Volume 218 Winter 2013

MILITARY LAW REVIEW

ARTICLES

THE MILITARY RETIREMENT SYSTEM: A PROPOSAL FOR CHANGE
Major Wener Vieux

TICKET TO RIDE: STANDARDIZING LICENSURE PORTABILITY FOR MILITARY SPOUSES
Major Adam W. Kersey

AUTONOMOUS WEAPONS AND THE LAW OF ARMED CONFLICT
Cadet Allyson Hauptman

AN EXTRAORDINARY LIFE SPAN: A SUMMARY AND ANALYSIS OF *AN ORAL HISTORY OF THE HONORABLE WILLIAM A. MCCLAIN, UNITED STATES ARMY (1943-1946)*
Major Dan Dalrymple

THE TWENTY-FOURTH ANNUAL MAJOR FRANK B. CREEKMORE LECTURE
Rodney A. Grandon

THE TWENTY-NINETH GILBERT A. CUNEO LECTURE IN GOVERNMENT CONTRACT LAW
Honorable Jacques S. Gansler

THE FORTY-FIRST KENNETH J. HODSON LECTURE IN CRIMINAL LAW
Congresswoman Loretta Sanchez

BOOK REVIEWS

Department of Army Pamphlet 27-100-218

U.S. DEP'T OF ARMY PAMPHLET 27-100-218
MILITARY LAW REVIEW
VOLUME 218 • 2013

MILITARY LAW REVIEW

Volume 218 **Winter 2013**

CONTENTS

ARTICLES

The Military Retirement System: A Proposal for Change
Major Wener Vieux 1

Ticket to Ride: Standardizing Licensure Portability for Military Spouses
Major Adam W. Kersey 115

Autonomous Weapons and the Law of Armed Conflict
Cadet Allyson Hauptman 170

An Extraordinary Life Span: A Summary and Analysis of *An Oral History of the Honorable William A. McClain, United States Army (1943–1946)*
Major Dan Dalrymple 196

The Twenty-Fourth Annual Major Frank B. Creekmore Lecture
Rodney A. Grandon 228

The Twenty-Ninth Gilbert A. Cuneo Lecture in Government Contract Law
Honorable Jacques S. Gansler 246

The Forty-First Kenneth J. Hodson Lecture in Criminal Law
Congresswoman Loretta Sanchez 265

BOOK REVIEWS

Bleeding Talent: How the U.S. Military Mismanages Great Leaders and Why It's Time for a Revolution
REVIEWED BY *Major Josef Daskal* 281

The Guns at Last Light: The War in Western Europe, 1944–1945
REVIEWED BY *Commander I. C. LeMoyne* 291

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

Pamphlet No. 27-100-218, Winter 2013

MILITARY LAW REVIEW—VOLUME 218

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.

BOARD OF EDITORS

CPT LAURA A. O'DONNELL, *Editor*
MAJ RONALD T. ALCALA, *Assistant Editor*
MAJ KEIRSTEN H. KENNEDY, *Assistant Editor*
MR. CHARLES J. STRONG, *Technical Editor*

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

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 218 MIL. L. REV. (page number) (Winter 2013). Each issue is a complete, separately numbered volume.

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

SUBMISSION OF WRITINGS: Anyone may submit for publication consideration articles, comments, recent development notes, and book reviews in Microsoft Word format to the Editor, *Military Law Review*, at MLREditor@jagc-smtp.army.mil or the Technical Editor, *Military Law Review*, at TechEditor@jagc-smtp.army.mil. If electronic mail is not available, please forward the submission in duplicate, double-spaced, to the Technical Editor, *Military Law Review*, The Judge Advocate General's Legal Center and School, U.S. Army, Charlottesville, Virginia 22903-1781.

Footnotes should be typed double-spaced and numbered consecutively from the beginning to the end of the writing, not chapter by chapter. Citations should conform to *The Bluebook: A Uniform System of Citation* (19th ed. 2010), copyrighted by the *Columbia*, *Harvard*, and *University of Pennsylvania Law Reviews* and the *Yale Law Journal*, and to the *Military Citation Guide* (TJAGLCS 18th ed. 2013).

