, *supra* note 5, at 140.

Israeli attitudes toward homosexuality have historically been more negative than those in America.<sup>155</sup> In spite of religious, cultural, and military resistance, Israel passed a law in 1993 prohibiting discrimination against GLB troops. Since then, Israel’s military forces have successfully adapted to the change with no reported decline in unit morale, cohesion, or effectiveness.<sup>156</sup>

#### 4. “Overarching Concerns”

Some may assert that differences between U.S. criminal laws and foreign criminal laws create “overarching concerns” that make the experience of foreign militaries inapplicable. They may claim, for example, that foreign nations differ in their “liberal views on sexuality in general,” which are “reflected in toleration for sexual relationships that would be entirely illegal in the United States.”<sup>157</sup> In support of this contention, they may provide examples of foreign laws that assess no criminal liability for those who engage in sexual intercourse with minors between the ages of twelve and sixteen, when the would-be offender is close in age (e.g., within two years), and claims such standards are “not comparable to the Uniform Code of Military Justice or most state laws in the United States.”<sup>158</sup> This assertion, however, is based on incorrect and overly-broad statements of fact. Most states in the United States, like Israel, Britain, Canada, and Australia, have provisions which provide an affirmative defense to the crime of statutory rape where the age difference between the sexual partners is only a few years apart. In New York, for example, a defendant accused of having sex with a minor as young as thirteen-years-old has an affirmative defense to the crime of rape if his age is within four years of the minor’s.<sup>159</sup> Most states have

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<sup>155</sup> RAND SEXUAL ORIENTATION POLICY, *supra* note 71, at 86 (stating the majority of Israelis are non-observant but nevertheless heavily influenced by traditional Judaic views on homosexuality [and] because of this, “homosexuality is perceived in Israel to be aberrant behavior and homosexuals are not generally accepted”); Amia Lieblich & Gitza Friedman, *Attitudes Toward Male and Female Homosexuality and Sex-Role Stereotypes in Israeli and American students*, 12 SEX ROLES 1573 (1985) (discussing findings indicating that Israelis are more homophobic and conservative in terms of sex-role orientation than are Americans).

<sup>156</sup> FRANK, *supra* note 5, at 145; RAND SEXUAL ORIENTATION POLICY, *supra* note 71.

<sup>157</sup> Bunn, *supra* note 24, at 244.

<sup>158</sup> *Id.*

<sup>159</sup> Telephone Interview with Anthony J. Colleluori, Attorney and past President of the Nassau County Criminal Courts Bar Association, Anthony J. Colleluori & Associates (May 14, 2010). *See also* Anthony John Colleluori, Understanding New York Statutory

similar provisions and age-range affirmative defenses to the crime of statutory rape.<sup>160</sup> Even the UCMJ provides an affirmative defense to statutory rape for servicemembers who engage in sexual intercourse and other sexual acts with their spouse when the spouse is under the age of sixteen.<sup>161</sup>

Other countries' experiences provide compelling evidence about the outcome of repealing military gay bans in units with cultures, structures, and missions similar to ours. According to Brigadier General Dennis Laich, a retired Army general with decades of experience leading American Soldiers, proponents of the ban who claim otherwise are "ignoring the long standing opinion of historians, sociologists, economists, and political scientists who maintain that there are legitimate . . . links between the United States and . . . and other countries . . . that have recently allowed gays and lesbians to openly serve."<sup>162</sup> These foreign experiences are not only relevant, but indicative of the fact that the U.S. military will successfully adapt when DADT is repealed.<sup>163</sup>

## VII. Neither State Nor Federal Statutes Preclude DADT's Repeal

### A. DOMA Does Not Preclude DADT's Repeal

Since 1996, state marriage laws have been subject to Public Law 104-199, the Federal Defense of Marriage Act.<sup>164</sup> The DOMA contains two key parts aside from its definition:

Section two relieves states from any legal obligation to recognize, legalize, or give effect to same-sex marriages or civil unions—though it does not prohibit states from legalizing or recognizing same-sex marriages or unions if they choose to do so.

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Rape Laws: The Age of Consent, *available at* <http://www.avvo.com/legal-guides/New-York-Age-Consent> (last visited Apr. 6, 2010).

<sup>160</sup> 1 SEX AND SOCIETY 54 (Marshall Cavendish 2010) ("Ages of consent range from . . . 15 to 18 across the United States. Most states have age-span provisions that exempt young people who are close in age from prosecution.")

<sup>161</sup> UCMJ art. 120a(t)(9) (2008).

<sup>162</sup> E-mail from Brigadier General (Ret.) Dennis Laich, U.S. Army Reserve, to author (Feb. 21, 2010) (on file with author).

<sup>163</sup> Prakash, *supra* note 17, at 93.

<sup>164</sup> Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996).

Section three provides a federal definition of marriage (“only a legal union between one man and one woman as husband and wife”) and spouse (“only a person of the opposite sex who is a husband or wife”), effectively precluding the federal government from extending to same-sex spouses the same benefits and rights available to heterosexual married spouses.<sup>165</sup>

According to the U.S. Government Accountability Office, the DOMA prevents same-sex spouses and partners from receiving 1138 federal benefits, rights, and privileges contingent on marital status as defined in DOMA.<sup>166</sup> The Gay & Lesbian Advocates & Defenders, a legal organization representing of eight married couples and three surviving spouses denied federal benefits based on their homosexual marriages, has challenged DOMA in the U.S. District Court, but has not obtained a ruling at the time of this writing.<sup>167</sup> Despite DOMA’s restrictions, President Obama has directed the extension of federal benefits for same-sex partners of federal employees, within DOMA’s limitations.<sup>168</sup>

When considering DOMA, it is essential to distinguish between DADT’s marriage prohibition and DOMA’s provisions precluding federal recognition of state-sanctioned same-sex marriages. First, DADT does not rely on, mention, or incorporate DOMA’s provision anywhere within its four corners. In fact, DADT predated DOMA by three years.<sup>169</sup> Similarly, nowhere in DOMA is DADT a factor.<sup>170</sup> Consequently, the two statutes are not explicitly related to or dependent

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<sup>165</sup> *Id.*; see also Gay & Lesbian Advocates and Defenders, “DOMA” Means Federal Discrimination Against Married Same-Sex Couples 1, available at <http://www.glad.org/uploads/docs/publications/doma-overview.pdf> (last visited Mar. 4, 2010) [hereinafter Gay & Lesbian Advocates and Defenders].

<sup>166</sup> Letter from Dayna K. Shah, Assoc. Gen. Counsel, U.S. Gen Accounting Off., to Senator Bill Frist (Jan. 23, 2004), available at <http://www.gao.gov/new.items/d04353r.pdf>.

<sup>167</sup> Gay & Lesbian Advocates and Defenders, *supra* note 165.

<sup>168</sup> Memorandum from President Barack Obama to the Heads of Executive Departments and Agencies, subject: Federal Benefits and Non-discrimination (June 17, 2009), available at [http://www.whitehouse.gov/the\\_press\\_office/Memorandum-for-the-Heads-of-Executive-Departments-and-Agencies-on-Federal-Benefits-and-Non-Discrimination-6-17-09/](http://www.whitehouse.gov/the_press_office/Memorandum-for-the-Heads-of-Executive-Departments-and-Agencies-on-Federal-Benefits-and-Non-Discrimination-6-17-09/).

<sup>169</sup> Don’t Ask, Don’t Tell was established in 1993. See, e.g., Fred Borch III, *The History of “Don’t Ask, Don’t Tell” in the Army: How We Got to It and Why It Is What It Is*, 203 MIL. L. REV. 189 (2010). The DOMA was passed in 1996. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996).

<sup>170</sup> Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419.

on one another. Although the DOMA will preclude extension of statutory federal benefits to same-sex GLB servicemembers and their spouses, it will have no bearing on their ability to serve in, be retained in, or retire from the Armed Forces. If there is concern that such consequences would be unfair to GLB servicemembers and their spouses, then it would be even more unfair to make service by GLBs contingent upon the harmonization of DOMA.

#### B. State Laws Pertaining to Gay Marriage and Domestic Partnerships Do Not Preclude DADT's Repeal

The policy of DADT is not connected in any way to the marriage and domestic partnership laws of any particular state. As of this writing, five states—Massachusetts,<sup>171</sup> Connecticut,<sup>172</sup> Iowa,<sup>173</sup> Vermont,<sup>174</sup> and New Hampshire<sup>175</sup>—plus the District of Columbia<sup>176</sup>—permit marriage for

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<sup>171</sup> Mass. Trial Court Law Libraries, Same-Sex Marriage, available at <http://www.lawlib.state.ma.us/subject/about/gaymarriage.html> (last visited Mar. 1, 2010) (“The same laws and procedures that govern traditional marriage also apply to same-sex marriages.”); see also Gay and Lesbian Advocates & Defenders, How to Get Married in Massachusetts (Nov. 2009), available at <http://www.glad.org/uploads/docs/publications/how-to-get-married-ma.pdf>.

<sup>172</sup> Conn. Dep’t of Pub. Health, State Office of Vital Record–Marriage License and Certificate, available at <http://www.ct.gov/dph/cwp/view.asp?a=3132&q=390672> (last visited Mar. 1, 2010) (stating, “[t]he eligibility requirements and application process for same sex marriage are identical to the requirements for opposite sex marriage”); see also Gay and Lesbian Advocates & Defenders, How to Get Married in Connecticut (Nov. 2009), <http://www.glad.org/uploads/docs/publications/how-to-get-married-ct.pdf>.

<sup>173</sup> Iowa Dep’t of Health, IDPH News: Updated Marriage Forms Issued, Apr. 17, 2009, available at <http://www.idph.state.ia.us/IdphNews/Reader.aspx?id=3EE35557-F781-4B42-ADCE-EAD34DF2F200> (describing how Iowa no longer limits marriage to heterosexuals); see also Iowa–Marriage FAQ, Lambda Legal, Apr. 23, 2009, available at [http://data.lambdalegal.org/publications/downloads/fs\\_iowa-marriage-faq.pdf](http://data.lambdalegal.org/publications/downloads/fs_iowa-marriage-faq.pdf).

<sup>174</sup> Vt. S.B. 115, 2009 Vt. Laws 3 (Apr. 7, 2009) (effective Sept. 1, 2009), available at <http://www.leg.state.vt.us/docs/2010/bills/Passed/S-115.pdf> (how do I cite to this?); Vt. Sec’y of State, Marriage Equality Act, available at [http://www.sec.state.vt.us/municipal/Marriage\\_equality.htm](http://www.sec.state.vt.us/municipal/Marriage_equality.htm) (last visited Mar. 1, 2010); see also, How to Get Married in New Hampshire, Gay and Lesbian Advocates & Defenders, Dec. 2009, available at <http://www.glad.org/uploads/docs/publications/how-to-get-married-nh.pdf> [hereinafter GLAD N.H. Website].

<sup>175</sup> N.H. H.B. No. 436 (2009), 2009 N.H. ch. 59, available at <http://www.gencourt.state.nh.us/legislation/2009/HB0436.html>; see also GLAD N.H. Website, *supra* note 174.

<sup>176</sup> See, e.g., Superior Court of D.C., Marriage Bureau, available at <http://www.dccourts.gov/dccourts/superior/family/marriage.jsp> (last visited Apr. 19, 2010) (“Pursuant to the Religious Freedom and Civil Marriage Equality Amendment Act of 2009 . . . effective

both opposite and same-sex spouses. At least seven other states, including New Jersey,<sup>177</sup> Hawaii,<sup>178</sup> Maine,<sup>179</sup> Washington,<sup>180</sup> Oregon,<sup>181</sup> California,<sup>182</sup> and Nevada,<sup>183</sup> permit same-sex civil unions or domestic partnerships, while precluding same-sex marriage. These state-sanctioned marriages and partnerships entitle same-sex spouses and partners to reap various benefits normally reserved for heterosexual

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March 3, 2010, same sex couples may apply for a marriage license in the District of Columbia.”); Ian Urbina, *Gay Marriage Is Legal in U.S. Capital*, N.Y. TIMES, Mar. 3, 2010, <http://www.nytimes.com/2010/03/04/us/04marriage.html>.

<sup>177</sup> N.J. Dep’t of Health & Senior Servs., How to Apply for a Civil Union License, available at [http://www.state.nj.us/health/vital/civilunion\\_apply.shtml](http://www.state.nj.us/health/vital/civilunion_apply.shtml) (last visited Mar. 1, 2010) (discussing New Jersey’s legal requirements for same-sex civil unions, and authorizing such unions for persons under the age of sixteen with parental and judicial consent).

<sup>178</sup> Haw. Dep’t of Health, Reciprocal Beneficiary Relationships, available at <http://hawaii.gov/health/vital-records/vital-records/reciprocal/index.html> (last visited Mar. 1, 2010) (providing instructions and forms for persons of any sexual orientation seeking to enter a “reciprocal beneficiary relationship,” which is described as legal relationship between two people who are otherwise prohibited by law from marrying each other).

<sup>179</sup> ME. REV. STAT. ANN. tit. 22, § 2710 (2003), available at <http://www.mainelegislature.org/legis/statutes/22/title22sec2710.html>.

<sup>180</sup> Substitute S. B. 5336, 60th Leg., Reg. Sess. (Wash. 2007), <http://apps.leg.wa.gov/documents/billdocs/2007-08/Pdf/Bills/Senate%20Passed%20Legislature/5336-S.PL.pdf> (last visited Mar. 1, 2010) (authorizing same-sex partners to enter domestic partnerships in Washington); WASH. REV. CODE § 26.60.010 (2010), <http://apps.leg.wa.gov/RCW/default.aspx?cite=26.60.030> (last visited Mar. 1, 2010) (detailing the legal requirements and responsibilities for state-registered domestic partners); see also WASH. COURTS., FAMILY LAW HANDBOOK: UNDERSTANDING THE LEGAL IMPLICATIONS OF DOMESTIC PARTNERSHIPS AND DISSOLUTION IN WASHINGTON STATE (2009), <http://www.courts.wa.gov/newsinfo/content/pdf/FamilyLawHandbook%20Domestic%20Partner.pdf#xml=http://206.194.185.202/texis/search/pdfhi.txt?query=domestic+partnerships&pr=www&prox=page&rorder=500&rprox=500&rdfreq=500&rwfreq=500&rlead=500&rdepth=0&sufs=0&order=r&cq=&id=4b20e5d611> (describing the legal status and responsibilities of same-sex domestic partners).

<sup>181</sup> Oregon Family Fairness Act, 2007 Or. Laws, ch. 99 § 7 (2007) (authorizing same-sex domestic partnerships in the state of Oregon); see also Or. Dept. of Human Servs., Domestic Partnership Forms/Instructions, available at <http://www.oregon.gov/DHS/ph/chs/order/dp.shtml> (last visited Mar. 1, 2010).

<sup>182</sup> California Domestic Partner Rights and Responsibilities Act, CAL. FAM. CODE §§ 297–299.6 (West 2004 & Supp. 2008) (authorizing same-sex domestic partnership in the state of California); see also Cal. Sec’y. of State, Domestic Partners Registry, available at <http://www.sos.ca.gov/dpregistry/> (last visited Mar. 1, 2010) (providing forms and instructions for domestic partnerships).

<sup>183</sup> S. B. 283, 2009 Leg., 75th Sess. (Nev. 2009); Nev. Sec’y of State, Domestic Partnership—FAQ, available at <http://www.nvsos.gov/index.aspx?page=274#283> (last visited Apr. 12, 2010) [hereinafter Nevada Domestic Partnership].

spouses.<sup>184</sup> One state, New York, does not permit same-sex marriage within its situs, but nevertheless recognizes same-sex marriages performed in other jurisdictions.<sup>185</sup>

Proponents of DADT speculate that if DADT is repealed while DOMA is still in effect, complicated legal issues related to interstate moves, child custody issues, and adoption, divorce, and other family law disputes will arise within the military.<sup>186</sup> When evaluating such fears, however, it is important to recognize that a purpose of the military's legal assistance programs is to address these very same routine, pervasive concerns with heterosexual servicemembers and their families. Disputes regarding paternity, child support, child custody, inheritance, divorce, alimony, and annulments are subjects encountered by legal assistance attorneys on a daily basis.<sup>187</sup> In resolving these state-specific issues within jurisdictions permitting same-sex marriages, military legal assistance attorneys and commanders will, for the most part, be able to rely on the same laws pertaining to heterosexual couples on which they currently do, since most of the laws apply equally to homosexual couples under state law. Legal assistance attorneys will have the option of referring unique and unusually complicated family law issues, including

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<sup>184</sup> Holly Hartman, A Primer on Same-Sex Marriage, Civil Unions, Domestic Partnerships, and Defense of Marriage Acts, *available at* <http://www.infoplease.com/ipa/A0922609.html#civil> (last visited Mar. 1, 2010).

<sup>185</sup> *See, e.g.*, Michael Gormley, *New York Must Recognize Gay Marriage in Other States*, HUFFINGTON POST, Nov. 19, 2009, [http://www.huffingtonpost.com/2009/11/19/new-york-must-recognize-g\\_n\\_364212.html](http://www.huffingtonpost.com/2009/11/19/new-york-must-recognize-g_n_364212.html). *See also* Nat'l Gay & Lesbian Task Force, Relationship Recognition for Same-Sex Couples in the U.S., National Gay and Lesbian Task Force, Nov. 4, 2009, *available at* [http://www.thetaskforce.org/downloads/reports/issue\\_maps/rel\\_recog\\_11\\_4\\_09.pdf](http://www.thetaskforce.org/downloads/reports/issue_maps/rel_recog_11_4_09.pdf).

<sup>186</sup> Bunn, *supra* note 24, at 248–49.

<sup>187</sup> *See, e.g.*, U.S. DEP'T OF ARMY, REG. 27-3, THE ARMY LEGAL ASSISTANCE PROGRAM, para. 3-6(a) (3 Dec. 2009) [hereinafter AR 27-3] (stating that legal assistance is provided as to marriage, annulment, legal separation, divorce, financial nonsupport, child custody and visitation, and paternity cases, and may be provided in adoption and other family law cases based on the availability of expertise and resources); U.S. Navy, Legal Servs. FAQ, *available at* [http://www.jag.navy.mil/legal\\_services/legal\\_services\\_faq.htm#lq1](http://www.jag.navy.mil/legal_services/legal_services_faq.htm#lq1) (last visited Mar. 1, 2010) (stating that while Navy attorneys are precluded from representing clients in family law proceedings, they can provide general advice about separation and divorces and assist in finding a civilian attorney); U.S. Air Force, U.S. Armed Forces Legal Assistance Frequently Asked Questions, *available at* <http://legalassistance.law.af.mil/content/afla.php?view=faqs> (last visited Mar. 1, 2010) (stating that military legal assistance attorneys typically provide advice as to domestic relations, including divorce, legal separation, annulment, custody, and paternity).

those pertaining to civil unions, to private attorneys, just as they now do for similar heterosexual family law issues.<sup>188</sup>

### VIII. Constitutional Considerations

#### A. The Constitutional Right to Engage in Sodomy Supports DADT’s Repeal

Even though aspects of this discussion will touch upon criminal provisions of the UCMJ, which is discussed later in this article, concerns related to sodomy are addressed here because of their link to constitutional privacy rights. Don’t Ask, Don’t Tell makes sexual acts between GLB troops, including sodomy, a basis for separation from the Armed Forces.<sup>189</sup> Additionally, Article 125 of the UCMJ criminalizes any act of “unnatural carnal copulation with another person,” regardless of the gender of the other person and regardless of whether the act is consensual.<sup>190</sup> Oral sex and anal sex are both acts of sodomy under the UCMJ, whether the person is the “giver” or “receiver.”<sup>191</sup>

A sodomy conviction is punishable by a dishonorable discharge, reduction to the lowest pay grade, forfeiture of all pay and allowances, and five years confinement.<sup>192</sup> If the act is accompanied by one of three aggravating factors, the maximum punishment increases to confinement for twenty years (when committed with a child over the age of twelve-years-old but under the age of sixteen) or life without parole (when committed by force and without consent, or with a child under the age of twelve).<sup>193</sup> Absent aggravating factors, Article 125—on its face—criminalizes *consensual* oral and anal sex, regardless of the gender of

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<sup>188</sup> See, e.g., AR 27-3, *supra* note 187, para. 3-7(h)(1) (stating that legal assistance attorneys may refer clients to an attorney to another military office, a civilian lawyer, or to another office or agency whenever referral is in the best interest of the client). Clients may be referred to a civilian lawyer on any matter “within or outside the legal assistance program” when such a referral is in their best interests. *Id.* para. 3-7(h)(5)(b). Eligible clients may be refused legal assistance altogether if their matter requires expertise that local legal assistance attorneys do not possess. *Id.* para. 3-5(c)(2)

<sup>189</sup> Policy Concerning Homosexuality in the Armed Forces, 10 U.S.C. § 654 (2006), available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=browse\\_usc&docid=Cite:+10USC654](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=browse_usc&docid=Cite:+10USC654) (last visited Feb. 20, 2010).

<sup>190</sup> UCMJ art. 125(a) (2008).

<sup>191</sup> *Id.* art. 125(c).

<sup>192</sup> *Id.* art. 125(e)(4).

<sup>193</sup> *Id.* art. 125(e).

those involved or the fact that it was done in a private place, such as one's home.

Historically, the military and all fifty states had criminal prohibitions on sodomy.<sup>194</sup> By 2003, however, only thirteen states outlawed private, consensual sodomy, with nine applying prohibitions to both heterosexual and homosexual acts and the remaining four selectively applying it only to homosexual acts.<sup>195</sup> Despite this trend of decriminalization, and the fact that both heterosexuals and GLBs, alike, engage in private, consensual sodomy, the military has maintained Article 125 based on “the need to prevent negative impact to morale and discipline . . . unit cohesion . . . and national security,” and to prevent discredit to the military.<sup>196</sup> In recent years, however, military courts have restricted the application of Article 125 based on the Supreme Court's landmark *Lawrence v. Texas*<sup>197</sup> ruling in 2003.

In *Lawrence*, the Supreme Court struck down state sodomy laws criminalizing consensual, private homosexual sodomy and held that consenting homosexual adults have a privacy right in their sexual lives.<sup>198</sup> The Court compared this privacy right to the reproductive rights protected in *Griswold v. Connecticut*<sup>199</sup> and stated that this type of private act

involve[s] two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The[y] . . . are entitled to respect for their private lives. The State cannot demean their

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<sup>194</sup> JOINT SERV. COMM. ON MIL. JUSTICE, SEX CRIMES AND THE UCMJ 48 (2004) [hereinafter SEX CRIMES & UCMJ], <http://www.dod.mil/dodgc/php/> (containing a link to the report, titled “DoD 2004 Review of Sex Offenses under the UCMJ and MCM, Tab G: JCS Subcommittee Report to JCS Chairman (Colonel) Mark Harvey”).

<sup>195</sup> *Id.* at 49

<sup>196</sup> James S. Leichter et al., *Prevalence and Correlates of Heterosexual Anal and Oral Sex in Adolescents and Adults in the United States*, 196 AM. J. OF INFECTIOUS DISEASES 1852 (2007), <http://www.ncbi.nlm.nih.gov/pubmed/18190267> (discussing the results of a survey of 12,571 heterosexual men and women, in which 75% of respondents indicated they had engaged in oral sex and 35% indicated they had engaged in anal sex); Letter from the Am. Civ. Lib. Union to Captain Kenneth R. Bryant, U.S. Navy, Chairman of the J. Servs. Comm. on Mil. J. (Oct. 31, 2003), available at [http://www.aclu.org/lgbt-rights\\_hiv-aids/coalition-letter-joint-services-committee-military-justice-urging-revision-arti](http://www.aclu.org/lgbt-rights_hiv-aids/coalition-letter-joint-services-committee-military-justice-urging-revision-arti).

<sup>197</sup> 539 U.S. 588 (2003).

<sup>198</sup> *Id.* at 560; see also SEX CRIMES AND THE UCMJ, *supra* note 194, at 48.

<sup>199</sup> 381 U.S. 479 (1965) (striking down state prohibitions on the use of birth control).

existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.<sup>200</sup>

While the *Lawrence* Court did not extend its holding to gay marriage, it stated that the right to engage in consensual same-sex sodomy and relationships is a “liberty protected by the Constitution.”<sup>201</sup>

The Court of Appeals for the Armed Forces (CAAF) has since considered *Lawrence*’s applicability in *United States v. Marcum*, a 2004 case involving homosexual conduct between a non-commissioned officer and the subordinate he rated.<sup>202</sup> In *Marcum*, the CAAF indicated that homosexual sodomy between consenting adults, conducted privately in one’s off-post residence, may fall within the liberty interest identified in *Lawrence* when not accompanied by aggravating factors (i.e., one of the participants is coerced, injured, or a minor, or the relationship is one in which consent might not easily be refused).<sup>203</sup> The CAAF also provided a three-prong test for analyzing the applicability and constitutionality of Article 125’s prohibitions in future cases:

- First, is the alleged conduct of a nature to bring it within the liberty interest identified by the Supreme Court?

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<sup>200</sup> *Lawrence*, 539 U.S. at 578.

<sup>201</sup> *Id.* at 567.

<sup>202</sup> 60 M.J. 198 (C.A.A.F. 2004); see also Captain Jeffrey S. Dietz, *Getting Beyond Sodomy: Lawrence and Don’t Ask, Don’t Tell*, 2 STAN. J. CIV. RTS. & CIV. LIB. 63 (2005) (providing detailed discussion of the *Marcum* decision and its potential implications on Don’t Ask, Don’t Tell).

<sup>203</sup> *Marcum*, 60 M.J. at 207.

The first question . . . is whether Appellant’s conduct was of a nature to bring it within the Lawrence liberty interest. Namely, did [it] involve private, consensual sexual activity between adults? . . . Appellant engaged in non-forcible sodomy [that] occurred off-base in Appellant’s apartment and it occurred in private. We will assume without deciding that . . . this case satisfies the first question of our . . . analysis.

*Id.* See also SEX CRIMES AND THE UCMJ, *supra* note 194, at 49–50 (discussing the current status of Article 125).

- Second, does the alleged act encompass any behavior or factors identified by the Supreme Court in *Lawrence* that remove it from a protected status?
- Third, are additional factors present, related solely to the military environment, that remove the conduct from the liberty interests defined in *Lawrence*?<sup>204</sup>

Because the petitioner in *Marcum* engaged in sodomy with a subordinate, the CAAF held the charged misconduct involved consent that might not easily be refused, and affirmed the conviction. The prima facie constitutionality of Article 125 was not definitively resolved, but, in *Marcum*, the CAAF sufficiently narrowed its applicability to withstand constitutional scrutiny, at least for the time being.

In 2009, a panel of legal scholars known as the Cox Commission recommended that Congress repeal Article 125 based on the criminal prohibitions contained in the recently-revised Article 120, which they opined already criminalizes forcible sodomy, nonconsensual sodomy, and sodomy with a minor.<sup>205</sup> Based on *Lawrence*, *Marcum*, and the persuasive findings and recommendations of the Cox Commission, to include anticipated appellate rulings along the same lines, military lawmakers have every incentive—regardless of the status of DADT—to repeal Article 125 in its entirety. The withering support for Article 125, even in the military’s highest court, is a factor that must be acknowledged in any analysis of DADT’s repeal.

#### B. DADT’s Repeal Will Not Significantly Affect *Voir Dire*

Opponents of repeal may assert that it will cause “discord” within military units<sup>206</sup> in that it will “impact the *voir dire* process by exposing a member’s personal beliefs in opposition to the repeal of DADT,” in turn, promoting “a hostile environment for members of the unit who are privy to the member’s comments.”<sup>207</sup> While such commentators assert that potential panel members will be required to share personal, privately-

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<sup>204</sup> *Marcum*, 60 M.J. at 206–07.

<sup>205</sup> NAT’L INST. MIL. J. & MIL. J. COMM., CRIM. JUSTICE SEC. AM. BAR ASS’N, REPT. OF THE COMM. ON MIL. J. 14–15 (Oct. 2009), [http://meetings.abanet.org/webupload/CR207500/otherlinks\\_files/coxreport\\_body.pdf](http://meetings.abanet.org/webupload/CR207500/otherlinks_files/coxreport_body.pdf).

<sup>206</sup> Bunn, *supra* note 24, at 254.

<sup>207</sup> *Id.* at 256.

held beliefs about homosexuality following DADT’s repeal, this point fails to acknowledge that panel members are already required to reveal such information about a variety of issues that are equally as sensitive and controversial and which may be politically incorrect and inconsistent with Army and command policy. Take, for example, *voir dire* that typically occurs in a “he-said, she-said” rape case involving a female complainant who has engaged in promiscuous behavior prior to and/or following the alleged rape. During questioning, prospective panel members may be required to express any number of personal biases they may have toward promiscuous female troops, female servicemembers in general, the concept of marital or “date rape,” and possibly their views on interracial dating and relationships.<sup>208</sup> Although some of these opinions may be shared in the presence of spectators and, perhaps, in front of subordinates, this does not prevent such *voir dire* from taking place. Nor does it prevent women from serving in the Armed Forces. When DADT is repealed, the same standards that apply to courts-martial involving gender or sexual acts will apply to cases in which sexual orientation is a relevant factor.

#### IX. Marital Privilege and Other Evidentiary Considerations

The Military Rules of Evidence (MRE) govern admissibility of evidence in courts-martial.<sup>209</sup> They were drafted by a military working committee in the late 1970s following enactment of the Federal Rules of Evidence (FRE) in 1975, and were codified as part of the Manual for Courts-Martial (MCM) in 1980.<sup>210</sup> These rules provide certainty and predictability for attorneys practicing in military courts.<sup>211</sup> Pursuant to Article 36 of the UCMJ, the MREs are largely consistent with the FREs.<sup>212</sup> Although the FRE have not been redrafted to account for state-sanctioned, same-sex civil marriages and partnerships, the military legal community should be prepared for changes to MRE 412 and 504. While

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<sup>208</sup> See, e.g., Major John I. Winn, *A Practitioner’s Guide to Race and Gender Neutrality in the Military Courtroom*, ARMY LAW., May 1995, at 40, 40–41 (discussing *voir dire* of panel members in sexual assault cases and questions that may need to be asked regarding members’ views on interracial dating and whether they believe a woman has an obligation to “tell a man no”).

<sup>209</sup> MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 101(a) (2008) [hereinafter MCM].

<sup>210</sup> *Id.* at A22-1; Lieutenant Colonel Fredric I. Lederer, *The Military Rules of Evidence: Origins and Judicial Implementation*, 130 MIL. L. REV. 5, 10 (1990).

<sup>211</sup> Lederer, *supra* note 210, at 37.

<sup>212</sup> *Id.* at 10.

MRE 412 may be revised regardless of the status of the DOMA, MRE 504 will likely not be subject to revision unless and until DOMA is repealed.

#### A. MRE 504: Husband-Wife Privilege

Military Rule of Evidence 504 grants husbands and wives evidentiary protection in two ways. First, it gives them the right to refuse to testify against each other in military judicial proceedings.<sup>213</sup> Second, it gives them the right, even after a marriage has ended, to refuse to testify about their confidential communications made during the course of the marriage.<sup>214</sup> This second privilege can be invoked by either the military spouse whose testimony is sought, or the other spouse on his or her own behalf.<sup>215</sup> Applicability of these two privileges turns on the existence of a “marriage,” “marital relationship,” and “spouse.”<sup>216</sup> If DADT and DOMA are both repealed, this evidentiary rule may require revision to ensure equity based on the marriage-like nature of lawful same-sex marriages and domestic partnerships.

#### B. MRE 412: Victim’s Sexual Behavior or Predisposition

Military Rule of Evidence 412 protects sexual assault victims from having their reputations unnecessarily attacked by attorneys during military judicial proceedings. Under this Rule, evidence of an alleged victim’s sexual predisposition is inadmissible at trial unless such evidence falls within one of three specified exceptions.<sup>217</sup> Prohibited evidence pertains to “an alleged victim’s mode of dress, speech, or lifestyle that does not directly refer to sexual activities or thoughts but that may have a sexual connotation for the fact finder.”<sup>218</sup> The policy justification for this prohibition is to prevent unfettered inquiry into irrelevant facts that may distract the fact-finder and discourage reporting or prosecution of sexual misconduct.<sup>219</sup> Due to the oftentimes controversial nature of a victim’s sexual orientation, lawmakers should

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<sup>213</sup> MCM, *supra* note 209, MIL. R. EVID. 504(a).

<sup>214</sup> *Id.* MIL. R. EVID. 504(b)(1).

<sup>215</sup> *Id.* MIL. R. EVID. 504(b)(3).

<sup>216</sup> *Id.* MIL. R. EVID. 504(b), 504(b)(1) & 540(a).

<sup>217</sup> *Id.* MIL. R. EVID. 412(a)(2).

<sup>218</sup> *Id.* MIL. R. EVID. 412(d).

<sup>219</sup> *Id.* at A22–35.

consider adding sexual orientation as an enumerated type of prohibited evidence detailed in MRE 412(d).

## X. Military Criminal Statutes

Servicemembers and their spouses are entitled to various rights, privileges, and protections under the MRE and UCMJ. In the wake of DADT’s repeal, the DOMA will likely preclude extension of spousal privileges and protections to GLB troops and their spouses. Only if DOMA is repealed or revised will military policymakers be required to determine, from a military justice perspective, what rights and protections will be granted to GLB troops and their spouses and lawful partners. Fairness may dictate extending the same evidentiary and penal code protections now available to married heterosexual troops, especially if the federal evidentiary and penal codes change in response to increased protection of gay marriages and state-sanctioned unions.<sup>220</sup> In consideration of these possibilities, the parts below address statutes and sections of the MRE and UCMJ that may require revision. It is important to note that DADT’s repeal will not invalidate existing criminal prohibitions against the many forms of misconduct in which one’s sexual orientation is not a factor. The GLB servicemembers whose conduct falls outside of the *Lawrence* protections, or whose conduct otherwise violates criminal prohibitions, will still be subject to adverse action and criminal penalties just as heterosexual servicemembers are.

### A. Uniform Code of Military Justice

The UCMJ, enacted in 1950, is the military’s penal code.<sup>221</sup> Its violation can result in a federal criminal conviction and a sentence

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<sup>220</sup> As of the date of this writing, they have not. It should be noted that when the military integrated African-Americans in 1949, many states still criminally prosecuted the act of interracial marriage and prohibited African-American children from attending the same schools as white children. The military did not base its policy decisions as to racial integration, or as to marriage or the desegregation of DOD schools, on such prohibitions. The DOMA may restrict the military’s ability to extend various rights and privileges to GLB troops.

<sup>221</sup> Lib. of Cong., Military Legal Resources: Uniform Code of Military Legislative History, available at [http://www.loc.gov/rr/frd/Military\\_Law/UCMJ\\_LHP.html](http://www.loc.gov/rr/frd/Military_Law/UCMJ_LHP.html) (last visited Mar. 1, 2010).

ranging from no punishment to death.<sup>222</sup> The UCMJ is one of the military's primary mechanisms for maintaining good order and discipline within its ranks.<sup>223</sup> Like the MRE, the UCMJ is patterned after the Federal Criminal Code.<sup>224</sup> It differs, however, from civilian provisions in its prohibition of uniquely military offenses. The UCMJ, for example, criminalizes any act that brings discredit to the service or is deemed to be prejudicial to good order and discipline—even if the act in and of itself is not criminal in nature (e.g., speaking disrespectfully to one's supervisor, or not showing up for work).<sup>225</sup> The UCMJ also criminalizes any act that is “unbecoming of an officer and gentleman,”<sup>226</sup> regardless of the criminality of the underlying act itself.

Following DADT's repeal, Special Assistant United States Attorneys (SAUSAs) at the installation level will need to be familiar with the marriage laws of the states in which they are practicing, as jurisdictions which permit or recognize same-sex marriages may have spousal provisions in their criminal codes and laws that affect military prosecutions in magistrate courts.<sup>227</sup> Additionally, if the ban on GLBs is lifted, the following UCMJ provisions may require revision to maintain fairness and equity in the military criminal justice system, notwithstanding DOMA, which remains current law at the writing of this article.

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<sup>222</sup> MCM, *supra* note 209, R.C.M. 1003; *see also* Major Robert L. Martin, *Military Justice in the National Guard: A Survey of the Laws and Procedures of the States, Territories, and the District of Columbia*, ARMY LAW., Dec. 2007, at 30, 47.

<sup>223</sup> Gen. (Ret.) William C. Westmoreland & Major Gen. (Ret.) George S. Prugh, *Judges in Command: The Judicialized Uniform Code of Military Justice in Combat*, 3 HARV. J. L. & PUB. POL'Y 1, 9 (1980).

<sup>224</sup> *Id.* at 3.

<sup>225</sup> UCMJ art. 134 (2008).

<sup>226</sup> *Id.* art. 133.

<sup>227</sup> Special Assistant U.S. Attorneys are military attorneys who have been detailed to prosecute civilians accused of committing crimes on military bases or otherwise within the military's jurisdiction. *See, e.g.*, Andrew Christensen, *JAG Corps Service Provides Opportunity to Serve Country*, *Practice Law*, VA. L. WKLY., Feb. 17, 2006, [http://www.lawweekly.org/?module=displaystory&story\\_id=1029&edition\\_id=27&format=html](http://www.lawweekly.org/?module=displaystory&story_id=1029&edition_id=27&format=html). *See also* Captain Eric D. Placke, *Prosecuting Civilian Misdemeanor Offenders Before United States Magistrate Judges: A Guide for Air Force Judge Advocates*, 39 A.F. L. REV. 73, 80 (1996) (discussing the use of state laws in magistrate court proceedings).

## B. UCMJ Article 134: Adultery

Article 134 of the UCMJ criminalizes sexual intercourse between a married servicemember and someone other than his spouse and sexual intercourse between an unmarried servicemember and a married person.<sup>228</sup> An additional element of this crime requires that this conduct be service discrediting or prejudicial to good order and discipline in the Armed Forces.<sup>229</sup>

Kissing, sexual touching, oral sex, anal sex, and other forms of romantic and sexual contact that take place between a married person and someone other than his or her spouse are arguably all forms of “cheating.” Indeed, it is hard to imagine that such behavior, if practiced by a Soldier’s wife or husband with another Soldier in the same unit, would be perceived as anything other than that, or would be any less disruptive to good order and discipline within the unit, simply because it was not accompanied by the act of sexual intercourse. None of these forms of sexual activity, however, constitute adultery under Article 134. Because Article 134 does not criminalize these acts for married heterosexuals, it would be unfair to both heterosexuals and GLBs alike to criminalize them in only same-sex marriages or domestic partnerships. Any revisions to Article 134’s adultery provisions, to include conduct that falls short of heterosexual intercourse, therefore, should apply equally to heterosexuals and GLBs. Don’t Ask, Don’t Tell’s repeal, however, requires no such revisions in the first place.

In discussing adultery, supporters of DADT may contend that the existence of same-sex marriages and civil unions within the military, without a simultaneous revision of Article 134, will result in an unfair application of adultery provisions.<sup>230</sup> They may assert that GLB servicemembers will be able to evade accountability for cheating on their spouses or partners via sexual acts that do not involve sexual intercourse by virtue of the fact that the military does not consider such acts to be adulterous.<sup>231</sup> This argument does not, however, provide a compelling reason for DADT’s retention or delayed repeal. As discussed above, heterosexuals are free to engage in the same type of sexual infidelity without incurring any liability under Article 134 either. Furthermore,

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<sup>228</sup> Bunn, *supra* note 24, at 264.

<sup>229</sup> UCMJ art. 134(b).

<sup>230</sup> Bunn, *supra* note 24, at 264–68.

<sup>231</sup> *Id.* at 264, 266–67.

heterosexual servicemembers who enter into state-sanctioned civil unions in states such as Nevada, which allows heterosexuals and GLBs alike to enter domestic partnerships,<sup>232</sup> are similarly free of liability under Article 134 for the aforementioned acts of infidelity and sexual intercourse itself because they are not married.

Finally, regarding the contention that lesbian servicemembers will recruit heterosexual male or gay male Soldiers to impregnate them through intercourse,<sup>233</sup> any such act would be handled the same way it is when heterosexual female troops intentionally engage in sexual intercourse with someone not their spouse to get pregnant. Married heterosexual and lesbian servicemembers who have sexual intercourse with a man not their spouse, for whatever reason, are liable under whatever applicable adultery or other punitive statutes and regulations exist at the time. If DOMA is repealed and the UCMJ is revised to include same-sex marriage and unions, married heterosexual and homosexual women alike will be criminally liable for adultery if they engage in sexual intercourse with a man who is not their spouse. Without revisions, a heterosexual woman will be liable for adultery if she, or the man she engages in intercourse with, is married. A lesbian woman, on the other hand, will be treated in the same way as a heterosexual woman who is part of a domestic partnership with a heterosexual man in states like Nevada that permit heterosexual partnerships.<sup>234</sup>

Neither the same-sex marriage nor the heterosexual domestic partnership is now recognized by the Federal Government or the military as a marriage. Therefore, neither individual will be subject to criminal prosecution for adultery under Article 134. If this discrepancy is cause for concern, policymakers should address it regardless of DADT based on the ability of heterosexual troops to enter into domestic partnerships and civil unions with one another.

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<sup>232</sup> See, e.g., Nevada Domestic Partnership, *supra* note 183 (stating that “Nevada domestic partnerships may be entered into by couples of any sexual orientation”); Cy Ryan, *With Veto Override, Domestic Partnership Bill Becomes Law*, LAS VEGAS SUN, May 31, 2009, <http://www.lasvegassun.com/news/2009/may/31/veto-override-domestic-partners-bill-becomes-law/>.

<sup>233</sup> Bunn, *supra* note 24, at 268.

<sup>234</sup> See, e.g., Nevada Domestic Partnership, *supra* note 183 (stating that “Nevada domestic partnerships may be entered into by couples of any sexual orientation”); Ryan, *supra* note 232.

As an aside, heterosexual and lesbian females alike may face reproductive barriers to pregnancy. These women, however, have a variety of options available to them to overcome such barriers, including adoption, artificial insemination, and in-vitro fertilization (IVF) by a sperm donor. The DoD, for example, has four facilities that provide fertility treatments, including IVF: Wilford Hall Medical Center in San Antonio, Tripler Army Medical Center in Honolulu, Walter Reed Army Medical Center in Washington, D.C., and the Naval Medical Center in San Diego.<sup>235</sup> Despite the fact that women seeking treatment at these facilities must pay for their own travel, lodging, medications, embryologist, IVF coordinator fees, and other associated costs, these facilities provide a financially viable option for fertility treatments greater than those available at public facilities, keeping associated government costs to a minimum.<sup>236</sup>

### C. UCMJ Articles 133 and 134 in Bigamy and Polygamy Cases

Some proponents of DADT assert that repealing the ban against GLBs in the military without repealing DOMA will result in a scheme whereby GLBs servicemembers can engage in bigamy and polygamy without criminal liability for their acts under the UCMJ.<sup>237</sup> In support of this argument, they suggest that, because DOMA prohibits the Federal Government from recognizing same-sex marriages and civil unions, GLB servicemembers who engage in bigamy or polygamy will escape military criminal prosecution.<sup>238</sup> This assertion is misleading because every state that permits same-sex marriages or civil unions prohibits bigamy and polygamy, and requires, as a condition for entering into marriage or a civil union, that both parties not be in any such a relationship with anyone else at the time the new union takes place.<sup>239</sup>

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<sup>235</sup> Press Release, TRICARE, A Tricare Reminder About Covered Infertility Treatments (May 28, 2009), available at <http://www.tricare.mil/pressroom/news.aspx?fid=530>.