Masculine pronouns appearing in the text refer to both genders unless the context indicates another use.

Typescripts should include biographical data concerning the author or authors. This data should consist of branch of service, duty title, present and prior positions or duty assignments, all degrees (with names of granting schools and years received), and previous publications. If submitting a lecture, or a paper prepared in partial fulfillment of degree requirements, the author should include the date and place of delivery of the lecture or the date and source of the degree.

EDITORIAL REVIEW: The *Military Law Review* does not purport to promulgate Department of the Army policy. The opinions and conclusions reflected in each writing are those of the author and do not necessarily reflect the views of the Department of Defense, The Judge Advocate General, the Judge Advocate General's Corps, or any other governmental or non-governmental agency.

The Editorial Board of the *Military Law Review* includes the Chair, Administrative and Civil Law Department, Lieutenant Colonel Luis O. Rodriguez; and the Director, Professional Communications Program, Major Keirsten H. Kennedy. The Editorial Board evaluates all material submitted for publication, the decisions of which are subject to final approval by the Dean, The Judge Advocate General's School, U.S. Army. We accept submissions from military and civilian authors, irrespective of bar passage or law school completion. In determining whether to publish an article, note, or book review, the Editorial Board considers the item's substantive accuracy, comprehensiveness, organization, clarity, timeliness, originality, and value to the military legal community. No minimum or maximum length requirement exists.

When the Editorial Board accepts an author's writing for publication, the Editor of the *Military Law Review* will provide a copy of the edited text to the author for prepublication approval. Minor alterations may be made in subsequent stages of the publication process without the approval of the author.

Reprints of published writings are not available. Authors receive complimentary copies of the issues in which their writings appear. Additional copies usually are available in limited quantities. Authors may request additional copies from the Technical Editor of the *Military Law Review*.

BACK ISSUES: Copies of recent back issues are available to Army legal offices in limited quantities from the Technical Editor of the *Military Law Review* at usarmy.pentagon.hqda-tjaglcs.list.tjaglcs-

tech-editor. Bound copies are not available and subscribers should make their own arrangements for binding, if desired.

REPRINT PERMISSION: Contact the Technical Editor, *Military Law Review*, The Judge Advocate General's Legal Center and School, U.S. Army, ATTN: ALCS-ADA-P, Charlottesville, Virginia 22903-1781.

INDIVIDUAL PAID SUBSCRIPTIONS TO THE *MILITARY LAW REVIEW*

The Government Printing Office offers a paid subscription service to the *Military Law Review*. To receive an annual individual paid subscription (4 issues), complete and return the order form on the next page.

RENEWALS OF PAID SUBSCRIPTIONS: You can determine when your subscription will expire by looking at your mailing label. Check the number that follows "ISSDUE" on the top line of the mailing label as shown in this example:

When this digit is 7, you will be sent a renewal notice.

MILR SMITH212J ISSDUE007 R1
JOHN SMITH
212 BROADWAY STREET
SAN DIEGO, CA 92101

The numbers following ISSDUE indicate how many issues remain in the subscription. For example, ISSDUE001 indicates a subscriber will receive one more issue. When the number reads ISSDUE000, you have received your last issue and you must renew.

To avoid a lapse in your subscription, promptly return the renewal notice with payment to the Superintendent of Documents. If your subscription service is discontinued, simply send your mailing label from any issue to the Superintendent of Documents with the proper remittance and your subscription will be reinstated.

INQUIRIES AND CHANGE OF ADDRESS INFORMATION: The Superintendent of Documents is solely responsible for the individual paid subscription service, not the Editors of the *Military Law Review* in Charlottesville, Virginia.

For inquires and change of address for individual paid subscriptions, fax your mailing label and new address to (202) 512-2250, or send your mailing label and new address to the following address:

United States Government Printing Office
Superintendent of Documents
ATTN: Chief, Mail List Branch
Mail Stop: SSOM
Washington, DC 20402

United States Government INFORMATION
PUBLICATIONS ★ PERIODICALS ★ ELECTRONIC PRODUCTS

Army Lawyer and Military Review
SUBSCRIPTION ORDER FORM

Order Processing Code: 5937

Easy Secure Internet: **bookstore.gpo.gov**

Toll Free: 866 512-1800
Phone: 202 512-1800
Fax: 202 512-2104

Mail: Superintendent of Documents
PO Box 371954
Pittsburgh, PA 15250-7954

☐ **YES,** enter my subscription(s) as follows:

_____subscription(s) of the *Army Lawyer* (ARLAW) for $50 each ($70 foreign) per year.

_____subscription(s) of the *Military Law Review* (MILR) for $20 each ($28 foreign) per year. The total cost of my order is $_______.