<sup>236</sup> *Id.* See also Michele Case Huddleston, Fertility Treatment Options for Military Families, available at <http://www.conceiveonline.com/assisted-reproduction-infertility-ivf/military-ivf/> (last visited Apr. 11, 2010) (stating that women are required to pay for the cost of their treatment).

<sup>237</sup> See, e.g., Bunn, *supra* note 24, at 270–74.

<sup>238</sup> E.g., *id.*

<sup>239</sup> See, e.g., Editorial, *Sen. Reid Says Polygamy is “Form of Organized Crime,”* FOX NEWS, Jul. 24, 2008, <http://www.foxnews.com/story/0,2933,390070,00.html> (reporting that “polygamy is illegal in all 50 states under state laws”); Ken LaMance, Legal Match, available at <http://www.legalmatch.com/law-library/article/bigamy-lawyers.html> (last visited Apr. 12, 2010) (reporting that bigamy is illegal in all 50 states).

Gay, lesbian, and bisexual servicemembers who violate these state prohibitions are not only subject to criminal prosecution in jurisdictions where they commit the offense, but are likewise criminally liable for their actions under UCMJ Article 134, clauses 1 and 2, which provide that any “act in violation of a local civil law . . . may be punished if it constitutes a disorder or neglect to the prejudice of good order and discipline in the armed forces.”<sup>240</sup> While the DOMA will likely preclude military recognition of same-sex marriages and, therefore, preclude prosecution under federal and military marital-related laws, it would not preclude prosecution under clauses 1 and 2 of Article 134 for violations of related state laws.

#### D. UCMJ Article 134: Wrongful Cohabitation

Uniform Code of Military Justice Article 134 makes it a crime for a servicemember and another person to openly and publically live together as husband and wife when they are not legal spouses and when such conduct is service discrediting or prejudicial to good order and discipline.<sup>241</sup> This statute does *not* criminalize a couple from living together and sharing a home as companions and sexual partners, nor does it criminalize the act of living together as domestic partners. The act of living together with someone is only prohibited under this statute when it is accompanied by behavior that leads others to believe that the living arrangement is the result of a marriage.<sup>242</sup> If DADT is repealed and DOMA is not, military lawmakers will likely be required to narrow the scope of prosecutions under this Article to avoid prosecuting GLBs who are in state-sanctioned same-sex marriages that are lawful and legally-binding but not recognized under federal law pursuant to the DOMA. Those who enter into civil unions or domestic partnerships, on the other hand—including heterosexual troops who do the same—will not be liable under this statute if they are honest about their status as lawful but unmarried partners, nor will they be entitled to marriage-based entitlements.

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<sup>240</sup> UCMJ art. 134, pt. IV-120 (2008).

<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

## E. UCMJ Article 120a(q): Marriage as an Affirmative Defense

Article 120a(q)(1) of the UCMJ makes marriage an affirmative defense to numerous sexual offenses, including aggravated sexual assault, aggravated sexual assault of a child (a person under the age of sixteen<sup>243</sup>), indecent liberty with a child, wrongful sexual contact, and wrongful sexual exposure.<sup>244</sup> Under Article 120a(q)(1), if a servicemember is accused of or charged with a violation of one of the enumerated offenses, and can prove he is married to the alleged victim, it may result in dismissal of charges, acquittal at trial, or no charges being preferred in the first place.

In some states, persons under the age of sixteen are permitted to marry as long as they have parental, judicial, or state approval, or some combination thereof.<sup>245</sup> For a servicemember, or other person subject to the UCMJ, who happens to be married to someone under the age of sixteen, the affirmative defense provided by Article 120a(q)(1) is extremely important. Without it, the servicemember spouse is criminally liable for engaging in sexual intercourse and other sexual acts with his spouse pursuant to Article 120a.

To assert this defense, an accused must be in a marriage as it is defined in Article 120a(q): “a relationship, recognized by the laws of a competent State or foreign jurisdiction, between the accused and the other person as spouses.”<sup>246</sup> Based on the DOMA, same-sex spouses and domestic partners will be precluded from asserting this defense even if they are in a lawful spousal-like relationship. This will potentially create an unfair prosecution scheme whereby a heterosexual eighteen year-old servicemember who is lawfully married to a fifteen year-old can raise the defense if prosecuted for consensual sexual intercourse with his spouse, whereas a homosexual eighteen year-old servicemember who is lawfully married or partnered to a fifteen year-old could not (e.g., where the civil union took place in New Jersey, which permits persons under the age of sixteen to enter into civil unions as long as they have parental consent

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<sup>243</sup> *Id.* art. 120a(t)(9).

<sup>244</sup> *Id.* art. 120a(q)(1).

<sup>245</sup> Find Law, State-by-State Marriage “Age of Consent” Laws, *available at* <http://family.findlaw.com/marriage/marriage-basics/state-age-of-consent-laws.html> (last visited Mar. 1, 2010) (indicating that the states include Alabama, Alaska, Arizona, California, Connecticut, Hawaii, Kansas, Massachusetts, Mississippi, Montana, Nevada, New Hampshire, South Carolina, Tennessee, Texas, and Utah).

<sup>246</sup> UCMJ art. 120a(q)(2).

and judicial approval).<sup>247</sup> If DADT and the DOMA are repealed, this statute will likely require revision so that it is equally applicable to same-sex and heterosexual spouses and domestic partners.

## XI. Arguments against Inclusion of GLBs and African-Americans

### A. Nature of the Comparison

While the qualities of sexual orientation and skin color are different, the arguments against inclusion of both GLBs and African-Americans in the military have historically been the same. Some proponents of DADT assert that this is not a valid comparison.<sup>248</sup> According to researchers with the RAND National Defense Research Institute (NDRI), however, to deny the validity of the comparison is to misread history.<sup>249</sup> In 1993, NDRI analysts conducted a comprehensive study on the issue, and noted in their final report:

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<sup>247</sup> N.J. Dep't of Health & Senior Servs., How to Apply for a Civil Union License, available at [http://www.state.nj.us/health/vital/civilunion\\_apply.shtml](http://www.state.nj.us/health/vital/civilunion_apply.shtml) (last visited Mar. 5, 2010) ("For two people to establish a civil union in New Jersey, they must . . . be at least 18 years of age, except that applicants under 18 may enter into a civil union with parental consent. Applicants under age 16 must obtain parental consent and have the consent approved in writing by any judge of the Superior Court, Chancery Division, Family Part.").

<sup>248</sup> General (Ret.) Colin Powell, for instance, stated in 1993 that the qualities of skin color and sexual orientation are so different in nature that any comparison of the two is "convenient but invalid." FRANK, *supra* note 5, at 63. See also Statement of Elaine Donnelly, Homosexuals Are Not Eligible to Serve in the Military 30 (July 23, 2008), available at [http://armedservices.house.gov/pdfs/MilPers072308/Donnelly\\_Testimony072308.pdf](http://armedservices.house.gov/pdfs/MilPers072308/Donnelly_Testimony072308.pdf) [hereinafter Donnelly Statement] (reprinting her statement submitted at a recent congressional hearing and stating that the DoD should not be "intimidated" by civil rights analogies, and citing Colin Powell's 1993 opinion on the issue.). Although Colin Powell was a proponent of DADT in 1993, he now supports its repeal. Martina Stewart, *Powell in Favor of Repealing "Don't Ask, Don't Tell"*, CNN, Jan. 3, 2010, <http://www.cnn.com/2010/POLITICS/02/03/powell.gays.military/>.

<sup>249</sup> See, e.g., RAND SEXUAL ORIENTATION POLICY, *supra* note 71, at 160 (stating that to perceive racial integration as being so different from the issue of gays in the military is to misread history). Racial integration "inspired many of the strong emotional reactions that the possibility of integrating homosexuals provokes today," in that most whites held a "visceral revulsion" to the idea of close physical contact with African-Americans. *Id.* See also Lorry M. Fenner, *Either You Need These Women or You Do Not: Informing the Debate on Military Service and Citizenship*, 16 GENDER ISSUES 5, 12 (1998) ("Historical information is not a blueprint for progress, but certainly using past experiences to inform out thinking is preferable to ignorance and amnesia.").

It is widely perceived today that the racial integration of the Armed Forces was a fairly simple, straightforward matter in comparison with the numerous complexities involved in integrating homosexuals. In reality, racial integration during the 1940s and 1950s was a . . . convoluted process which inspired many of the strong emotional reactions that the possibility of integrating homosexuals provokes today. Many white Americans . . . responded with visceral revulsion to the idea of close physical contact with blacks. . . . In light of the historical evidence, any assertion that racial integration was inherently less problematic than the integration of homosexuals today must be viewed with skepticism.<sup>250</sup>

In 2008, Retired Army Major General Vance Coleman, an African-American who spent thirty years of his life in service to the military and our nation, testified similarly in a hearing on DADT before the U.S. House of Representatives Armed Services Committee. In explaining his support for the repeal of DADT, General Coleman discussed how the ban on GLBs mirrors the exclusion and restrictions placed on African-Americans during his early years of service. He testified about what it was like to be excluded from all-white units and devalued “because of who you are.”<sup>251</sup> According to General Coleman, DADT is disruptive to military commanders in that, “no matter how well a person does his or her job . . . no matter how integral to their unit they are . . . they must be removed . . . and dismissed because of who they happen to be, or who they happen to love.”<sup>252</sup> It is time, he contends, “to end this modern-day prejudice and embrace all of our troops as first-class patriots with an important contribution to make.”<sup>253</sup>

Mildred Loving, too, has compared prohibitions against blacks to prohibitions against gays. Ms. Loving was the African-American co-

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<sup>250</sup> *Id.* Reprinted with permission of the Rand Corporation.

<sup>251</sup> Written Statement of Major General (Ret.) Vance Coleman to the Subcommittee on Military Personnel House Armed Servs. Comm., U.S House of Representatives (June 23, 2008) [hereinafter Coleman Statement], *available at* [http://armedservices.house.gov/pdfs/MilPers072308/Coleman\\_Testimony072308.pdf](http://armedservices.house.gov/pdfs/MilPers072308/Coleman_Testimony072308.pdf).

<sup>252</sup> *Id.*

<sup>253</sup> *Id.*

plaintiff (her white husband was the other) in *Loving v. Virginia*<sup>254</sup>—the historic 1967 Supreme Court case overturning race-based legal restrictions on marriage. In 2007, on the 40th anniversary of that landmark case, Ms. Loving described how modern day restrictions on gay marriage parallel historical restrictions on interracial marriage:

Surrounded as I am now by wonderful children and grandchildren, not a day goes by that I don't think of Richard and our love, our right to marry, and how much it meant to me to have that freedom to marry the person precious to me, even if others thought he was the "wrong kind of person" for me to marry. I believe all Americans, no matter their race, no matter their sex, no matter their sexual orientation, should have that same freedom. . . . Government has no business imposing some people's religious beliefs over others. Especially if it denies people's civil rights. I am . . . proud that Richard's and my name is on a court case that can help reinforce the love, the commitment, the fairness, and the family that so many people, black or white . . . gay or straight seek in life. I support the freedom to marry for all. That's what Loving, and loving, are all about.<sup>255</sup>

#### B. Behavioral-Based Arguments for Exclusion of GLB's and African-Americans

The arguments and military prohibitions against integration of gays and African-Americans have been based on behavioral, moral, and physical characteristics attributed to both groups. African-Americans, for instance, were not victims of white discrimination based merely on the color of their skin; they were discriminated against based on *behavioral attributes* whites associated with the color of their skin. In the years preceding military integration, many whites reportedly believed African-Americans possessed, savage natures and inferiorities that "prevented [them] from rising above their violent passions, passions that

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<sup>254</sup> 388 U.S. 1 (1967). For an overview of this case and its aftermath, see Editorial, *Loving Decision: 40 Years of Legal Interracial Unions*, NPR, June 11, 2007, <http://www.npr.org/templates/story/story.php?storyId=10889047>.

<sup>255</sup> Public Statement by Mildred Loving (June 12, 2007), available at [http://freedomtomarry.org/pdfs/mildred\\_loving-statement.pdf](http://freedomtomarry.org/pdfs/mildred_loving-statement.pdf).

erupted unpredictably and with staggering brutality.”<sup>256</sup> African-Americans were believed by many to be sexually promiscuous<sup>257</sup> and to have “deadened sensibilities . . . [that] responded only to swift and harsh physical punishment.”<sup>258</sup>

In the 1940s, military and political leaders opposing military integration did so based on statistics showing that African-Americans carried sexually transmitted diseases at a higher rate than whites, committed crimes of sexual aggression at a higher rate than whites, and were less capable Soldiers than whites.<sup>259</sup> And, contrary to the concept that the military’s limitations on African-Americans were based on the benign, non-behavioral quality of skin color, Lieutenant General Edward M. Almond wrote, “[t]he basic characteristics of Negro[s] are fundamentally different. . . . There is no question in my mind of the inherent difference in the races. This is not racism—it is common sense and understanding. Those who ignore these differences merely interfere with the combat effectiveness of battle units.”<sup>260</sup> Interracial socializing, sexual intercourse, and marriage were considered to be so harmful to white society that they were prohibited by civil laws and criminalized in penal codes for more than a decade after President Truman’s 1948 executive order mandating full military integration.<sup>261</sup> “Intermarriage,” it was claimed, would “lead inevitably to a loss in the intellectual and cultural assets of this country,” which would further “make the difference between victory and defeat in any future conflict.”<sup>262</sup>

Similar arguments pertaining to morality, sexual misconduct, AIDS, and other sexually transmitted diseases, for instance, have all been cited as a basis for exclusion of acknowledged GLBs. In his book, *Unfriendly Fire: How the Gay Ban Undermines the Military and Weakens America*,

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<sup>256</sup> WILLIAM FITZHUGH BRUNDAGE, *LYNCHING IN THE NEW SOUTH: GEORGIA AND VIRGINIA, 1880–1930*, at 5 (1993).

<sup>257</sup> HEGARTY, *supra* note 92, at 65.

<sup>258</sup> BRUNDAGE, *supra* note 256, at 5.

<sup>259</sup> FRANK, *supra* note 5, at 61-2.

<sup>260</sup> MORRIS J. MACGREGOR, JR., *INTEGRATION OF THE ARMED FORCES: 1940–1965*, at 440–41 (1985) (quoting from Lieutenant General Almond’s archived letter).

<sup>261</sup> *See, e.g.*, Nat’l Park Serv., *Jim Crow Laws*, available at [http://www.nps.gov/malu/forteachers/jim\\_crow\\_laws.htm](http://www.nps.gov/malu/forteachers/jim_crow_laws.htm) (last visited Feb. 6, 2010); Exec. Order No. 9981, 13 Fed. Reg. 4313 (July 26, 1948); Staff Sergeant Kristofer Baumgartner, *Korean War Vets Celebrate Leadership and Integration*, Mar. 19, 2009, available at <http://www.army.mil/news/2009/03/19/18450-korean-war-vets-celebrate-leadership-and-integration/>.

<sup>262</sup> HENRY E. GARRETT, *HOW CLASSROOM DESEGREGATION WILL WORK* 19 (Patrick Henry Press, n.d.).

Dr. Nathaniel Frank explores the resemblance of the arguments made against both groups:

In the 1940s, Americans were told . . . whites would not respect or obey commands by an African American; that integration would prompt violence against a despised minority that the military would be helpless to stop; that integration would lower public acceptance of the military and the federal government; that the military should not be used for “social experimentation”; that military integration was being used to further a larger minority rights agenda that would ultimately break the armed forces; [and] that the military is unique and not a democracy . . . . Every last one of these arguments [has also been] used, in some instances with frighteningly similarity, against letting gays serve.<sup>263</sup>

In addition to General Coleman and Dr Frank, officials from the U.S. General Accounting Office (GAO) noted, in an official 1992 report, that the same rationale used to exclude gays from the military was used to justify limitations in the integration of African-Americans.<sup>264</sup>

According to Dr. Frank, just as the beliefs and arguments cited in opposition to military integration of African-Americans weren't true, they aren't true respecting gays.<sup>265</sup> Army Secretary John McHugh has echoed this assertion, pointing out—in response to questions about gays in the military—that the Army has taken on similar issues in the past and, despite predictions of “doom and gloom,” the military successfully adapted.<sup>266</sup> This section analyzes these predictions and arguments and their underlying claims and beliefs.

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<sup>263</sup> FRANK, *supra* note 5, at 62. Reprinted with permission of Dr. Nathaniel Frank.

<sup>264</sup> GAO HOMOSEXUALITY POLICY, *supra* note 94, at 5 (citing to comments from an earlier report that indicating the “DoD policy prohibiting homosexuals from serving in the military was based on the same rationale used to limit the integration of blacks”).

<sup>265</sup> FRANK, *supra* note 5, at 61.

<sup>266</sup> Rick Maze, *McHugh: Army Can Handle Lift of Gay Ban*, ARMY TIMES, Oct. 29, 2009, [http://www.armytimes.com/news/2009/10/army\\_mchugh\\_dadt\\_102709w/](http://www.armytimes.com/news/2009/10/army_mchugh_dadt_102709w/).

### C. Analysis of the Arguments

#### 1. “Homosexuality is Immoral”

Some military and religious leaders believe homosexuals are immoral and therefore should not be allowed to serve openly in the Armed Forces. In 2007, for instance, Former Marine General Peter Pace, while serving as Chairman of the Joint Chiefs of Staff, publicly stated: “I believe that homosexual acts between individuals are immoral . . . [and] I do not believe the armed forces of the U.S. are well served by saying through our polices that it is OK to be immoral in any way.”<sup>267</sup> A religious document on the Vatican’s official website similarly states that “[a] person engaging in homosexual behavior . . . acts immorally,” and that homosexuals have a “moral disorder.”<sup>268</sup>

In the early 1900s, African-Americans, too, were considered by many to have low moral character.<sup>269</sup> Marine Lieutenant General Thomas Holcom, for example, testified before the General Board of the Navy that “an infantry battalion is the very last place [blacks] would be put. There is no branch of the service that requires more character and a higher degree of morality than the infantry.”<sup>270</sup> African-Americans reportedly had “10 times as many illegitimate children as white people” and had character limitations that arose from “inborn traits—or the lack

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<sup>267</sup> Jonathan Karl, *Top U.S. General Calls Homosexuality “Immoral,”* ABC NEWS, Mar. 13, 2007, <http://abcnews.go.com/GMA/story?id=2946397> (quoting former Chairman of the Joint Chiefs of Staff, Marine General Peter Pace).

<sup>268</sup> Letter from Prefect Joseph Cardinal Ratzinger & Archbishop Alberto Bovone, Vatican, to the Bishops of the Catholic Church (Oct. 1, 1986), *available at* [http://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_19861001\\_homosexual-persons\\_en.html](http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19861001_homosexual-persons_en.html) (discussing this in paragraph 7); *see also* Cardinal Zenon Grocholewski and Archbishop J. Michael Miller, Instruction Concerning the Criteria for the Discernment of Vocations with Regard to Persons with Homosexual Tendencies (Nov. 4, 2005), *available at* [http://www.vatican.va/roman\\_curia/congregations/ccatheduc/documents/rc\\_con\\_ccatheduc\\_doc\\_20051104\\_istruzione\\_en.html](http://www.vatican.va/roman_curia/congregations/ccatheduc/documents/rc_con_ccatheduc_doc_20051104_istruzione_en.html) (discussing this at paragraph 2).

<sup>269</sup> *See, e.g.,* JACK ROGERS, JESUS, THE BIBLE, AND HOMOSEXUALITY 19–25 (2006) (discussing assertions made by religious leaders in the late 1800s that African-Americans are morally inferior to whites); Debra A. Kuker, Comment, *The Homosexual Law and Policy in the Military: “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass”. . . Don’t be Absurd!*, 3 SCHOLAR 267, 312 (2001) (discussing historical state prohibitions on interracial marriage and the once widely-held public perception that interracial marriage is immoral).

<sup>270</sup> David A. Bianco, *Echoes of Prejudice*, in GAY RIGHTS, MILITARY WRONGS 54 (Craig A. Rimmerman, ed., 1996).

of them.”<sup>271</sup> Interracial marriage was considered so dangerous and harmful to society that many states continued to criminally prosecute it for nearly twenty years after President Truman’s 1948 Executive order that fully integrated the military. It was only in 1967 that the Supreme Court, in *Loving v. Virginia*, struck down state laws criminalizing interracial marriage.<sup>272</sup>

Morality is difficult to define. Religious leaders and people from all walks of life have contrasting views on what is moral and what is not. In terms of homosexuality, many religious denominations and leaders—presumably experts in morality—are split on whether homosexuality is “right” or “wrong.”<sup>273</sup> Some mainstream Christian denominations allow homosexuals to marry and to serve as religious leaders within their organizations, while others denounce homosexuality as a sin and ban them from marrying and ministering. The United Church of Christ,<sup>274</sup> Episcopal Church,<sup>275</sup> Evangelical Lutheran Church,<sup>276</sup> and Unitarian Universalist Association,<sup>277</sup> for instance, all bless same-sex unions and have member churches that allow gay clergy. The Roman Catholic

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<sup>271</sup> GARRETT, *supra* note 262, at 23.

<sup>272</sup> 388 U.S. 1 (1967).

<sup>273</sup> Interview with Colonel (Ret.) Fred Borch, U.S. Army, Army JAG Corps Historian, in Charlottesville, Va. (Oct. 2009).

<sup>274</sup> United Church of Christ, LGBT Ministries, available at [http://www.ucc.org/lgbt#The\\_LGBT\\_Ministries\\_of\\_the\\_United\\_Church](http://www.ucc.org/lgbt#The_LGBT_Ministries_of_the_United_Church) (last visited Feb. 13, 2010) (indicating that membership, church leadership, and employment are open to those of all sexual orientations); see also Editorial, *United Church of Christ Endorses Gay Marriage*, MSNBC, July 4, 2005, <http://www.msnbc.msn.com/id/8463741/>.

<sup>275</sup> See, e.g., Laurie Goodstein, *Episcopal Vote Reopens a Door to Gay Bishops*, N.Y. TIMES, July 14, 2009, at A11 (discussing the church’s “mainline” status, its July 2009 vote to allow consecration of openly gay bishops, and its measure to “create a liturgy to bless same-sex couples,” which, until then, had been occurring unofficially in many dioceses); Ed Stoddard, *Episcopal Church Moves Toward Blessing Gay Unions*, REUTERS, July 18, 2009, <http://www.reuters.com/article/idUSTRE56H01120090718>; Human Sexuality, Official Website of the Episcopal Church, available at [http://www.episcopalchurch.org/infoline\\_10414\\_ENG\\_HTM.htm](http://www.episcopalchurch.org/infoline_10414_ENG_HTM.htm) (last visited Mar. 2, 2010) (containing links to articles discussing various religious views on homosexuality).

<sup>276</sup> Evangelical Lutheran Church, Homosexuality and the ELCA, available at <http://www.elca.org/What-We-Believe/New-or-Returning-to-Church/Dig-Deeper/Homosexuality-and-the-ELCA.aspx> (last visited Mar. 2, 2010). The church has no prohibition on the blessing of same-sex unions, and expresses trust in its pastors and congregations who bless such unions. *Id.* See also Josh Levs, *Lutherans Accept Clergy in “Lifelong” Same-Sex Relationships*, CNN, Aug. 21, 2009, <http://www.cnn.com/2009/US/08/21/lutheran.gays/index.html>.

<sup>277</sup> Barbara J. Pescan, Unitarian Universalist Affirmation of Gay, Lesbian, Bisexual, and Transgender People, Unitarian Universalist Association of Congregants, available at <http://www.uua.org/visitors/uuperspectives/59581.shtml> (last visited Mar. 2, 2010).

Church, Methodist Church,<sup>278</sup> Southern Baptist Convention,<sup>279</sup> Seventh-Day Adventists,<sup>280</sup> and Church of Jesus Christ of Latter Day Saints do not (although Latter Day Saints do not oppose civil unions that grant limited rights pertaining to hospitalization, employment, and housing).<sup>281</sup> Islam similarly prohibits gay marriage and gay religious leaders.<sup>282</sup> The American Baptist Church<sup>283</sup> and Conservative Movement’s Committee on Jewish Law and Standards<sup>284</sup> are split on the issue. Not only are churches split on the morality of homosexuality, biblical scholars are split as well. Some assert, based on scripture, that homosexuality is a sin,<sup>285</sup> while others disagree, and point out that scripture was also used to

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<sup>278</sup> Daniel Burke, *Methodists Defeat Gay-Related Membership Policy*, USA TODAY, July 31, 2009, [http://www.usatoday.com/news/religion/2009-07-31-methodist-gay\\_N.htm](http://www.usatoday.com/news/religion/2009-07-31-methodist-gay_N.htm). The church rejected a membership amendment that would have made membership “open to all Christians regardless of sexual orientation.” *Id.* But see United Methodist Church, Church to Be in Ministry to Persons of All Sexual Orientations, available at [http://www.umc.org/site/apps/nlnet/content2.aspx?c=IwL4KnN1LtH&b=4951419&content\\_id={CAF9E91C-06A0-4D90-8AC2-97E9A0102D1B}&notoc=1](http://www.umc.org/site/apps/nlnet/content2.aspx?c=IwL4KnN1LtH&b=4951419&content_id={CAF9E91C-06A0-4D90-8AC2-97E9A0102D1B}&notoc=1) (last visited Mar. 2, 2010) (stating that the church dedicates itself to hospitality toward those of all sexual orientations, and welcome sexual minorities, their friends, and their families).

<sup>279</sup> Southern Baptist Convention, Sexuality, available at <http://www.sbc.net/aboutus/pssexuality.asp> (last visited Mar. 2, 2010).

<sup>280</sup> Seventh-Day Adventist Church, Seventh-Day Adventist Position Statement on Homosexuality, available at [http://www.adventist.org/beliefs/statements/main\\_stat\\_46.html](http://www.adventist.org/beliefs/statements/main_stat_46.html) (last visited Mar. 3, 2010).

<sup>281</sup> See, e.g., Jennifer Dobner, *Film Focuses on Mormon Role in Gay Marriage Ban*, ABC NEWS, Jan. 23, 2010, <http://abcnews.go.com/Entertainment/wirestory?id=9643209&page=2> (asserting that the church has indicated it does not oppose civil unions or other limited rights); Church of Jesus Christ Latter-Day Saints, Same-Gender Attraction, <http://www.newsroom.lds.org/ldsnewsroom/eng/public-issues/same-gender-attraction> (last visited Mar. 3, 2010) (stating that the church opposes any “legally sanctioned relationship with the [same] bundle of legal rights traditionally belonging to marriage,” but has “no objection to” certain other partnerships or pairings without the right to adopt).

<sup>282</sup> Editorial, *Pro-Gay-Marriage Muslim Delegate Stirs Conservatives*, NPR (Aug. 11, 2009), <http://www.npr.org/templates/story/story.php?storyId=111770008> (discussing traditional Islam beliefs as to homosexuality).

<sup>283</sup> See, e.g., Gregory Tomlin, *Split Among Baptists Over Homosexuality Is Final*, BAPTIST PRESS, May 18, 2006, <http://www.bpnews.net/bpnews.asp?ID=23275> (discussing the split that started in the 1990s, with the formation of the Association of Welcoming and Affirming Baptists); Ass’n of Welcoming & Affirming Baptists, *Who We Are*, available at <http://www.wabaptists.org/> (last visited Mar. 3, 2010).

<sup>284</sup> Alan Cooperman, *Conservative Rabbis Allow Ordained Gays, Same-Sex Unions*, WASH. POST, Dec. 7, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/12/06/AR2006120601247.html>.

<sup>285</sup> See, e.g., Stephen Dove, *Baylor University Defends Stance on Homosexuals*, BAYLOR UNIV. LARIOT ONLINE, Jan. 30, 2002, <http://www.baylor.edu/Lariat/news.php?action=story&story=17692>.

wrongly justify suppression of women and the enslavement of African-Americans for decades.<sup>286</sup>

Within the military, chaplains provide pastoral counseling to all troops regardless of sexual orientation and will continue to do so following repeal of DADT.<sup>287</sup> They are not, however, required to perform religious rites or marriages that violate the tenets of their distinct faith group.<sup>288</sup> If the military elects to recognize same-sex marriages and civil unions, chaplains will be free to perform or refuse to perform them in accordance with the mandates of their individual denominations, just as they are today.<sup>289</sup>

America's Armed Forces exist to fight and win wars, not to provide a workplace for servicemembers with any single set of religious beliefs.<sup>290</sup> Troops from all walks of life serve effectively alongside those whose beliefs or private behaviors they may find offensive or immoral.<sup>291</sup>

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<sup>286</sup> ROGERS, *supra* note 269, at 18–25 (providing in-depth discussion); *see also* Rev., Dr. Kathlyn James, *Is Homosexuality a Sin?* (1997), available at [http://www.jesumcc.org/resource/rev\\_james.html](http://www.jesumcc.org/resource/rev_james.html) (last visited Mar. 4, 2010) (discussing Paul's letter to the Romans in which he not only condemns homosexuality but also directs slaves to obey their masters and women not to teach, cut their hair, or speak in church).

<sup>287</sup> Telephone Interview with Chaplain (Colonel) Michael A. Hoyt, Chief of Chaplain Corps Operations, U.S. Army (Mar. 4, 2010) [hereinafter Hoyt Interview]. *See also* Press Release, Chaplains Back Repeal of Don't Ask, Don't Tell (Nov. 16, 2009), available at <http://www.votevets.org/news?id=0263> (explaining that military chaplains are already required to provide pastoral counseling to gay troops, and citing the joint position of three retired military chaplains that DADT should be repealed).

<sup>288</sup> *See, e.g.*, U.S. DEP'T OF DEF., DIR. 1304.19, APPOINTMENT OF CHAPLAINS FOR THE MILITARY SERVICE para. C (18 Sept. 1993) [hereinafter DODD 1304.19], available at <http://www.maaf.info/regs/DODD1304-19pv1993.pdf>; U.S. DEP'T OF ARMY, REG. 165-1, ARMY CHAPLAIN CORPS ACTIVITIES para. 3-2(5) (3 Dec. 2009) [hereinafter AR 165-1]; Hoyt Interview, *supra* note 287. Pursuant to these and other applicable regulations, military chaplains are not required to perform marriages. They are free to perform weddings on a case-by-case basis and to refrain from performing religious rites when doing so violates any tenet of their faith (i.e., those who believe divorce is a sin do not perform marriage rites for divorced troops). In these cases, troops are referred to another chaplain or an appropriate non-military resource. *Id.*

<sup>289</sup> DoD DIR. 1304.19, *supra* note 288, para. C; AR 165-1, *supra* note 288, para. 3-2(5); Hoyt Interview, *supra* note 287.

<sup>290</sup> Terrence K. Kelly, *Transformation and Homeland Security: Dual Challenges for the US Army*, 33 PARAMETERS 36 (2003), available at <http://www.carlisle.army.mil/USAWC/Parameters/03summer/kelly.pdf>.

<sup>291</sup> For example, abortion, sexual promiscuity, sex outside of marriage (to include sex between single, consenting, heterosexual adults), sex for non-procreation purposes, masturbation, use of birth control, and the act of viewing adult pornography are all considered to be immoral and sinful by troops who practice Catholicism and troops who

Servicemembers are trained to overlook cultural, religious, ethnic, and gender differences and focus instead on institutional service values such as integrity, honor, selfless service, and courage. This is reflected in the Army’s diversity policy, which states “men and women who serve our great Army come from all walks of life. While each thinks differently and brings different attributes and characteristics, together they make up the best Army in the world.”<sup>292</sup> Army leaders are further directed to “develop and maintain an inclusive environment that will sustain the Army as a relevant and ready Force.”<sup>293</sup> Diversity is valued and celebrated in the military, rather than discouraged.<sup>294</sup> The high quality of America’s military forces is based in large part on inclusion, rather than exclusion.

2. “GLBs Will Lower Morale, Unit Cohesion, and Good Order & Discipline”

Opponents of gays in the military state that concerns over unit cohesion, morale, discipline, and privacy should preclude openly gay individuals from serving.<sup>295</sup> In the 1940s Secretary of the Army Kenneth Royall cited these very same factors as primary reasons why the

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follow traditional Christian teachings. Yet, none of these activities are prohibited by the military outside of deployed environments. See, e.g., CATECHISM OF THE CATHOLIC CHURCH (2d ed. 1997); Janet Smith, The Christian View of Sex, <http://www.catholiceducation.org/articles/sexuality/se0004.html> (last visited Mar. 3, 2010).

<sup>292</sup> U.S. Military Acad., Army Policy on Diversity, available at <http://www.eecs.usma.edu/webs/events/diversity/dlc2009/GENWard.html> (providing text of the Army’s diversity policy, which is signed by Sergeant Major of the Army Kenneth O. Preston, Chief of Staff George W. Casey Jr., and Secretary of the Army Pete Geren).

<sup>293</sup> Sergeant Major of the Army Kenneth O. Preston et al., Army Policy on Diversity (Apr. 1, 2009), available at [https://www.deomi.org/DiversityMgmt/documents/Diversity\\_Policy\\_Memo\\_000.pdf](https://www.deomi.org/DiversityMgmt/documents/Diversity_Policy_Memo_000.pdf).

<sup>294</sup> See, e.g., Sec’y of the Navy David C. Winter, Dep’t of the Navy Diversity Policy Statement (Aug. 27, 2007), available at <https://www.deomi.org/DiversityMgmt/Documents/SECNAVDiversityPolicyStatement2007.pdf>; Admiral Thad W. Allen, Coast Guard Diversity Policy Statement, available at <https://www.deomi.org/DiversityMgmt/documents/USCGDiversityPolicyStatement.pdf> (last visited Mar. 3, 2010); GERRY J. GILMORE, DIVERSITY, EQUALITY PROGRAMS STRENGTHEN AMERICA’S MILITARY (Feb. 22, 2007), <http://www.defense.gov/News/NewsArticle.aspx?ID=3145>.

<sup>295</sup> Statement of Support for the 1993 Law Regarding Homosexuals in the Military (2009), Center for Military Readiness, available at <http://cmrlink.org/CMRDocuments/FlagOfficersLetterPOTUS-033109.pdf> (last visited Mar. 3, 2010) (containing a statement sent to President Obama and Congress by a group of retired flag and general officers, expressing their support for the ban on gays based on concerns regarding unit cohesion, morale, discipline, and effectiveness).

President and Congress should think twice before integrating African-Americans into all-white units. In a letter to the White House, he wrote, "Soldiers live and work closely together. They are not only on the same drill field but also in the same living and eating quarters. . . . Any change in our [segregation] policy would adversely affect the morale of many Southern [S]oldiers and other [S]oldiers now serving."<sup>296</sup> General Omar N. Bradley, too, contended that "complete integration might seriously affect morale and thus affect battle efficiency,"<sup>297</sup> and expressed concern not for its effect during the workday, but for the "big problems" that would "arise after work or training hours, in living quarters and social gatherings."<sup>298</sup> Opponents of integration predicted that white Soldiers would refuse to voluntarily work, sleep, or eat with black Soldiers and that forced integration would negatively impact team work, and discipline.<sup>299</sup> The Chairman of the General Board of the Navy wrote:

How many white men would choose, of their own accord, that their closest associates in sleeping quarters, at mess, and in a gun's crew should be of another race? How many would accept such conditions, if required to do so, without resentment and just as a matter of course? The General Board believes that the answer is "few, if any," and further believes that if the issue were forced, there would be a lowering of contentment, teamwork, and discipline in the service.<sup>300</sup>

The Secretary of the Navy predicted that if African-American troops were given positions of leadership, they would be unable to maintain discipline among white subordinates and would cause a loss in

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<sup>296</sup> Memorandum from Sec'y of the Army Kenneth Royall to the Honorable Clark Clifford (Mar. 29, 1949), available at [http://www.trumanlibrary.org/whistlestop/study\\_collections/desegregation/large/documents/pdf/4-17.pdf#zoom=100](http://www.trumanlibrary.org/whistlestop/study_collections/desegregation/large/documents/pdf/4-17.pdf#zoom=100) (last visited Feb. 6, 2010) [hereinafter Royall Memorandum].

<sup>297</sup> General Omar N. Bradley, Statement Before the President's Comm. on Equality of Treatment and Opportunity in the Armed Forces 5 (Mar. 28, 2009), available at [http://www.trumanlibrary.org/whistlestop/study\\_collections/desegregation/large/documents/index.php?pagenumber=5&documentid=10-1&documentdate=1949-03-28&study\\_collectionid=coldwar&groupid=](http://www.trumanlibrary.org/whistlestop/study_collections/desegregation/large/documents/index.php?pagenumber=5&documentid=10-1&documentdate=1949-03-28&study_collectionid=coldwar&groupid=) (last visited Feb. 6, 2010) [hereinafter General Bradley Statement].

<sup>298</sup> *Id.* at 3.

<sup>299</sup> Huong Thien Nguyen, Note, *Irrational Prejudice: The Military's Exclusion of Gay, Lesbian, and Bisexual Servicemembers After Romer v. Evans*, 28 HASTINGS CONST. L.Q. 461, 500 (2001).

<sup>300</sup> Bianco, *supra* note 270, at 47, 57 (quoting from the Chairman's written document).

“teamwork, harmony, and efficiency.”<sup>301</sup> Despite these warnings and predictions, however, integration did not have a negative impact,<sup>302</sup> and today, the military prides itself on its “ability to integrate different races within its ranks more successfully than the civilian sector.”<sup>303</sup>

Proponents of DADT are correct in their assertion that unit morale, cohesion, and discipline are critical to military effectiveness and success, and that the military must have rules and policies in place that protect them.<sup>304</sup> However, as pointed out by Congressman Patrick Murphy (a combat veteran and former Army Judge Advocate), excluding an entire class of otherwise qualified individuals is not necessarily the best or only way to achieve this. In a July 2008 congressional hearing on the issue, Congressman Murphy pointed out that current military laws, rules, and structure protect good order and discipline and will continue to do so when the ban is lifted.<sup>305</sup> Military and political leaders such as Former Chairmen of the Joint Chiefs of Staff General John Shalikashvili and General Colin Powell, former Senator San Nunn, and General Minton Alexander—who were all at one time were involved in the implementation of DADT and believed it necessary for preservation of unit cohesion, morale, and good order and discipline—have changed their position on the issue and support its repeal.<sup>306</sup>

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<sup>301</sup> *Id.* at 57.

<sup>302</sup> Michael K. Kauth & Dan Landis, *Applying Lessons Learned from Minority Integration in the Military*, in *OUT IN FORCE: SEXUAL ORIENTATION AND THE MILITARY* 86, 88 (Gregory M. Herek et al. eds., 1996) (discussing a 1951 Army-sponsored university study finding that desegregation had caused no significant effect on unit effectiveness, and a subsequent 1963 DoD directive stating that racial discrimination is *harmful* to morale and unit effectiveness).

<sup>303</sup> Nguyen, *supra* note 299, at 500.

<sup>304</sup> Captain John A. Carr, *The Difference Between Can and Should: Able v. United States and the Continuing Debate About Homosexual Conduct in the Military*, 46 A.F. L. REV. 1, 65 (1999).

<sup>305</sup> Comments of Representative Patrick Murphy (July 23, 2008), *available at* <http://www.youtube.com/watch?v=tjqs1SqVVSQ> (depicting his statement at the congressional hearings on Don’t Ask, Don’t Tell).

<sup>306</sup> *See, e.g.*, Press Release, General (Ret.) John M. Shalikashvili, Statement to Pentagon Leadership (Jan. 27, 2010), *available at* <http://gillibrand.senate.gov/newsroom/press/release/?id=60c1b742-f0ff-4397-83a8-49adf322e77b>; Karen DeYoung, *Colin Powell Now Says Gays Should be Able to Serve Openly in Military*, WASH. POST, Feb. 4, 2010, <http://www.washingtonpost.com/wpdyn/content/article/2010/02/03/AR2010020302292.html>; Owen West, *An About-Face on Gay Troops*, N.Y. TIMES, Feb. 8, 2009, <http://www.nytimes.com/2009/02/09/opinion/09west.html>; FRANK, *supra* note 5, at 115–17.

Moreover, a 1992 GAO report states that there is no empirical evidence to support the contention that lifting the ban on gays will negatively impact these components of military readiness.<sup>307</sup> In its response to this report, the DoD concurred, stating that the ban “is based solely upon concerns about homosexuality itself” and on “professional judgment that the exclusionary policy promotes overall combat effectiveness.”<sup>308</sup> General Mintor Alexander, U.S. Army (Ret.), who initially led the Army’s DADT advisory group in 1993, recalls the group had no empirical data on which to base its recommendation and explained that its recommendation on implementation was based solely on fears and subjective data.<sup>309</sup> Alexander believes the ban is harmful to military readiness and morale and should be repealed.<sup>310</sup>

Military leaders and lower-enlisted Soldiers alike are adaptable and disciplined. Day in and day out, on bases, ships, remote, and deployed locations around the world, they demonstrate their ability to follow rules and policies with which all individuals do not necessarily agree. Servicemembers work, train, and fight side-by-side with those whose personalities or religious, moral, or behavioral traits they may dislike or of which they disapprove. It is their ability to do so successfully that makes the U.S. military one of the most effective fighting forces in the world, and well suited for the inclusion of acknowledged GLB servicemembers.<sup>311</sup>

#### *A Special Note on Privacy Considerations*

Proponents of the ban also worry that the presence of gay troops in barracks rooms and group showers will violate the privacy and modesty of others. There is concern that heterosexuals and homosexuals showering together will lead to inappropriate sexual stares, uncontrollable erections, and lewd behavior. Privacy is, indeed, an important component of morale. These fears and concerns, however, assume that all homosexuals are sexual predators, and fail to recognize

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<sup>307</sup> GAO HOMOSEXUALITY POLICY, *supra* note 94, at 7 (noting the DoD’s statement that the ban is not based on scientific or sociological evidence). *See also id.* at 59; Aaron Belkin, *supra* note 126, at 116–17 (discussing the lack of scientific and sociological evidence).

<sup>308</sup> GAO HOMOSEXUALITY POLICY, *supra* note 94, at 27 (citing DoD comments).

<sup>309</sup> FRANK, *supra* note 5, at 116.

<sup>310</sup> *Id.* at 117.