Prices include first class shipping and handling and is subject to change.

Check method of payment:

☐ Check payable to Superintendent of Documents

☐ SOD Deposit Account ☐☐☐☐☐☐☐ — ☐

☐ VISA ☐ MasterCard ☐ Discover/NOVUS ☐ American Express

☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐

☐☐☐☐ (expiration date)

Thank you for your order!

Personal name _______________ (Please type or print)

Company name _______________

Street address _______________ City, State, Zip code

Daytime phone including area code _______________

Purchase Order Number _______________

Authorizing signature _______________

11/02

MILITARY LAW REVIEW

Volume 218 **Winter 2013**

THE MILITARY RETIREMENT SYSTEM: A PROPOSAL FOR CHANGE

MAJOR WENER VIEUX[*]

You can always count on Americans to do the right thing—after they've tried everything else.[1]

The credit belongs to the man who is actually in the arena, whose face is marred by dust and sweat and blood; who strives valiantly; who errs, who comes short again and again, because there is no effort without error and shortcoming; but who does actually strive to do the deeds;. . . .[2]

I. Introduction

War. From the rolling fields of Antietam, the trenches of the Marne, the volcanic sands of Mount Suribachi, the jungles of the Ho Chi Minh

---

[*] Judge Advocate, United States Army. Presently assigned as Command Judge Advocate, 513th Military Intelligence Brigade, Fort Gordon, Georgia. L.L.M., 2013, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia; J.D., 2004, University of Arizona; B.A., 1999, University of Arizona. Previous assignments include Knowledge Management Officer, U.S. Army Claims Service, Fort Meade, Maryland, 2011–2012; Chief, Criminal Law, Aberdeen Proving Ground, Maryland, 2008–2011; Senior Defense Counsel, Camp Victory, Iraq 2007–2008; (Defense Counsel, 2006–2007; Tax Center Officer-in-Charge, 2006; Legal Assistance Attorney, 2005) Fort Bragg, North Carolina; Davis-Monthan Air Force Base, Tucson, Arizona, United States Air Force Enlisted Member 1992–2000. Member of the state bar of Arizona. This article was submitted in May 2013 in partial completion of the Master of Laws requirements of the 61st Judge Advocate Officer Graduate Course.

[1] WILLIAM B. WHITMAN, THE QUOTABLE POLITICIAN 98 (2003) (quote by Sir Winston Leonard Spencer Churchill (1874–1965)).

[2] President Theodore Roosevelt, Citizenship in a Republic, Speech delivered at the Sorbonne, Paris, France (Apr. 23, 1910), *available at* http://design.caltech.edu/erik/Misc/Citizenship_in_a_Republic.pdf.

Trail, and in the mountains of Helmand Province, servicemembers have fought for the ideals of liberty and democracy. These servicemembers stood and faced the dangers of war. With sweat oozing down their faces, hands numb from clutching their muskets, carbines, and M16s, their bodies and minds near or at the point of exhaustion, they have faced this country's enemies. They faced their fears because they trusted in their government to take care of them after it was all over. But today, that trust is in jeopardy.

The economic recession that started in late 2008, the slow recovery that began in late 2009, persistent high unemployment,[3] the growing national debt, the fiscal cliff, and the systematic problems with two key entitlement benefits—social security and Medicare—have made reducing government spending a key issue.[4] In May 2010, Secretary of Defense Robert M. Gates, citing the "current and projected fiscal climate" and its impact on the Department of Defense (DoD) effort to modernize military capabilities, tasked the Defense Business Board (the Board) with providing recommendations on options that would "materially reduce overhead and increase the efficiency" of the DoD's business operations.[5] The military retirement system was one of several issues that the Board identified as an opportunity for budget savings.