<sup>311</sup> Coleman Statement, *supra* note 251.

that many homosexuals value modesty and privacy just as much as heterosexuals do.<sup>312</sup> Moreover, gays are already showering and rooming with heterosexual Soldiers when accommodations force them to do so, and have been doing so for years, with no widespread patterns of sexual misconduct reported. While there are occasional instances of same-sex sexual assaults, the perpetrators involved are addressed individually, under applicable criminal laws, as are the many more heterosexuals who are accused of sexual harassment and misconduct.<sup>313</sup> While some same-sex sexual assaults may go unreported due to a perceived stigma associated with homosexuality, many heterosexual sexual assaults are similarly underreported due to the perceived stigma of being sexually assaulted and other factors.<sup>314</sup> Don’t Ask, Don’t Tell itself hinders gay troops from reporting sexual assaults against them because doing so may compel them to discuss their sexual orientation with military investigators risking subsequent discharge under the policy.<sup>315</sup>

Furthermore, DADT does not protect privacy. As noted above, heterosexual troops are already serving, showering, rooming and living with homosexual troops. Heterosexual Soldiers have no way, of knowing who among them is homosexual, however, since gay Soldiers

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<sup>312</sup> See, e.g., Letter from a Mountain Soldier, *supra* note 82 (stating that despite his sexual orientation, “the only thing I’ve ever thought about while showering [at places like Ranger School and deployed locations] was getting in and getting out” quickly); Hughes, *supra* note 6 (stating that despite his sexual orientation, there was “nothing remotely sexual” about having to share showers or quarters with fellow male troops during his deployment to Afghanistan).

<sup>313</sup> See, e.g., Roger Simon, *Arguments Against Gays in Military Don’t Hold Up*, BALTIMORE SUN, Mar. 31, 1993, [http://articles.baltimoresun.com/1993-03-31/news/1993090078\\_1\\_sam-nunn-gays-in-military-showers](http://articles.baltimoresun.com/1993-03-31/news/1993090078_1_sam-nunn-gays-in-military-showers)).

<sup>314</sup> See, e.g., Michael Rand & Shannan Catalano, *Criminal Victimization: 2006*, BUREAU OF JUSTICE STATISTICS BULLETIN 5 (Dec. 2007), <http://www.rainn.org/pdf-files-and-other-documents/News-Room/press-releases/2006-ncvs-results/NCVS%202006-1.pdf> (rape and sexual assaults are less likely to be reported to police than other crimes); Gordon Block, *Sexual Assault Goes Underreported*, COLLEGIATE TIMES, Feb. 5, 2009, <http://www.collegiatetimes.com/stories/12903/sexual-assault-goes-underreported> (factors such as intoxication and a preexisting relationship between victim and offender sometimes cause underreporting); McCollum Addresses Under-Reporting of Sexual Assaults in the Military, available at [http://www.mccollum.house.gov/index.php?option=com\\_content&view=article&id=115&catid=43&Itemid=125](http://www.mccollum.house.gov/index.php?option=com_content&view=article&id=115&catid=43&Itemid=125) (last visited Mar. 3, 2010) (sexual assaults often go unreported based on fears of ostracism, harassment, gossip, ridicule, or that nothing will be done).

<sup>315</sup> See, e.g., Stephen M. Silverman, *Lance Bass’s Beau: I Was Assaulted in the Military*, PEOPLE, Oct. 23, 2006, <http://www.people.com/people/article/0,1549383,00.html> (former Air Force Academy graduate and Air Force officer Reichen Lehmkuhl discusses being sexually assaulted as a cadet and his initial decision to remain silent about the incident).

are prohibited from indicating their sexuality and troops are prohibited from asking about it. In addition, many troops now, even on ships and in deployed areas, have access to private shower stalls.<sup>316</sup> Although a few locations, such as temporary training sites and deployment hubs, do not have private shower stalls, some of these (such as the Army's Combined Readiness Center at Fort Benning, Georgia) require troops to shower in open bays with deploying DoD civilians and contractors,<sup>317</sup> who have no restrictions prohibiting them from acknowledging their sexual orientation.<sup>318</sup> At these locations, troops seeking privacy typically use poncho liners, towels, or other items, and when possible, shower during off-peak times.<sup>319</sup> Don't Ask, Don't Tell does not protect privacy; instead, it prevents commanders from creating solutions to provide for it. Only if the ban is lifted can these issues be openly and effectively discussed and ideas for increased privacy be created and implemented.

### 3. "Recruiting and Retention will Suffer"

In a 2009 letter to President Obama, a group of retired general and flag officers (some who have subsequently asked that their names be retracted) warned that repealing the ban will "undermine recruiting and

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<sup>316</sup> Three e-mail messages from Lieutenant Commander Paige Ormiston, U.S. Navy (Mar. 3, 2010) (on file with author) (discussing, based on her military experience on Navy vessels, the availability of private shower stalls on at least five Navy carriers, six cruisers, eight destroyers, two fast combat support ships, three coastal patrol craft, and two amphibious assault ships); Telephone Interview with, and e-mail from, Captain Timothy Hsia, U.S. Army (Feb. 8, 2010) (email message on file with author) (discussing, based on his experiences as a deployed infantry officer, the availability of private shower stalls on at least eight Iraq forward operating bases, including Mosul, Balad, Baghdad, and Baqubah). This assertion is also based on author's observations over the course of more than ten years of active duty military service (including enlisted service in the Signal Corps and as an officer in the Military Police and JAG Corps) in locations such as Saudi Arabia (Dhahran and King Kalid Military City), Kuwait (Camp Arifjan and Ali al Saleem Air Base), and Iraq (Camp Victory and Camp Liberty) [hereinafter Author's Observations].

<sup>317</sup> Author's Observations, *supra* note 316; e-mail messages from three active duty military officers (Feb. 2010) (on file with author). See also sources cited *supra* note 78 (describing shared living arrangements).

<sup>318</sup> U.S. DEP'T OF DEF., DIR. 1020.02, DIVERSITY MANAGEMENT AND EQUAL OPPORTUNITY (EO) IN THE DEPARTMENT OF DEFENSE 1 (Feb. 5, 2009), available at [http://www.deomi.org/EOAdvisorToolkit/documents/DoD\\_Directive102002p.pdf](http://www.deomi.org/EOAdvisorToolkit/documents/DoD_Directive102002p.pdf) (prohibiting military departments and combatant commands from discriminating against their civilian employees on the basis of sexual orientation).

<sup>319</sup> E-mail messages from two active duty Army officers (Feb. 2010) (on file with author); Author's Observations, *supra* note 316.

retention . . . and eventually break the All-Volunteer Force.”<sup>320</sup> In 1949, Secretary of the Army Royall made the same prediction as to the integration of African-Americans, stating, “it is a well known fact that close personal association with Negroes is distasteful to a large percentage of Southern whites. A . . . substantial and sudden change in the Army’s partial segregation policy [will] in my opinion adversely affect enlistments and reenlistments . . . probably making peacetime selective service necessary.”<sup>321</sup> Vice Admiral F.E.M. Whiting voiced his concern more strongly, stating, “The minute the negro is introduced into general service . . . [the] type of man that we have been getting for the last twenty years will go elsewhere and we will get the type of man who will lie in bed with a negro.”<sup>322</sup> General Omar Bradley also cautioned that “complete integration might very seriously affect voluntary enlistments. . . .”<sup>323</sup> None of these dire predictions, however, came to pass.

The current predictions of the “breaking” of the United States’ volunteer military if openly gay troops are allowed to serve are unsupported by evidence or studies. Federal and private research studies point to this lack of evidence and make no such predictions.<sup>324</sup> There is, however, evidence—including our experiences with racial and gender integration and the United Kingdom’s experiences with the integration of gays—that allowing openly gay individuals to serve will improve the

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<sup>320</sup> Flag & General Officers for the Military Statement to the President and Congress (Apr. 9, 2009), *available at* <http://www.flagandgeneralofficersforthemilitary.com/>. Several of the flag and general officers who signed this petition have reportedly denied signing it or asked to have their names removed; others are deceased. At least one had reportedly been dead for at least six years prior to his name appearing on the petition. Servicemembers United and the Servicemembers United Defense Policy Council, Flag and General Officer for the Military: A Closer Look, *available at* <http://www.servicemembersunited.org/closerlook> (last visited Apr. 12, 2010).

<sup>321</sup> Sec’y of the Army Kenneth C. Royall, Statement before the President’s Comm. on Equality of Treatment and Opportunity in the Armed Servs. (Mar. 28, 1949), *available at* [http://www.trumanlibrary.org/whistlestop/study\\_collections/desegregation/large/documents/pdf/4-17.pdf#zoom=100](http://www.trumanlibrary.org/whistlestop/study_collections/desegregation/large/documents/pdf/4-17.pdf#zoom=100) (last visited Feb. 6, 2010) [hereinafter Royall Statement].

<sup>322</sup> Bianco, *supra* note 270, at 55 (quoting Admiral Whiting).

<sup>323</sup> General Bradley Statement, *supra* note 297, at 5.

<sup>324</sup> *See, e.g.*, RAND SEXUAL ORIENTATION POLICY, *supra* note 71, at 395–97 (citing the lack direct evidence, and stating any such predictions as the effect of GLBs in the military “are inherently speculative”); GAO FOREIGN COUNTRY PRACTICES, *supra* note 135 (finding no adverse affect on retention or recruiting in several foreign military organizations that now allow gays to serve); Gregory M. Herek, *Sexual Orientation and Military Service: A Social Science Perspective*, 48 AM. PSYCHOLOGIST 538, 544 (1993).

military's ability to recruit and retain more talented, qualified troops and that America's military forces will successfully adapt.

#### 4. "GLBs Spread Sexually Transmitted Diseases"

Some supporters of DADT express concern that its repeal will result in increased health care costs and the spread of AIDS and other sexually transmitted diseases throughout the military.<sup>325</sup> Similar arguments were made against integration in the 1940s. In 1948, for example, Senator Richard Russell, an opponent of military desegregation, "cast African Americans as disease-riddled outsiders who threatened innocent young white boys with deadly health risks, particularly sexually transmitted diseases. Syphilis, gonorrhea, chancre, and tuberculosis, he said, 'are appallingly higher among the members of the Negro race than among the members of the white race.'"<sup>326</sup> He "took to the floor of the Senate with charts to demonstrate how African-Americans had, 'high rates of venereal disease,' and how mingling the races in the armed forces would expose white people to this health threat."<sup>327</sup> In a conversation with General Dwight D. Eisenhower, Russell explained that his objections to integration were not based on racial prejudice, but on the "vital factors as the morale, discipline, and health of the troops" and African-Americans' "incidence(s) of venereal diseases."<sup>328</sup> These concerns had been so worrisome that military leaders forced the Red Cross to maintain separate blood banks—one for whites, another for African-Americans—during all of World War II.<sup>329</sup>

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<sup>325</sup> See, e.g., Bunn, *supra* note 24, at 234; Sean O'Donnell, Commentary, *Why the "Don't Ask, Don't Tell" Policy Should Stay*, EXAMINER (Balt.), Feb. 3, 2010, <http://www.examiner.com/x-3108-Baltimore-Republican-Examiner-y2010m2d3-Why-the-Dont-ask-dont-tell-policy-should-stay>.

<sup>326</sup> FRANK, *supra* note 5, at 61; see also Phyllis W. Jordan, Commentary, *When the Military Mixed*, VA.-PILOT & LEDGER STAR (Norfolk), Mar. 14, 1993 (describing Russell's emphasis on the disease rate among African-American Soldiers and citation of statistics that bolstered his arguments regarding rates of tuberculosis and venereal disease).

<sup>327</sup> Judy Holland, *Activists Take on Russell Building over Racism*, SEATTLE POST-INTELLIGENCER, Feb. 1, 2003, at A2.

<sup>328</sup> Alexander Cockburn, *Same Song, Different Verse*, L.A. TIMES, Jan. 31, 1993, at 5.

<sup>329</sup> E.g., MACGREGOR, *supra* note 260, at 36 (citing to a 1942 memo by Rear Admiral Ross T. McIntire to the Secretary of the Navy regarding segregated blood banks); SPENCIE LOVE, ONE BLOOD: THE DEATH AND RESURRECTION OF CHARLES R. DREW 32, 49 (1996). In 1941, Drew established the first American Red Cross blood bank, but was unable to donate his own blood because it refused donations from African-Americans. In 1942, the Red Cross changed its policy permitting African-Americans to donate, but kept

Medical fitness and the prevention of infectious diseases are critically important in maintaining an effective fighting force. Don’t Ask, Don’t Tell, however, does not serve this function. Educational programs and routine medical screening (including biennial AIDS testing for all current Soldiers) already in place are the military’s method to identify, treat, and limit the spread of contagious diseases within its population, including the portion that is gay. According to the American Medical Association (AMA), repealing the ban will result in more honest and open communications between GLB troops and their health care providers, and better overall health care for these troops.<sup>330</sup> That, in turn, will increase military effectiveness, not harm it.

5. “GLBs Will Cause an Increase in Sexual Assaults and Misconduct”

Supporters of DADT assert that its repeal will result in an increase in sexual misconduct by GLBs against heterosexual troops. One general officer testified in 1993, for example, that gays should not serve because they may solicit others to commit homosexual acts.<sup>331</sup> In 1948, this same argument was made by Senator Richard Russell of Georgia in opposition of racial integration. Russell asserted that integration would “‘increase the rate of crime committed by servicemen,’ since ‘Negro troops,’ reportedly committed rape thirteen times more often per capita than whites”<sup>332</sup> and sodomy two-and-a-half more times.<sup>333</sup>

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their blood separate from that of whites. Ironically, Drew later bled to death after being refused treatment at a whites-only hospital following an automobile accident. *Id.*

<sup>330</sup> Am. Med. Ass’n, AMA Policy Regarding Sexual Orientation, available at <http://www.ama-assn.org/ama/pub/about-ama/our-people/member-groups-sections/glb-advisory-committee/ama-policy-regarding-sexual-orientation.shtml> (last visited Mar. 3, 2010) (stating, in Policy H-65.972, Repeal of “Don’t Ask, Don’t Tell,” that the association will advocate for repeal of DADT); Kevin B. O’Reilly, *AMA Meeting: “Don’t Ask, Don’t Tell” Said to Hurt Patient Care; Repeal Urged*, AM. MED. NEWS, Nov. 23, 2009, <http://www.ama-assn.org/amednews/2009/11/23/prsc1123.htm> (discussing passage of a resolution calling for complete repeal of DADT); Editorial, *AMA Opposes Military Gay Policy*, WASH. TIMES, Nov. 11, 2009, <http://www.washingtontimes.com/news/2009/nov/11/ama-opposes-military-gay-policy/> (reporting on doctors who say DADT forces GLB troops to keep their sexual orientation a secret creating a chilling effect on open communication between them and their health care providers).

<sup>331</sup> Bianco, *supra* note 270, at 50.

<sup>332</sup> FRANK, *supra* note 5, at 61.

<sup>333</sup> Bianco, *supra* note 270, at 50.

Crime rate statistics were not reliable indicators of how well African-American Soldiers would perform, nor did they accurately predict integrated Soldiers' ability to comply with the rules and discipline imposed by the military. Similarly, there is no proof that similar statistics regarding homosexuals (or any other group serving in the military) are an accurate indicator of how well they—as a group—will perform. There are military mechanisms in place for dealing with those from all walks of life—including gays—who commit misconduct. The UCMJ criminalizes sexual offenses, and provides a mechanism for the prosecution and punishment of those who engage in fraternization, abuse of power, sexual harassment, assault, and other crimes.

Moreover, if homosexuals are all sexually aggressive predators and unable to control their sexual urges and behavior, then what of the 66,000 currently serving against whom no such allegations have been made? What of the thousands who have been administratively discharged under DADT with no such allegations? Or the ones administratively discharged prior to the policy's enactment? What of GLB veterans like retired Commander Zoe Dunning (a lesbian Navy officer who served openly for fourteen years),<sup>334</sup> retired Petty Officer First Class Keith Meinhold (a gay Sailor who served openly from 1992 until his retirement in 1996),<sup>335</sup> and retired Colonel Margarethe Cammermeyer (a lesbian Army nurse who served openly from 1994 until her retirement in 1997),<sup>336</sup> who served honorably with no such incidents? While sexual assaults involving homosexual behavior do sometimes occur in the military, the vast majority of sexual misconduct is committed by males against females.<sup>337</sup> It is noteworthy that American

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<sup>334</sup> Cynthia Laird, *Out Navy Commander Retires*, BAY AREA REP., June 7, 2007, <http://ebar.com/news/article.php?sec=news&article=1884>; see also Willie Monroe, *Strong Reactions to General's Gay Remarks*, ABC NEWS 7, Mar. 13, 2007, [http://abclocal.go.com/kgo/story?section=news/national\\_world&id=5119262](http://abclocal.go.com/kgo/story?section=news/national_world&id=5119262).

<sup>335</sup> Nancy A. Youssef, *U.S. Military Moves to End Ban on Gays*, MIAMI HER., Feb. 2, 2010, <http://www.miamiherald.com/2010/02/02/1459853/us-military-moves-to-end-ban-on.html>;

<sup>336</sup> COLONEL (RET.) MARGARETHE CAMMERMEYER & CHRIS FISHER, *SERVING IN SILENCE* (1995) (discussing Colonel Cammermeyer's military service as a nurse); see also *Breaking the Silence . . . Grethe Cammermeyer*, available at <http://www.cammermeyer.com/bio.htm> (last visited Feb. 27, 2010).

<sup>337</sup> U.S. DEP'T OF DEF., *FY08 REPORT ON SEXUAL ASSAULT IN THE MILITARY* 74 (Mar. 2009) [hereinafter *FY08 SEXUAL ASSAULT REPORT*], available at [http://www.sapr.mil/Contents/ResourcesReports/AnnualReports/DoD\\_FY08\\_Annual\\_Report.pdf](http://www.sapr.mil/Contents/ResourcesReports/AnnualReports/DoD_FY08_Annual_Report.pdf) (discussing 2265 unrestricted allegations of sexual assault investigated in 2008, 1864 of which were male-on-female, 14 which were female-on-male, 123 which were male-on-male, and 9 which were female-on-female [the remaining 255 involved gender-

paramilitary organizations and the military organizations of countries like the United Kingdom have experienced no reported increases in homosexual sexual harassment or assault since the repeal of their bans.<sup>338</sup>

The DADT policy has never been shown to prevent sexual assaults, nor was it designed to do so. This author has found no reports or studies indicating that sexual predators—whether homosexual or heterosexual—base their decision to commit a sexual assault on personnel policies or potential loss of employment. The possibility of job loss certainly did not prevent the alleged 2908 military-wide sexual assaults reported in fiscal year 2008.<sup>339</sup>

6. “*Heterosexual Troops will Commit Acts of Violence Against GLBs*”

Some proponents of DADT express concern over the safety of openly gay troops.<sup>340</sup> During desegregation, proponents of segregation voiced similar concerns; fear that “integration would prompt violence against a despised minority that the military would be helpless to stop.”<sup>341</sup> Such an assertion, however, presumes that heterosexual troops so lack discipline and self control that they are—as a group—unable to follow disfavored rules, and incapable of overcoming personal prejudices

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unknown assailants)]; *see also* Or. State Univ., Myths & Facts About Male Victimization, available at <http://oregonstate.edu/sexualassault/myths-amp-facts-about-male-victimization> (last visited Mar. 3, 2010) (stating that homosexual men are less likely than heterosexual men to commit sexual assault).

<sup>338</sup> Sen. Carl Levin, Opening Statement before the Senate Armed Servs. Comm. (Feb. 2, 2010), available at <http://levin.senate.gov/newsroom/release.cfm?id=322020> (stating that the presence of openly gay troops in the military organizations of other westernized countries have not been shown to cause any negative impact on unit cohesion or morale).

<sup>339</sup> FY08 SEXUAL ASSAULT REPORT, *supra* note 337, at 33 (discussing 2265 unrestricted reports and 753 restricted reports); *see also* U.S. Army Sexual Assault Prevention & Response Program, What is Acquaintance or “Date” Rape?, available at [http://www.sexualassault.army.mil/content/prev\\_date\\_rape.cfm](http://www.sexualassault.army.mil/content/prev_date_rape.cfm) (last visited Feb. 13, 2010) (asserting that approximately two-thirds of sexual assault victims in the United States know their assailants).

<sup>340</sup> Richard Sisk, *Military Less Resistant to Ending Anti-Gay “Don’t Ask, Don’t Tell” Policy for Soldiers*, N.Y. DAILY NEWS, Nov. 29, 2009, [http://www.nydailynews.com/news/politics/2009/11/29/2009-11-29\\_military\\_less\\_resistant\\_to\\_ending\\_antigay\\_dont\\_ask\\_dont\\_tell\\_policy\\_for\\_soldiers.html](http://www.nydailynews.com/news/politics/2009/11/29/2009-11-29_military_less_resistant_to_ending_antigay_dont_ask_dont_tell_policy_for_soldiers.html) (reporting that some proponents of the ban believe its repeal may result in violence against GLB troops).

<sup>341</sup> FRANK, *supra* note 5, at 62.

to the extent necessary to serve with gay troops.<sup>342</sup> Current and former military leaders dispute this presumption, citing how American troops, as a whole, have proven themselves adaptable, resilient, and disciplined, and able to comply with rules that they do not necessarily like or agree. According to U.S. Representative Patrick Murphy (the first Iraq war veteran elected to Congress), for instance, “to say that other countries’ Soldiers are professional enough to handle this and American Soldiers aren’t is really a slap in the face.”<sup>343</sup> Currently, military laws provide for the prosecution and punishment of troops—gay or straight—who engage in violent or harassing behavior. Perpetrators of violence against gays or any other troops are subject to the UCMJ and can be prosecuted and punished accordingly.

7. “*The Military Isn’t the Place for Social Experimentation or Evolution*”

Supporters of DADT argue that lifting it is akin to social experimentation and that the military is not the place for it.<sup>344</sup> Former Marine and current President of the Family Research Council, Tony Perkins, for example, claims that “this is not the time to be tinkering with the military and making it a playground of social experimentation.”<sup>345</sup> Former Marine Lieutenant Colonel Oliver North recently wrote that allowing gays to serve openly will turn the military into a “radical social experiment” with troops serving as “lab rats,” and would subject the military to same-sex marriages and military housing for same-sex married couples.<sup>346</sup> Opponents of racial integration voiced the same argument in opposition of integration of African-Americans in the 1940s.<sup>347</sup> In 1941, for example, Colonel Eugene R. Householder of the Army Adjutant General’s Office publicly responded to criticism of military restrictions on African-Americans by stating that the military

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<sup>342</sup> Herek, *supra* note 324, at 547.

<sup>343</sup> David Crary, *Allies’ Stance Cited in Gays-in-Military Debate*, USA TODAY, July 12, 2009, [http://www.usatoday.com/news/washington/2009-07-12-military-gay\\_N.htm](http://www.usatoday.com/news/washington/2009-07-12-military-gay_N.htm).

<sup>344</sup> See, e.g., Bunn, *supra* note 24, at 226.

<sup>345</sup> Editorial, *Out in Military: “Not the Time”* (CNN television broadcast Feb. 2, 2010), available at <http://www.cnn.com/video/#/video/politics/2010/02/02/gays.in.military.debate.cnn?hpt=C2>.

<sup>346</sup> Lieutenant Colonel (Ret.) Oliver North, *Military Lab Rats*, FOX NEWS, Feb. 5, 2010, <http://www.foxnews.com/story/0,2933,584955,00.html>.

<sup>347</sup> FRANK, *supra* note 5, at 62.

was made of up of troops with “pronounced views with respect to the Negro” that military orders would not change, and that:

The Army is not a sociological laboratory; to be effective it must be organized and trained according to the principles which will insure success. Experiments, to meet the wishes and demands of the champions of every race and creed for the solution of their problems are a danger to efficiency, discipline, and morale and would result in ultimate defeat.<sup>348</sup>

Shortly after President Truman issued his 1948 Executive order to integrate the military, Army Chief of Staff General Omar N. Bradley expressed public opposition based on his belief that it would make the Army an “instrument of social change in areas of the country which still rejected integration.”<sup>349</sup> Despite military and societal opposition, the Army nevertheless became a testing ground for one of the biggest social experiments conducted in the history of the United States: the integration of African-Americans in an era when the entire country was still segregated. In response to President Truman’s order to integrate the military, a “Proposed Experimental Plan for Integration” was drafted and integration began.<sup>350</sup> Military integration began six years before African-Americans were granted the legal right to attend white schools,<sup>351</sup> seventeen years before their voting rights were enforced by the Voting Rights Act of 1965 (forcing states to abide by the 15th Amendment),<sup>352</sup> and nineteen years before the Supreme Court struck down laws prohibiting and criminalizing interracial marriage.<sup>353</sup>

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<sup>348</sup> ULYSSES LEE, *THE EMPLOYMENT OF NEGRO TROOPS* 141 (2000) (1966), available at <http://www.history.army.mil/books/wwii/11-4/>.

<sup>349</sup> MACGREGOR, *supra* note 260, at 317 (citing to comments made by General Bradley in a media interview).

<sup>350</sup> Exec. Order No. 9981, 13 Fed. Reg. 4313 (July 26, 1948); U.S. Army, *Army Proposed Experimental Plan for Integration* (1949), Record Group 220, available at [http://www.trumanlibrary.org/whistlestop/study\\_collections/desegregation/large/document\\_s/pdf/10-3.pdf#zoom=100](http://www.trumanlibrary.org/whistlestop/study_collections/desegregation/large/document_s/pdf/10-3.pdf#zoom=100).

<sup>351</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). See also Nat’l Park Serv., *Brown v. Board of Education National Historic Site*, available at <http://www.nps.gov/nr/travel/civilrights/ka1.htm> (last visited Mar. 2, 2010) (stating that the Supreme Court’s decision in *Brown* forced the desegregation of public schools in twenty-one states).

<sup>352</sup> 42 U.S.C. § 1973–1973aa-6 (2006); U.S. Dep’t of Justice, *The Voting Rights Act of 1965*, U.S. Department of Justice, available at [http://www.justice.gov/crt/voting/intro/intro\\_b.php](http://www.justice.gov/crt/voting/intro/intro_b.php).

<sup>353</sup> *Loving v. Virginia*, 388 U.S. 1 (1967).

If the ban against GLBs is lifted, the military may elect to grant housing and other benefits to GLB troops and their lawful same-sex partners (based on state-recognized civil domestic partnerships or marriages) that are bestowed on heterosexual troops and their spouses. Such logistical issues are not new to the military. President Truman's integration order forced the military to deal with the contentious issue of integrating African-American families into all-white military housing areas years before the rest of the country began the long process of desegregation. It integrated African-American children into all-white DoD schools six years before the rest of the country was forced to do so pursuant to *Brown v. Board of Education*.<sup>354</sup> It forced the military to deal with the issue of whether or not to recognize interracial marriages performed in states that permitted it, at a time when interracial marriages were illegal in most states. The military successfully dealt with all these issues despite opposition by military and political leaders and the visceral repulsion many white troops and their families had toward African-Americans.<sup>355</sup>

The military was also forced to deal with housing and benefits issues when it integrated women into the regular military and service academies. In response to this integration, policymakers created rules, housing regulations, and benefits pertinent to women (such as maternity leave), and created solutions to address fraternization and sexual harassment. Had the military refused to integrate African-Americans and women based on arguments against "social experimentation" and concerns over housing issues and benefits, America's military would not be the diverse fighting force it is today. The contributions, skills, talent and leadership of troops like General Colin Powell (65th U.S. Secretary of State and former Chairman of the Joint Chiefs of Staff), Vernice Armour (female African-American Marine combat pilot who graduated number one in her flight school and flew combat missions during two tours in Iraq), and others like them would have been lost to the military.<sup>356</sup> The presence of African-Americans and women, and their

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<sup>354</sup> 347 U.S. 483 (1954).

<sup>355</sup> RAND SEXUAL ORIENTATION POLICY, *supra* note 71, at 93 (stating that racial integration was a "process which inspired many of the strong emotional reactions that the possibility of integrating homosexuals provokes today" in that most whites held a "visceral revulsion" to the idea of close physical contact with African-Americans).

<sup>356</sup> See, e.g., General Colin L. Powell, *available at* <http://www.achievement.org/autodoc/page/pow0bio-1> (last visited Mar. 4, 2010); *First African-American Female Combat Pilot* (CNN television broadcast), [http://www.youtube.com/watch?v=XuYWvNkEF\\_c](http://www.youtube.com/watch?v=XuYWvNkEF_c) (last visited Mar. 5, 2010).

many contributions, have increased military effectiveness, not reduced it.<sup>357</sup> If the military’s integration of these groups is any indicator, the military will successfully adapt to the inclusion of acknowledged GLB troops and similarly benefit from their service.

#### 8. “Now Isn’t the Time”

Proponents of DADT also assert that, based on our current posture in Iraq and Afghanistan, now is not the time for its repeal. Army Chief of Staff General George Casey recently stated that he has “serious concerns about the impact of [DADT’s repeal] on a force that is fully engaged in two wars and has been at war for eight-and-a-half years.”<sup>358</sup> Others contend that while DADT is not perfect, it has worked satisfactorily since its inception in 1993 and therefore should not be changed.<sup>359</sup> Opponents of racial integration made similar arguments about integration, which began shortly after America’s participation in two world wars and continued through a new war in Korea.<sup>360</sup> Political leaders warned President Truman to move very slowly on the issue.<sup>361</sup> At least one Army staff officer publicly opposed the change based on his assessment that segregation had proven “satisfactory” and “[t]o change now would destroy morale and impair preparations for a national defense.”<sup>362</sup> However, despite racial friction and predictions of reduced

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<sup>357</sup> Brigadier General John W. Miller II, Commander, The Judge Advocate Gen’s Legal Ctr. & Sch., 2010 National Women’s History Month (on file with author) (encouraging military judge advocates to consider the “countless recorded and unrecorded contributions [American women make] to the growth and strength of our nation” and to military service).

<sup>358</sup> Editorial, *Army Opposes Immediate End to Gay Ban*, MILITARY TIMES, Feb. 23, 2010, <http://www.military.com/news/article/army-to-oppose-suspension-of-gay-firings.html?ESRC=eb.nl&ESRC=army-a.nl>.

<sup>359</sup> Michael D. Shear, *McCain Appears to Shift on “Don’t Ask, Don’t Tell,”* WASH. POST, Feb. 3, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/02/02/AR2010020202588.html>.

<sup>360</sup> Neil Schoenherr, *Korean War Had Major Impact on Race Relations in the United States*, Jul. 25, 2003, available at <http://news.wustl.edu/news/Pages/304.aspx> (discussing the overlap of integration with the Korean War in the 1950s).

<sup>361</sup> See, e.g., MACGREGOR, *supra* note 260, at 299–301 (discussing Secretary of Defense James Forrestal’s advice to President Truman that he move slowly on integration and that he not force it on the military); *id.* at 310 (discussing presidential specialist Philleo Nash’s argument against the President’s use of an executive order to force integration, and his advice military integration be achieved instead through small steps by each service department).

<sup>362</sup> Bianco, *supra* note 270, at 54.

military efficiency, the military successfully integrated servicemembers of different races during wartime conditions.<sup>363</sup>

The fact that our Armed Forces have been engaged in simultaneous wars in two countries for nearly ten years, deployed multiple times in the same conflict, and are facing growing threats from countries like Iran, arguably make now an ideal time to lift the ban against otherwise qualified GLB troops. According to Army counterinsurgency expert Lieutenant Colonel John Nagl, the military is “putting more strains on the all-volunteer force than it was ever designed to bear.”<sup>364</sup> Shortages in critical job specialties and maintaining “troop levels needed to fight two wars” have stretched the capacity of our Armed Forces, causing the military to lower the educational and background qualifications for new recruits and to raise the maximum enlistment age from thirty-four to forty-two.<sup>365</sup> In addition to these challenges, Defense Secretary Robert Gates recently announced plans to increase the size of the U.S. Army by 22,000 Soldiers.<sup>366</sup> In 2010, the United States will reportedly deploy approximately 30,000 additional troops to Afghanistan, thereby tripling its presence in the region.<sup>367</sup> According to Sergeant Major of the Army Kenneth Preston, these and other demands threaten to exceed the capabilities of our all-volunteer force.<sup>368</sup> The only way to meet the growth requirements of the Army, he stated last year, is to “retain good Soldiers.”<sup>369</sup> Clearly, there is a need for retention and recruitment of fit,

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<sup>363</sup> RAND SEXUAL ORIENTATION POLICY, *supra* note 71, at 173 (reporting findings of the same).

<sup>364</sup> Andrew Gray, *U.S. Military Stretched Dangerously Thin by War: Poll*, REUTERS, Feb. 19, 2008, <http://www.reuters.com/article/topNews/idUSN1930361920080219>.

<sup>365</sup> Steward M. Powell & Gary Martin, *Army Standards Under Scrutiny*, HOUS. CHRON., Nov. 15, 2009, at A1; *see also* Greer et al., *supra* note 47, at 1153 (comments of Professor Elizabeth L. Hillman) (discussing the Army’s increased acceptance of “category four” recruits with low test scores and aptitude assessments).

<sup>366</sup> John J. Kruzal, *Gates Calls for Increase of 22,000 Soldiers*, U.S. Army, July 21, 2009, available at <http://www.army.mil/-news/2009/07/21/24678-gates-calls-for-increase-of-22000-soldiers/>.

<sup>367</sup> Eric Schmitt, *Obama Gives Troop Orders Before Speech*, N.Y. TIMES, Dec. 1, 2009, at A1, <http://query.nytimes.com/gst/fullpage.html?res=9E04E7DC1638F932A35751C1A96F9C8B63>.

<sup>368</sup> Bridgett Siter, *Force Out of Balance, Preston Says*, FORT HOOD SENTINEL, Oct. 1, 2009, at AA2, <http://www.forthoodsentinel.com/edition/20091001/Page%20E02.pdf> (“Right now, the demands exceed our capabilities. With the current pace and tempo, many question our ability to sustain an all-volunteer force.”).

<sup>369</sup> *Id.* (citing to Sergeant Major of the Army Preston).

qualified troops.<sup>370</sup> Retention of qualified, competent, battle-tested GLB troops like LTC Fehrenbach, SGT Hughes, and others like them will enhance our combat effectiveness, not harm it.

It should be noted that former Senator Sam Nunn, a former Chairman of the U.S. Senate Committee on Armed Services and a key figure in the implementation of DADT in 1993, contends that the ban is now preventing the military from filling empty slots with talented personnel.<sup>371</sup> Lifting it will result in increased retention of competent, combat-seasoned, specially-trained infantrymen, linguists, fighter pilots, intelligence specialists, doctors, nurses, and other critical personnel, and a larger pool of fit, qualified recruits.

## VII. Potential for “Eros” in the Workplace: How the Experience of Women in the Military is Relevant to the Inclusion of GLB

### A. Maintaining a Professional Military Environment

Proponents of DADT further claim that allowing gays to serve will harm good order, discipline, and unit cohesion by creating an inappropriate sexually-charged military environment. Retired Marine officer Mackubin Thomas Owens, for instance, recently wrote that “[t]he presence of open homosexuals in the close confines of ships or military units opens the possibility that eros, which . . . is sexual, will be unleashed into the environment” and that this will result in “sexual competition, protectiveness, and favoritism, all of which undermine the nonsexual bonding essential to unit cohesion, good order, discipline and morale.”<sup>372</sup> Assuming, for the sake of argument, that the potential for sexual attraction does cause an environment of possible “eros,” this argument is not compelling because it fails to recognize that America’s

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<sup>370</sup> See also David Wood, *New Afghan War Headache: Not Enough Troops Available?*, POLITICS DAILY, Nov. 6, 2009, <http://www.politicsdaily.com/2009/11/06/new-afghan-war-headache-not-enough-troops/> (discussing shortage of available troops for overseas missions).

<sup>371</sup> FRANK, *supra* note 5, at 289. Nunn has recently stated that public and military opinions have evolved and that DADT is “getting in the way” of filling the military’s empty slots with talented personnel.” *Id.* See also Jonathan Capehart, *Don’t Ask Nunn*, WASH. POST, June 11, 2008, <http://www.washingtonpost.com/wp-dyn/content/article/2008/06/10/AR2008061002527.html>.

<sup>372</sup> Mackubin Thomas Owens, *The Case against Gays in the Military*, WALL ST. J., Feb. 2, 2010, [http://online.wsj.com/article/SB10001424052748703389004575033601528093416.html?mod=googlenews\\_wsj&mg=com-wsj](http://online.wsj.com/article/SB10001424052748703389004575033601528093416.html?mod=googlenews_wsj&mg=com-wsj).

Armed Forces already operate in an environment where the potential for sexual attraction exists.

Heterosexual men and women—who presumably have a natural emotional, physical, and sexual attraction to each other—serve together and have been doing so effectively for years. They do so on ships, remote camps and forward operating bases, and in high-risk training and operations.<sup>373</sup> They do so in countries like Saudi Arabia and Afghanistan, where local national women have none of the same fundamental rights that American women do, and in locations where men and women, alike, are confined on bases together. They not only share workplaces and common areas, but foxholes and sometimes even sleep areas.<sup>374</sup> Innocent but unwanted romantic advances that sometimes occur are rebuffed in the military just as they are in civilian society. Advances that cross the line in terms of physical contact (such as an unwanted touch or kiss), offensiveness, or sexual harassment are punishable under administrative rules and criminal statutes. Consensual romantic and sexual relationships that involve favoritism, fraternization, or other misconduct are likewise addressed by the UCMJ, administrative prohibitions, and through organizational equal opportunity, sexual harassment prevention, and inspector general programs.<sup>375</sup>

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<sup>373</sup> See, e.g., Sheree Callahan, *Navy Celebrates 25 Years of Women at Sea*, *U.S. Navy Sealift Command*, available at <http://www.msc.navy.mil/sealift/2003/December/women.htm> (last visited Mar. 2, 2010); Michelle Norris, *Roles for Women in U.S. Army Expand*, NPR, Oct. 1, 2007, <http://www.npr.org/templates/story/story.php?storyId=14869648> (stating women have been allowed to serve on combat ships since the 1990s); Jack Zahora, *Army Polices Don't Keep Women Off Front Lines*, NPR, Aug. 26, 2007, <http://www.npr.org/templates/story/story.php?storyId=13961298&ps=rs> (reporting that female troops, including sixty-one killed by hostile fire in Iraq, are increasingly filling dangerous positions); Michelle Norris, *Roles for Women in U.S. Army Expand*, NPR, Oct. 1, 2007, <http://www.npr.org/templates/story/story.php?storyId=14869648> (reporting that since 2002, women have served nearly 170,000 tours of duty in Iraq and Afghanistan).

<sup>374</sup> E-mail messages from two Marine and five Army officers (Feb. 2010) (on file with author) (recounting instances when they have shared sleeping quarters with troops of the opposite sex); see also Steven Lee Myers, *Living and Fighting Alongside Men, and Fitting In*, N.Y. TIMES, Aug. 16, 2009, [http://www.nytimes.com/2009/08/17/us/17women.html?\\_r=1](http://www.nytimes.com/2009/08/17/us/17women.html?_r=1) (reporting that women sometimes share sleeping quarters with men).

<sup>375</sup> See, e.g., UCMJ art. 120 (2008) (criminalizing rape, sexual assault, unwanted sexual touches, and other forms sexual misconduct); *id.* art. 134 (criminalizing fraternization); U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY chs. 6, 7, & 8 (18 Mar. 2008) (detailing command responsibilities in the prevention and handling of sexual harassment/assault, and the Army's equal opportunity program); *id.* para. 4-14 to 4-16 (governing relationships between Soldiers); U.S. DEP'T OF ARMY, PAM. 600-35, RELATIONSHIPS BETWEEN SOLDIERS OF DIFFERENT RANKS (21 Feb. 2000) (containing examples of prohibited relationships); Army Sexual Harassment/Assault Response &

## B. Sexual Assault by GLBs

Since 2007, thousands of incidents of male-on-female sexual assault have reportedly been committed within America’s Armed Forces.<sup>376</sup> This fact does not preclude men and women from deploying together, working together, training together, sharing foxholes and bunkers together, and living in co-ed barracks and field quarters. That certain males or individuals from any group—white, black, male, female, Christian, atheist, officer, enlisted, heterosexual and homosexual—are sexually aggressive or demonstrate an inability to control their behavior and actions hardly means that all members from these groups possess the same traits. That is why the military allows members of all these groups, and others, to serve together in a large variety of training, deployment, and living environments. The military solution to the broad spectrum of possible acts of inappropriate sexual behavior (from a relatively innocuous but nevertheless inappropriate sexual stare or leer to a violent sexual assault) is to deal with those concerned individually with administrative and/or criminal sanctions—not to exclude an entire group based on the actions of a few. Tensions that exist due to personality, gender, ethnic, religious and behavioral differences are addressed with preventative educational programs and with swift consequences for those unable to overcome their personal feelings to the extent necessary to co-exist in the melting pot of America’s Armed Forces.<sup>377</sup> This system makes America’s military well-suited for the service of acknowledged GLB individuals.

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Prevention Program, *available at* [www.sexualassault.army.mil/policy\\_reg.cfm](http://www.sexualassault.army.mil/policy_reg.cfm) (last visited Mar. 3, 2010) (discussing the goals of the program and providing links to applicable regulations and policies); U.S. Navy, Naval Inspector Gen., Sexual Harassment, *available at* [http://www.ig.navy.mil/Complaints/Complaints%20%20\(SexHarassment\).htm](http://www.ig.navy.mil/Complaints/Complaints%20%20(SexHarassment).htm) (last visited Mar. 2, 2010) [hereinafter Naval Inspector Gen., Sexual Harassment].

<sup>376</sup> *See, e.g.*, FY08 SEXUAL ASSAULT REPORT, *supra* note 337, at 74 (discussing the investigation, in fiscal year 2008, of 1864 reports of male-on-female sexual assaults); U.S. DEP’T OF DEF., FY07 REPORT ON SEXUAL ASSAULT IN THE MILITARY 31 (Mar. 2008), *available at* <http://www.sapr.mil/contents/references/2007%20Annual%20Report.pdf> (discussing the investigation, in fiscal year 2007, of 1742 instances of male-on-female sexual assaults).

<sup>377</sup> *See, e.g.*, Army Sexual Harassment/Assault Response & Prevention Program, [www.sexualassault.army.mil/policy\\_reg.cfm](http://www.sexualassault.army.mil/policy_reg.cfm) (last visited Mar. 3, 2010) (discussing the Army’s Sexual Harassment and Assault Response and Prevention Program, and providing links to applicable regulations and policies); Naval Inspector Gen., Sexual Harassment, *supra* note 375.

### C. Where Will They Live?

Opponents of racial integration, women in the military, and gays in the military have all raised this concern as a basis for exclusion. During integration, the thought of African-Americans sharing the same living quarters as whites was untenable to many whites, including military leaders and troops.<sup>378</sup> Similarly, the thought of women serving on ships and remote forward operating bases with men, and attending service academies and co-ed basic training, made many military leaders and troops extremely uncomfortable. Critics protested the increased presence of women in these settings based on logistical and disciplinary concerns, and concerns about unit cohesion, sexual misconduct, and pregnancy.<sup>379</sup>

The military created solutions for inclusion of African-Americans and women—groups whose presence was objected to, in part, based on privacy concerns and the fact that some Soldiers would not want to serve with or live amongst them. It will no doubt be able to do so for GLBs when DADT is repealed. As a starting point, policymakers should look at how homosexual troops in countries like ours, such as Great Britain, have done it. Britain, Canada, Australia, Israel, and many other nations that allow acknowledged GLB troops to serve and house them with heterosexual servicemembers of the same gender.<sup>380</sup> To date, none of these countries has experienced reported increases in harassment, assaults, or similar related misconduct.<sup>381</sup>

## XII. Conclusion

Societal views toward homosexuality have evolved since 1993, as have the views of many military and political leaders who implemented DADT that same year. As evidenced by our experience with racial integration in the 1950s, and the experiences of paramilitary

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<sup>378</sup> Royall Memorandum, *supra* note 296 (stating the morale of white troops would suffer if they had to live with African-American troops); General Bradley Statement, *supra* note 296, at 5 (explaining that integration would harm the morale of white troops forced to live with African-Americans).

<sup>379</sup> See, e.g., Rowan Scarborough, *Pentagon Urged to Separate Sexes in Basic Training*, WASH. TIMES, Aug. 7, 2001, at A1; Daniel F. Drummand, *Just 13 More "Rat Line" Survivors, VMI's First Class of Women Feel Part of School's Tradition*, WASH. TIMES, May 19, 2001, at A1.

<sup>380</sup> PALM CTR., *GAYS IN FOREIGN MILITARIES 2010*, *supra* note 77, at 3.

<sup>381</sup> *Id.* at 2–3.

organizations and foreign nations similar to ours that allow acknowledged GLBs to serve, America's Armed Forces will successfully adapt to and benefit from their service. Furthermore, the quality and professionalism of our troops and our current force structure make America's Armed Forces well-suited for the inclusion of acknowledged GLB troops. The service of leaders like LTC Fehrenbach is needed now more than ever. It is time to repeal the ban on GLB personnel in the military.

## Appendix

This appendix compares the primary arguments made by those seeking to limit or exclude African-Americans, women, and GLBs from military service. Although many of the arguments are stated in the present tense, those made against African-Americans are predominantly from the 1940s.

### I. Morality Issues

#### A. African-Americans

Because of their behaviors and beliefs, African-Americans are morally inferior.<sup>382</sup> Because of their poor character, whites should not have to serve with them in integrated units.<sup>383</sup> The act of interracial marriage is so dangerous and harmful to society that it is criminalized in nearly every state.<sup>384</sup>

#### B. Women

Because of their gender difference, women should not be fully integrated into the military. The presence of female troops causes immoral behavior between male and female troops, including sexual misconduct and promiscuity.<sup>385</sup> Single female troops who get pregnant are immoral and therefore cannot serve.<sup>386</sup>

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<sup>382</sup> See, e.g., ROGERS, *supra* note 269, at 19–25 (discussing assertions made by religious leaders in the late 1800s that African-Americans are morally inferior to whites); Debra A. Kuker, *supra* note 269, at 312 (discussing historical state prohibitions on interracial marriage and the once widely-held public perception that interracial marriage is immoral).

<sup>383</sup> Bianco, *supra* note 270, in GAY RIGHTS, MILITARY WRONGS 54 (Craig A. Rimmerman, ed., 1996) (citing Lieutenant General Thomas Holcom's testimony before the General Board of the Navy in 1942 that "an infantry battalion is the very last place [blacks] would be put" because "there is no branch of the service that requires more character and a higher degree of morality than the infantry").

<sup>384</sup> *Loving v. Virginia*, 388 U.S. 1 (1967). Interracial marriage continued to remain criminalized in many states for nearly 20 years after the military was fully integrated. This 1967 case struck down all state laws criminalizing interracial marriage.

<sup>385</sup> See, e.g., BRIAN MITCHELL, WOMEN IN THE MILITARY: FLIRTING WITH DISASTER 348 (1998) (stating that "the disadvantages of substituting women for men are many,"

### C. GLBs

Because of their behaviors and beliefs, acknowledged GLBs should not be allowed to serve in the Armed Forces.<sup>387</sup> Homosexuality is immoral and, therefore, heterosexuals should not have to serve with those who practice it.<sup>388</sup> The act of act of same-sex marriage is so harmful to society that the federal government refuses to recognize state-sanctioned same-sex marriages.<sup>389</sup>

### D. Analysis of the Argument as to GLBs

Religious leaders and troops alike have differing views on what is moral and what is not, including homosexuality. It is adherence to institutional values, such as integrity, honor, and courage—not adherence to any particular set of religious or moral beliefs—that makes our military forces effective.

## II. Morale, Unit Cohesion, and Good Order & Discipline

### A. African-Americans

Troops don’t just work together; they also have to live together. Because of this, “any change in . . . policy [will] adversely affect the morale of many Southern soldiers and other soldiers now serving”<sup>390</sup> and negatively impact battle efficiency.<sup>391</sup>

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including “in-service marriages, fraternization, sexual harassment, [and] sexual promiscuity”); *id.* at 66–67 (asserting [in support of Mitchell’s overall contention that women should not be fully integrated in the military] that the presence of female cadets at service academies caused pregnancies, sexual misconduct, fraternization, and sexual promiscuity).

<sup>386</sup> See, e.g., Murnane, *supra* note 70, at 1072–03 (discussing the discharge of a female Seaman who, despite her “professional performance and her strong desire to remain in the Navy,” was involuntarily discharged solely because she became an unwed mother, which the Navy considered to be immoral). Only in 1975, after being forced to do so because of lawsuits surrounding this and similar issues, did the Department of Defense change its policies to make separations for pregnancies voluntary. *Id.* at 1074.

<sup>387</sup> See generally Bunn, *supra* note 24.

<sup>388</sup> See, e.g., Karl, *supra* note 267.

<sup>389</sup> *Id.*

<sup>390</sup> Royall Memorandum, *supra* note 296.

<sup>391</sup> General Bradley Statement, *supra* note 297.

## B. Women

Troops don't just work together; they also have to live together. The presence of female troops will have a "deleterious" effect on a unit's cohesion and fighting spirit, and on "the loyalty and respect that servicemen feel toward" the military.<sup>392</sup> They will be a "toxic kind of virus," create sexual tension, and "feminize the boys."<sup>393</sup>

## C. GLBs

Troops don't just work together; they also have to live together in a communal environment. Because of this, repealing DADT will adversely affect "discipline and morale."<sup>394</sup>

## D. Analysis of the Argument as to GLBs

There is no evidence to support the contention that lifting the ban on gays will negatively impact these components of military readiness.<sup>395</sup> Furthermore, U.S. troops are used to working, training, and fighting side-by-side with those whose personalities or religious, moral, or behavioral traits they may dislike or of which they do not approve. It is their ability to do so successfully that makes the U.S. military one of the most effective fighting forces in the world, and well suited for the inclusion of acknowledged GLB servicemembers.<sup>396</sup>

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<sup>392</sup> MITCHELL, *supra* note 385, at 349. See also Firestone, *supra* note 70, at 86 (discussing the belief that the presence of women will disrupt the male bonding that is "necessary for maintaining social order and defense"); Nancy Goldman, *The Utilization of Women in the Military*, 406 ANNALS AM. ACAD. POL. & SOC. SCI. 107, 115 (1973) (stating that the integration of women "into the social life of the base presents a problem" because "military life is a form of communal living").

<sup>393</sup> See, e.g., Michael Kimmel, *Saving the Males: The Sociological Implications of the Virginia Military Institute and the Citadel*, 4 GENDER & SOC. 494, 502 (2000) (discussing such assertions made by Major General Josiah Bunting III and by psychologist G. Stanley Hall).

<sup>394</sup> Elaine Donnelly, *Homosexuals in the Military* (Aug. 22, 2008), <http://cmrlink.org/HMilitary.asp?docID=337>.

<sup>395</sup> GAO HOMOSEXUALITY POLICY, *supra* note 94, at 7 (noting the DoD's statement that the ban is not based on scientific or sociological evidence); *id.* at 59; Belkin, *supra* note 126, at 116–17 (Summer 2003) (discussing the lack of scientific and sociological evidence).

<sup>396</sup> Coleman Statement, *supra* note 251.

### III. Privacy

#### A. African-Americans

White men will not consent to sharing private quarters with African-Americans. One military leader, for example, stated,

How many white men would choose, of their own accord, that their closest associates in sleeping quarters, at mess, and in a gun’s crew should be of another race? How many would accept such conditions, if required to do so, without resentment and just as a matter of course? The . . . answer is “few, if any,” and . . . if the issue [is] forced, there [will] be a lowering of contentment, teamwork, and discipline in the service.<sup>397</sup>

#### B. Women

Women should not be integrated into service academies or regular military units because their gender difference creates a need for privacy in a communal society.<sup>398</sup>

#### C. GLBs

Heterosexual troops should not have to share quarters with GLB troops.<sup>399</sup>

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<sup>397</sup> Bianco, *supra* note 270, in GAY RIGHTS, MILITARY WRONGS 54 (Craig A. Rimmerman, ed., Routledge, 1996) (quoting from Chairman of the General Board of the Navy’s written document).

<sup>398</sup> See, e.g., MITCHELL, *supra* note 385, at 58; Firestone, *supra* note 70, at 82 (discussing factors that may cause female troops to seek privacy); Goldman, *supra* note 392, at 115.

<sup>399</sup> Editorial, Marine Officer: Gays, Straights Shouldn’t Share Housing, CNN, Mar. 26, 2010, <http://www.cnn.com/2010/US/03/26/marines.gay.housing/index.html>. “I would not ask our Marines to live with someone that’s homosexual if we can possibly avoid it.” *Id.* (quoting Marine Commandant General James Conway).

#### D. Analysis of the Argument as to GLBs

DADT does not protect privacy. Heterosexual troops are *already* serving, showering, and sharing private quarters with GLB troops.

### IV. Recruiting and Retention

#### A. African-Americans

Integration will harm recruiting and retention because “close personal association with Negroes is distasteful,” and any “change in the Army’s partial segregation policy [will]...adversely affect enlistments and reenlistments . . . probably making peacetime selective service necessary.”<sup>400</sup> It will “very seriously affect voluntary enlistments. . . .”<sup>401</sup>

#### B. Women

Full integration will affect recruiting and retention. Good troops will resign if women are fully integrated.<sup>402</sup>

#### C. GLBs

Repeal will harm “recruiting and retention . . . and eventually break the All-Volunteer Force.”<sup>403</sup>

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<sup>400</sup> Royall Statement, *supra* note 321.

<sup>401</sup> General Bradley Statement, *supra* note 296, at 5

<sup>402</sup> See, e.g., Harold E. Cheatham, *Integration of Women into the U.S. Military*, 11 SEX ROLES 141, 144 (1984) (discussing the threatened resignation of a past superintendent of the U.S. Military Academy during a debate over admitting women); Editorial, *The Sexes: Beauties and the Beast*, TIME, Jul. 19, 1976, <http://www.time.com/time/magazine/article/0,9171,914360,00.html> (reporting that Lieutenant General Sidney B. Berry, former Superintendent of the U.S. Military Academy threatened to resign if women were accepted at West Point and his subsequent statement that his threat “was rather adolescent on my part . . . I got over it and decided to do what a good [S]oldier does—get on with the job.”).

<sup>403</sup> Flag & General Officers for the Military Statement to the President and Congress (Apr. 9, 2009), available at <http://cmrlink.org/HMilitary.asp?docID=350>.

#### D. Analysis of the Argument as to GLBs

The current predictions of the “breaking” of the United States’ volunteer military if openly gay troops are allowed to serve are not supported by evidence or studies. Federal and private research studies point to this lack of evidence and make no such predictions.<sup>404</sup> There is, however, evidence—including our experiences with racial and gender integration and the United Kingdom’s experiences with the integration of gays—that allowing openly gay individuals to serve will improve the military’s ability to recruit and retain more talented, qualified troops and that America’s military forces will successfully adapt.<sup>405</sup>

#### V. Disease, Medical Issues, and Increased Medical Care

##### A. African-Americans

Integration will expose white troops to increased health threats in that syphilis, gonorrhea, chancre, and tuberculosis, are “appallingly higher among the members of the Negro race than among the members of the white race,”<sup>406</sup> and African-Americans have “. . . high rates of venereal disease.”<sup>407</sup>

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<sup>404</sup> See, e.g., RAND, SEXUAL ORIENTATION POLICY, *supra* note 71, at 395–97 (citing the lack of direct evidence, and stating any such predictions as the effect of GLBs in the military “are inherently speculative”); see also GAO FOREIGN COUNTRY PRACTICES, *supra* note 135 (finding no adverse affect on retention or recruiting in several foreign military organizations that now allow gays to serve); Herek, *supra* note 324.

<sup>405</sup> For example, the experience of forced military integration (which was successful despite the same arguments against it as those cited in opposition to inclusion of gays) and the United Kingdom’s experience when forced to allow GLBs to serve (which was successful despite resistance from military leaders based on the same arguments cited by proponents of DADT).

<sup>406</sup> FRANK, *supra* note 5, at 61; see also Phyllis W. Jordan, Commentary, *When the Military Mixed*, VIRGINIA-PILOT & LEDGER STAR (Norfolk, Va.), Mar. 14, 1993 (observing how Russell emphasized the disease rate among African-American Soldiers and cited statistics that bolstered his arguments as to their rates of tuberculosis and venereal diseases).

<sup>407</sup> Judy Holland, *Activists Take on Russell Building over Racism*, SEATTLE POST-INTELLIGENCER, Feb. 1, 2003, at A2.

## B. Women

Inclusion of women will reduce readiness in that they lack testosterone,<sup>408</sup> may get pregnant,<sup>409</sup> and have psychological differences that make them “[un]impressed with physical prowess,” disinterested in competition, and not want “to hide their weaknesses.”<sup>410</sup> Women also have “higher rates of morbidity” and are less willing than male troops to ignore illness and to endure pain.<sup>411</sup> American female troops have higher rates of mental disorders, infective and parasitic diseases, and digestive, diarrheal, and genitourinary disorders.<sup>412</sup>

## C. GLBs

Repealing DADT will result in increased health care costs and the spread of AIDS and other sexually transmitted diseases throughout the military.<sup>413</sup>

## D. Analysis of the Argument as to GLBs

The military already uses educational programs and routine medical to identify, treat, and limit the spread of contagious diseases within its population, including the portion that is gay.

## VI. GLBs Will Commit Sexual Misconduct and/or Assaults

### A. African-Americans

Integration will cause an “‘increase the rate of crime committed by servicemen,’ since ‘Negro troops,’ reportedly [commit] rape thirteen

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<sup>408</sup> MITCHELL, *supra* note 385, at 172.

<sup>409</sup> *Id.* at 151, 335.

<sup>410</sup> *Id.* at 169–70.

<sup>411</sup> *Id.* at 170.

<sup>412</sup> *Id.* at 148; *see also* Firestone, *supra* note 70, at 78–81 (discussing opposition to the integration of women based on their body composition, “menses”-related hygiene issues, “emotionality,” and “psychiatric syndromes”); *id.* at 85 (discussing the assertion that “soldiering is detrimental to women’s self-image[s]”).

<sup>413</sup> *See, e.g.*, Sean O’Donnell, Commentary, *Why the “Don’t Ask, Don’t Tell” Policy Should Stay*, EXAMINER, Feb. 3, 2010, <http://www.examiner.com/x-3108-Baltimore-Republican-Examiner~y2010m2d3-Why-the-Dont-ask-dont-tell-policy-should-stay>.

times more often per capita than whites<sup>414</sup> and sodomy 2-1/2 more times.<sup>415</sup>

#### B. Women

Integration of women into regular military units will cause an increase in sexual fraternization because women will engage in sexual misconduct.<sup>416</sup>

#### C. GLBs

Repeal will cause an increase in the rate of sexual misconduct and assaults by GLB troops.<sup>417</sup>

#### D. Analysis of the Argument as to GLBs

Crime statistics regarding African-Americans, women, GLBs, or any other group serving in the military are not an accurate indicator of how well they—as a group—perform or abide by military rules and laws. Furthermore, there are military mechanisms in place for dealing with those from all walks of life—including GLBs—who commit misconduct.

### VII. Other Troops Will Assault Them

#### A. African-Americans

Integration will “prompt violence against a despised minority that the military would be helpless to stop.”<sup>418</sup>

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<sup>414</sup> FRANK, *supra* note 5, at 61 (quoting Senator Russell).

<sup>415</sup> Bianco, *supra* note 270, at 50 (quoting Senator Russell).

<sup>416</sup> See, e.g., Firestone, *supra* note 70, at 86.

<sup>417</sup> See, e.g., *id.* at 50 (discussing General Norman Schwartzkopf’s assertion that the presence of GLBs will result in solicitations of unwanted homosexual acts).

<sup>418</sup> FRANK, *supra* note 5, at 62.

### B. Women

Women should not be permitted to serve because they are at risk for sexual assault.<sup>419</sup>

### C. GLBs

Repeal will jeopardize the safety of openly gay troops.<sup>420</sup>

### D. Analysis of the Argument as to GLBs

There are military mechanisms in place for dealing with those who commit violence against others, including those who are assaulted for their skin color, ethnicity, or sexual orientation.

## VIII. The Military Is Not the Place for Social Experimentation or Evolution

### A. African-Americans

“The Army is not a sociological laboratory; to be effective it must be organized and trained according to the principles which will insure success. Experiments to meet the wishes and demands of the champions of every race and creed for the solution of their problems are a danger to efficiency, discipline, and morale and [will] result in ultimate defeat.”<sup>421</sup>

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<sup>419</sup> MITCHELL, *supra* note 385, at 335.

<sup>420</sup> Richard Sisk, *Military Less Resistant to Ending Anti-Gay “Don’t Ask, Don’t Tell” Policy for Soldiers*, N.Y. DAILY NEWS, Nov. 29, 2009, [http://www.nydailynews.com/news/politics/2009/11/29/2009-11-29\\_military\\_less\\_resistant\\_to\\_ending\\_antigay\\_dont\\_ask\\_dont\\_tell\\_policy\\_for\\_soldiers.html](http://www.nydailynews.com/news/politics/2009/11/29/2009-11-29_military_less_resistant_to_ending_antigay_dont_ask_dont_tell_policy_for_soldiers.html) (reporting that some proponents of the ban believe its repeal may result in violence against GLB troops).

<sup>421</sup> LEE, *supra* note 348, at 141 (quoting Colonel Eugene R. Householder of the Army Adjutant General’s Office).

## B. Women

“[The military is] not the place where an ideology, unproved no matter how worthy, should be imposed so that the rest of society will follow.”<sup>422</sup>

## C. GLBs

“This is not the time to be tinkering with the military and making it a playground of social experimentation.”<sup>423</sup> Allowing acknowledged gays to serve will turn the military into a “radical social experiment” with troops serving as “lab rats.”<sup>424</sup>

## D. Analysis of the Argument as to GLBs

This argument is raised every time the military elects to include a group that others harbor prejudices against. Had the military refused to integrate African-Americans and women based on arguments against “social experimentation,” America’s Armed Forces would not be the diverse fighting force that it is today. The contributions of African-Americans, women, and GLBs have increased military effectiveness, not reduced it.

## IX. Now Is Not the Time

### A. African-Americans

Military integration began shortly after America’s participation in two world wars and had to be implemented during a new war in Korea.<sup>425</sup>

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<sup>422</sup> MITCHELL, *supra* note 385, at 334 (citing Richard Cohen, *Duty, Gender, Country*, WASH. POST, Apr. 24 1997).

<sup>423</sup> Editorial, *Out in Military: “Not the Time”* (CNN television broadcast Feb. 2, 2010), available at <http://www.cnn.com/video/#/video/politics/2010/02/02/gays.in.military.debate.cnn?hpt=C2> (televising this public statement made by former Marine, Tony Perkins).

<sup>424</sup> Editorial, North, *supra* note 346.

<sup>425</sup> Neil Schoenherr, *Korean War Had Major Impact on Race Relations in the United States*, July 25, 2003, <http://news.wustl.edu/news/Pages/304.aspx> (discussing the overlap of integration with the Korean War in the 1950s).

Political leaders warned President Truman to move very slowly on the issue<sup>426</sup> and at least one Army staff officer publicly opposed integration based on his assessment that segregation had proven “satisfactory” and “[t]o change now [will] destroy morale and impair preparations for a national defense.”<sup>427</sup>

#### B. Women

An argument that may not pertain to this particular group.

#### C. GLBs

There are “serious concerns about the impact of [DADT’s repeal] on a force that is fully engaged in two wars and has been at war for eight-and-a-half years.”<sup>428</sup> While DADT isn’t perfect, it works satisfactorily and therefore should not be changed.<sup>429</sup>

#### D. Analysis of the Argument as to GLBs

The fact that our Armed Forces have been engaged in simultaneous wars in two countries for nearly ten years, and are forced to deploy multiple times in the same conflict, make now an ideal time to lift the ban against otherwise qualified GLB troops.

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<sup>426</sup> See, e.g., MACGREGOR, *supra* note 260, at 299–301 (discussing Secretary of Defense James Forrestal’s advice to President Truman that he move slowly on integration and that he not force it on the military); *id.* at 310 (discussing presidential specialist Philleo Nash’s argument against the President’s use of an executive order to force integration, and his advice military integration be achieved instead through small steps by each service department).

<sup>427</sup> Bianco, *supra* note 270, in *GAY RIGHTS, MILITARY WRONGS* 54 (Craig A. Rimmerman, ed., 1996).

<sup>428</sup> Editorial, *Army Opposes Immediate End to Gay Ban*, MIL. TIMES, Feb. 23, 2010, <http://www.military.com/news/article/army-to-oppose-suspension-of-gay-firings.html?ESRC=eb.nl&ESRC=army-a.nl>.

<sup>429</sup> See, e.g., Michael D. Shear, *McCain Appears to Shift on “Don’t Ask, Don’t Tell,”* WASH. POST, Feb. 3, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/02/02/AR2010020202588.html>.

X. Eros in the Workplace

A. African-Americans

An argument that may not pertain to this particular group.

B. Women

“The presence of women inhibits male bonding, corrupts allegiance to the hierarchy, and diminishes the desire of men to compete for anything but the attentions of women. Pushing women into the military academies made a mockery of the academies’ essential nature and most honored values.”<sup>430</sup>

C. GLBs

“The presence of open homosexuals in the close confines of ships or military units opens the possibility that eros, which . . . is sexual, will be unleashed into the environment” and that this will result in “sexual competition, protectiveness, and favoritism, all of which undermine the nonsexual bonding essential to unit cohesion, good order, discipline and morale.”<sup>431</sup>

D. Analysis of the Argument as to GLBs

This argument fails to take into account the fact that America’s Armed Forces already operate in an environment where the potential for sexual attraction exists. Heterosexual men and women—who presumably have a natural emotional, physical, and sexual attraction to each other—serve together and have been doing so effectively for years.

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<sup>430</sup> MITCHELL, *supra* note 385, at 175.

<sup>431</sup> Mackubin Thomas Owens, Opinion, *The Case against Gays in the Military*, WALL ST. J., Feb. 2, 2010, [http://online.wsj.com/article/SB100014h24052748703389004575033601528093416.html?mod=googlenews\\_wsj&mg=com-wsj](http://online.wsj.com/article/SB100014h24052748703389004575033601528093416.html?mod=googlenews_wsj&mg=com-wsj).

## XI. Cost of Accommodation Is Too High

### A. African-Americans

An argument that may not pertain to this particular group.

### B. Women

The cost of accommodation is too high. Military child care facilities cost too much money, and dual-military couples cause too much logistical work for assignment managers.<sup>432</sup> The cost of women's health care is too expensive.<sup>433</sup>

### C. GLBs

The cost of accommodation is too high.<sup>434</sup>

### D. Analysis of the Argument as to GLBs

The inclusion of acknowledged GLBs will not require a significant increase in costs associated with housing, family, medical, or other benefits compared to those that are bestowed on heterosexual servicemembers. It should be noted that women are permitted to serve despite the costs associated with their service, to include childbirth, maternity leave, subsidized childcare, gynecological care in deployed regions, and other appropriate accommodations.

## XII. Exclusion Is Not Based on Bigotry

### A. African-Americans

African-Americans are fundamentally different from whites in ways that go beyond mere skin color. Their exclusion is not based on racism, but on "common sense and understanding. Those who ignore these

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<sup>432</sup> MITCHELL, *supra* note 385, at 159–60.

<sup>433</sup> *Id.* at 345–46.

<sup>434</sup> *See, e.g.*, Bunn, *supra* note 24, at 227, 230.

differences merely interfere with the combat effectiveness of battle units.”<sup>435</sup>

Their exclusion isn’t based on racial prejudice, but on the “vital factors [of] the morale, discipline, and health” of troops based on the African-Americans’ “incidence(s) of venereal diseases.”<sup>436</sup>

#### B. Women

Women are too “fundamentally different” from men to be fully integrated into the military.<sup>437</sup> This belief isn’t based on bigotry, but on “sexual difference[s]” that are simply too disruptive for our troops to handle and that human nature cannot overcome.<sup>438</sup>

#### C. GLBs

The military exclusion against GLBs is different, because it’s based on behavior, not on skin color or gender.

#### D. Analysis of the Argument as to GLBs

The arguments and military prohibitions against African-Americans, women, and GLBs have been based on behavioral, moral and physical characteristics attributed to all three groups by those opposed to their full and open presence in the ranks.

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<sup>435</sup> MACGREGOR, *supra* note 260, 440–41 (quoting from Lieutenant General Almond’s archived letter).

<sup>436</sup> Alexander Cockburn, *Same Song, Different Verse*, L.A. TIMES, Jan. 31, 1993, at 5 (discussing Senator Russell’s statements to General Dwight D. Eisenhower asserting that the exclusion of African-Americans wasn’t based on racism).

<sup>437</sup> MITCHELL, *supra* note 385, at 346–47 (quoting Brian Mitchell’s testimony before the Presidential Commission on the Assignment of Women in the Armed Forces in 1992, in opposition to expanding roles for women in the Armed Forces).

<sup>438</sup> *Id.* at 334 (citing to articles written by Stephanie Guttman and Richard Cohen).

### XIII. They Do Not Have the “Right” to Serve

#### A. African-Americans

An argument that may not pertain to this particular group.

#### B. Women

The military does not “owe anyone a military career,” including women.<sup>439</sup>

#### C. GLBs

There is no constitutional right to serve in the military, and the only people who are “pushing this issue” are GLB individuals themselves.<sup>440</sup>

#### D. Analysis of the Argument as to GLBs

The fact that no particular group in American society has the right to serve does not, in itself, justify any group’s exclusion. Furthermore, those advocating DADT’s repeal include heterosexual civilians and military servicemembers with no personal connection to the issue.

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<sup>439</sup> *Id.* at 347 (quoting Brian Mitchell’s testimony before the Presidential Commission on the Assignment of Women in the Armed Forces in 1992, in opposition to expanding roles for women in the Armed Forces).

<sup>440</sup> Elaine Donnelly, *Misusing the Military*, Feb. 1, 2010, <http://corner.nationalreview.com/post/?q=YTFiYmE4MjNmMTRjYWZlYmEzNWU0ZTc5ZTdhZTBkNmQ=>.

**WIRED FOR WAR: THE ROBOTICS REVOLUTION AND  
CONFLICT IN THE TWENTY-FIRST CENTURY<sup>1</sup>**

REVIEWED BY MAJOR FRANKLIN D. ROSENBLATT<sup>2</sup>

I. Introduction

Pity the librarian who receives a copy of P.W. Singer's *Wired for War* and must decide where to put it. Since the book wrestles with the changing nature of warfare, it could fit in with other books on war and military affairs. It may also belong in the science fiction section, since it is largely a tribute to the vision of science fiction writers such as Isaac Asimov. Perhaps *Wired for War* should go alongside works by other futurist thinkers such as George Orwell and Freeman Dyson. Is it really an ethics book? A science text? Strong arguments could be made for each of these.

All these topics, and more, come together in *Wired for War* for a thought-provoking exploration of how technology is driving the most recent revolution in military affairs. The author convincingly defends his thesis that while the infusion of unmanned systems and robots into the frontlines of combat offers tactical advantages, it also presents a number of strategic issues that our nation must address as our war machines become inexorably more autonomous. The author has succeeded in creating that rarest combination: a rousing page-turner that is also comprehensive, timely, and well-indexed. Dr. Singer, who is the son of a former Army judge advocate (JA),<sup>3</sup> has compiled an excellent resource that will help uniformed attorneys and military scholars anticipate future issues at the intersection of law and warfare. Predicting the future may be tough, but predicting that *Wired for War* will be just as relevant fifteen years from now as today seems like a safe bet. Singer has created a masterpiece.

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<sup>1</sup> P.W. SINGER, *WIRED FOR WAR: THE ROBOTICS REVOLUTION AND CONFLICT IN THE TWENTY-FIRST CENTURY* (2009).

<sup>2</sup> Judge Advocate, U.S. Army. Student, 58th Judge Advocate Officer Graduate Course, The Judge Advocate General's Legal Center & School, U.S. Army, Charlottesville, Virginia.

<sup>3</sup> E-mail Interview with P.W. Singer, Senior Fellow and Dir. of the 21st Century Def. Initiative at the Brookings Inst. (Sept. 5, 2009, 00:41:13 EST) [hereinafter Singer Interview].

The book is divided into two parts, and each part is so different from the other that *Wired for War* could have been written as two separate books. In the first part, *The Change We are Creating*, Singer's enthusiasm for gadgets is on display as he catalogues cutting-edge consumer and military products. Singer then canvasses the scientific and defense communities, where we learn that not only are robots doubling in number every nine months,<sup>4</sup> but that exponential advances in computing ability could lead to thinking and feeling robots in the not-too-distant future.

*Wired for War's* real excellence is in the second part, *What Change is Creating for Us*. Here, Singer matures from ebullient YouTube generation spokesman into a thoughtful and wide-ranging visionary. Singer views the continuing encroachment of technology into warfare from dozens of angles, and is often uncomfortable with what he finds. A technological revolution has already played out since the Iraq and Afghanistan wars began, and even greater changes loom. However, nobody has really planned for the strategic, legal, and ethical consequences of this revolution. We are good at making things, Singer finds, but we tend to avoid setting goals for developing and regulating our cutting-edge technological advances. It is naïve to think that technology will end war; in fact, Singer's gravest concern is that the robotics revolution (and its tendency to remove humans from the front lines of combat) will make going to war easier than ever. The book's final sentence is apt: "Sadly, our machines may not be the only thing wired for war."<sup>5</sup>

## II. What (or Who) Are These Robots?

*Wired for War* starts with Singer's reason for writing about robots: "Because robots are frakin' cool."<sup>6</sup> This proves true: the robots of the future will indeed be frakin' cool. Future warbots will range from autonomous infantry robots<sup>7</sup> to drone warplanes that can pilot themselves and hover for years<sup>8</sup> to self-driving automobiles<sup>9</sup> to robots that can

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<sup>4</sup> SINGER, *supra* note 1, at 99.

<sup>5</sup> *Id.* at 436.

<sup>6</sup> *Id.* at 1.

<sup>7</sup> *Id.* at 130.

<sup>8</sup> *Id.* at 117.

<sup>9</sup> *Id.* at 88.

“morph”<sup>10</sup> and change form like in *Terminator 2*.<sup>11</sup> Singer gives fair treatment to the risks of these advances, particularly the human tendency to defer to machine judgment,<sup>12</sup> the dangers of trusting machines to distinguish between combatants and non-combatants,<sup>13</sup> and the competing views about whether unmanned systems on the battlefield tend to demoralize or embolden opposing insurgencies.<sup>14</sup>

What is a robot? An obvious problem must have faced Singer when he decided to write *Wired for War*: how to interweave the machines in use today by the U.S. military in Iraq and Afghanistan into a book about robots. As it turns out, many of our current war machines are called robots, but they do not live up to the billing. Singer provides a helpful definition of “robot”:

Robots are machines that are built upon what researchers call the “sense-think-act” paradigm. That is, they are man-made devices with three key components: “sensors” that monitor the environment and detect changes in it, “processors” or “artificial intelligence” that decides how to respond, and “effectors” that act upon the environment in a manner that reflects the decisions, creating some sort of change in the world around the robot. When these three parts act together, a robot gains the functionality of an artificial organism. If a machine lacks any of these three parts, it is not a robot.<sup>15</sup>

Curiously, Singer never acknowledges that many of his featured gadgets do not meet his own definition. Instead, he relies on descriptions that breathe humanlike traits onto simple machines that are operated by videogame-style controllers. For example, a remote-controlled platform called the Warrior is touted by its manufacturers as able to “run a four-

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<sup>10</sup> *Id.* at 92–93.

<sup>11</sup> *TERMINATOR 2: JUDGMENT DAY* (Tri-Star Pictures 1991). In this action movie, an evil T-1000 Terminator robot is sent from the future to kill John Connor in Los Angeles. The T-1000 robot is made of a futuristic alloy that allows it to change its appearance.

<sup>12</sup> In a harrowing example, the author describes the U.S.S. *Vincennes* in 1988, also known as the “Robo-cruiser,” whose automated Aegis radar system mistook an Iranian passenger jet for an enemy F-14. The crew trusted the Aegis and without further verification fired at the plane, killing all 290 passengers. See SINGER, *supra* note 1, at 125.

<sup>13</sup> *Id.* at 383.

<sup>14</sup> See *id.* at 35, 212–23, 307, 312.

<sup>15</sup> *Id.* at 67.

minute mile” rather than the more vehicular description of traveling fifteen miles per hour.<sup>16</sup> The PackBot, a remote-controlled vehicle used for explosive ordnance disposal (EOD) missions in Iraq, is described as a “brave”<sup>17</sup> beloved lost member of an EOD team after it was destroyed on a bomb detonation mission.<sup>18</sup> One suspects that these descriptions are efforts by the machine manufacturers to present their products as high-end technology rather than commodities, and to price them accordingly in defense contracts. Dr. Singer, eager to include “frakin’ cool” war machines in his book on robots, temporarily lets down the guard of his scrutiny by repeating the manufacturers’ labeling of lesser machines as robots. After all, a machine that “runs a four-minute mile” is still basically the same technology as a remote-controlled toy car. This is twenty-first century window dressing on twentieth century gadgets. Resembling WALL-E<sup>19</sup> does not make a robot. These definitions matter, since if we are going to regulate our new machines, we must be able to speak with clarity about which ones we are talking about.

Although many American machines now touted as “robots” do not yet live up to the billing, lots of Japanese robots do. *Wired for War*’s missed opportunity was the chance to explore Japan to ponder robotic possibilities. Japanese robots range from lifelike receptionist drones to factory workers to “life assistance robots”<sup>20</sup> who often become beloved companions to their owners. (The United States, by contrast, has built an autonomous vacuum cleaner robot.)<sup>21</sup> Japan, which hopes to replace 15% of its workforce with robots in the next twenty years,<sup>22</sup> presents the most logical groundwork for discussing possibilities for autonomous machines and how society must adjust (if at all) to science-fiction turned science-reality. *Wired for War* does offer a glimpse of Japanese robots and the Japanese cultural response, but only enough to whet the reader’s appetite for more.

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<sup>16</sup> *Id.* at 24.

<sup>17</sup> *Id.* at 40.

<sup>18</sup> *Id.* at 20.

<sup>19</sup> WALL-E (Pixar Animation Studios 2008). WALL-E, the title character, is a fictional robot in the future whose job is to clean up trash on Earth, until he falls in love with another robot named Eve and follows her to adventures in outer space. The PackBot and other new machines (perhaps intentionally) resemble WALL-E, with cameras for eyes and tank-like treads for movement.

<sup>20</sup> SINGER, *supra* note 1, at 242.

<sup>21</sup> *See id.* at 22–23. The Roomba is a commercially available robot vacuum cleaner that can measure the room it is assigned to vacuum, return to its charger, and avoid stairs. The Roomba was designed by iRobot, the same manufacturer of the PackBot.

<sup>22</sup> *Id.* at 242.

### III. An All-Seeing Eye in the Sky: Get JAG on the Phone!

Robots or not, unmanned aerial vehicles (UAVs) are transforming warfare, with even more profound changes on the horizon. In fact, UAVs have the potential to entirely transform war as we know it. Singer explained in a television interview that “[w]e’ve gone from having a handful of these unmanned drones in the air when we invaded Iraq to now we have 5300 of them. . . . And these are like the Model-T Fords compared to what’s coming.”<sup>23</sup>

It would be unwise to assume lasting American military dominance with UAVs. More than three dozen countries operate UAVs, and any country with cash can easily contract for private UAV services.<sup>24</sup> In February 2009 (just after *Wired for War* went to press), the American military shot down an Iranian UAV flying over Iraq.<sup>25</sup> Human rights groups are pursuing their own UAVs to perform wartime monitoring to support their own objectives.<sup>26</sup> Cities are hiring UAVs, such as those flown by the City of Los Angeles, to monitor high-crime neighborhoods.<sup>27</sup> Based on current research, future UAVs may be as small as insects,<sup>28</sup> number in the millions, and operate in huge “swarms.”<sup>29</sup> Once this technology is commercially common, anyone could potentially monitor anything, at any time. This omnipresent, omniscient monitoring may feel like an all-seeing eye in the sky.

These UAV notions brim with possibility for the uniformed attorney. Strategic contracting could advance American military interests in such a future. While any citizen or nation can now purchase UAV surveillance, the more sophisticated drones and monitors will likely be operated by a smaller group of private contractors from technologically advanced countries such as Israel and the United States. If these firms seek future defense contracts with the American Government, we ought to insist on contractual terms that they not hire themselves out for any missions of

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<sup>23</sup> Interview by Jon Stewart with P.W. Singer, Senior Fellow and Dir. of the 21st Century Def. Initiative at the Brookings Inst., in New York, N.Y., *The Daily Show with Jon Stewart* (Comedy Central television broadcast Jan. 29, 2009), available at <http://www.thedailyshow.com/watch/thu-january-29-2009/p-w--singer>.

<sup>24</sup> *Attack of the Drones*, ECONOMIST TECH. Q., Sept. 5, 2009, at 22, in ECONOMIST, Sept. 5–11, 2009.

<sup>25</sup> *Id.* at 24.

<sup>26</sup> SINGER, *supra* note 1, at 268.

<sup>27</sup> *Id.* at 420.

<sup>28</sup> *Id.* at 118.

<sup>29</sup> *Id.* at 228.

monitoring the U.S. military. This power of contract would tend to deny a growing intelligence capability to the United States' enemies. Had the French military pursued such a plan, they may have avoided a 2004 surprise attack in which the Ivory Coast (then the 157th poorest country in the world),<sup>30</sup> hired two Israeli drones to gather intelligence on occupying French military forces, then attacked and killed nine French troops by using contracted planes flown by ex-Red Army Belarussian pilots.<sup>31</sup>

Singer's research will also prod the minds of military lawyers about how the law of armed conflict may apply in the future. In the present age of television and the Internet, the notion of the "strategic corporal"<sup>32</sup> has resonated. Since television cameras presently capture just a small fraction of what happens on the battlefield, will our troops behave less boldly with an "all-seeing eye"? It seems likely that judge advocates in the future will have a greater role in ferreting out war crimes allegations as non-governmental organizations (NGOs) gain more tools to monitor our forces, or if our enemies heighten efforts at "lawfare" with their own UAV coverage. Alternatively, judge advocates will have more ability than ever to harness and document our enemies' law of war violations, thus aiding public perceptions about the legitimacy of American military operations. The concept that may be best described as "law as a weapon system" seems to have a bright future.

#### IV. "Dr. Frankenstein Doesn't Get a Free Pass, Just Because He Had a PhD"<sup>33</sup>

As our machines become more autonomous, who should be held accountable when they go awry? Given the eerie similarities between forthcoming autonomous robots and Dr. Frankenstein's fictional monster,<sup>34</sup> the standard legal framework of product liability through principles of tort and contract could be insufficient. Thus, Singer boldly calls for manufacturer criminal liability for scientific discoveries that

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<sup>30</sup> *Id.* at 268.

<sup>31</sup> *Id.*

<sup>32</sup> Coined by Marine General Charles Krulak in the late 1990s, "strategic corporal" refers to the strategic consequences of leadership and decision-making at the lowest levels of the American military, given the advent of the internet, television coverage, and propaganda campaigns in modern warfare.

<sup>33</sup> Singer Interview, *supra* note 3.

<sup>34</sup> MARY SHELLY, FRANKENSTEIN; OR THE MODERN PROMETHEUS (1818).

wreak intended or unintended havoc.<sup>35</sup> Several months after *Wired for War* came out, Singer explained that this proposal turned out to be one of the book's most controversial, and that he was challenged about it during a presentation to a group of engineering graduate students. "I still held firm to the idea that accountability should not just fall on the person at the pointy end of the spear, but in every other field where we try to apportion accountability to wherever in the chain of events it is appropriate. Robotics should be no different."<sup>36</sup>

While troops at the pointy end of the spear are liable for what they do in battle, notions of what it means to be at the pointy end are changing. The UAV flying overhead in Iraq may now be flown by a pilot halfway around the world in Nellis Air Force Base near Las Vegas. In one way, this greater detachment is the next step in a familiar continuum, since many previous technologies such as arrows, firearms, cannons, and airplanes each in their own time increased the physical distance between combatants.<sup>37</sup> To address the remote operation of war machines, which he rightly concludes is an inherently military function, Singer recommends that the operation of military unmanned systems should never be handed off to private contractors.<sup>38</sup> This recommendation will be important for both military discipline and also for unity of military effort. However, the ever-present need for contractors to tend to our technology-heavy systems will require vigilance in enforcement if we are to achieve Singer's objective.

## V. Conclusion

Looking into the future and drafting the governing framework for anticipated technological frictions are both tasks fraught with uncertainty. *Wired for War* prods the reader to think about the questions we must ask as a military and a society in order to set a proper

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<sup>35</sup> SINGER, *supra* note 1, at 410. The author's proposal could lead to a predicament in which legislatures are not able to specify what scientific conduct should be criminalized until further advances in robotics show the possibilities. In other words, we may not be able to outlaw the creation of Dr. Frankenstein's monster until the first one is let loose. For more on the American concept of advance legislative crime definition, see John C. Jeffries, *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 191 (1985).

<sup>36</sup> Singer Interview, *supra* note 3.

<sup>37</sup> SINGER, *supra* note 1, at 407.

<sup>38</sup> *Id.* at 407-08.

groundwork for our war machines that (like it or not) are inexorably becoming more autonomous. Though we cannot accurately predict the future, we also cannot afford to *not* think ahead. Chinese writers have noted that the United States is a world leader in technological development, but is unable to anticipate technological applications.<sup>39</sup> The Chinese have recognized the virtue of having a viable plan: “Technology is like the ‘magic shoes’ on the feet of mankind, and after the spring has been wound tightly by commercial interests, people can only dance along with the shoes, whirling rapidly in time to the beat that they set.”<sup>40</sup>

In *Wired for War*, American ingenuity is on abundant display, as are the tough issues we must work through in order to avoid the techno-nightmares that keep science fiction and Hollywood writers busy. For better or worse, warfare will radically change. The most important lesson from *Wired for War* is that American technology will not decide our future. Our ideas will.

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<sup>39</sup> *Id.* at 247.

<sup>40</sup> *Id.* at 246 (quoting Qiao Liang and Wang Xiangsui, UNRESTRICTED WARFARE: CHINA’S MASTER PLAN TO DESTROY AMERICA (Beijing: PLA Literature and Arts Publishing House, 1999)).