The cost of maintaining the retirement system is more than $100 billion a year and has risen steadily over the past ten years.[6] The Board recommended abolishing the twenty-year "cliff" vesting system, which grants an immediate annuity to servicemembers upon retirement, and replacing it with a 401(k)-style system similar to the Thrift Savings Plan

---

[3] Christopher J. Goodman & Steven M. Mance, *Employment Loss and the 2007–2009 Recession: an Overview*, MONTHLY LAB. REV., Apr. 2011 at 3.

[4] Jeanne Sahadi, *National Debt: Why Entitlement Spending Must Be Reined In*, CNNMONEY, Sep. 6, 2011, http://money.cnn.com/2011/09/05/news/economy/national_debt_spending/index.htm.

[5] DEF. BUS. BD., REPORT TO THE SECRETARY OF DEFENSE: MODERNIZING THE MILITARY RETIREMENT SYSTEM tab A (Oct. 2011) [hereinafter DEF. BUS. BD.].

[6] *See* U.S. DEP'T OF DEF. COMPTROLLER, FISCAL YEAR 2012 MILITARY RETIREMENT FUND AUDITED FINANCIAL REPORT, 1 (Nov. 2012) [hereinafter MILITARY RETIREMENT FUND AUDIT]. Cost is broken down into three components: (1) normal cost payments as part of the Department of Defense (DoD) budget and U.S. Treasury; (2) payment from the U.S. Treasury to cover the unfunded liability; and (3) investment income from the U.S. Treasury in the form of interest earned from bonds. *Id.* In Fiscal Year (FY) 2012 total cost consisted of $21.9 billion from the Defense budget and U.S. Treasury; $70.13 billion from the U.S. Treasury; and $12.5 billion from investment income, also from the Treasury. *Id.* *See also infra* Part V.C.1 for additional information on the cost of the retirement system and payment to retirees.

for the Uniformed Services (TSP).[7] Further, the Board, while not explicitly supporting the option of immediately transitioning active duty servicemembers into the new plan, estimated that the government would save more than $100 billion in Fiscal Year (FY) 2034 if troops were transitioned into the new system.[8] The Board's recommendations caused an uproar in the servicemembers' retirement community[9] and sparked fear among active duty servicemembers[10] and family members who would see a retirement system that they have depended on abolished.

The military retirement system is a compact between our nation and those who have served faithfully and tirelessly. While the system as currently structured is costly and fails to provide retirement benefits to the vast majority of servicemembers currently serving in the Armed Forces, the Board's proposal to convert the current annuity system into a 401(k)-style plan is extreme, and tramples on the compact between the nation and servicemembers and their families.

Despite the annuity's high cost, it is an investment that the country must make to maintain the best military in the world[11] and servicemembers who exhibit a level of professionalism, skill, and ability unparalleled by any other force.[12] Thus, the challenge is to devise a modernized retirement system that (1) provides retirement benefits to more servicemembers (earlier vesting while providing the DoD tools to

---

7 DEF. BUS. BD., *supra*, note 5, at 4–5.

8 *Id.* n.5, at tab C, apps. D, F. Under the current plan, FY2034 cost would be $217 billion. Under the new 401(k)-style system, FY2034 cost would be $112 billion.

9 *See* Andrew Tilghman, *Plan to Cut Retirement Outrages Service Members*, ARMYTIMES, Sep. 1, 2011, http://www.armytimes.com/money/retirement/military-retirement-plan-troops-react-090111w/. *See also* James Dao & Mary Williams Walsh, *Retiree Benefits for the Military Could Face Cuts*, N.Y. TIMES, Sep. 18, 2011, http://www.nytimes.com/2011/09/19/us/retiree-benefits-for-the-military-could-face-cuts.html?_r=0. As a side note, Mr. Dao refers to the health care and military retirement system as a "big social welfare system." It is disappointing for someone to belittle the sacrifice that servicemembers and military family members make in defending this country. After twenty or more years of service, a health care system and retirement benefits are earned, not a result of a social welfare system.

10 *See* Lisa M. Novak, *Military Retirement System Broken, Board Says*, STARS & STRIPES, Aug. 7, 2010, http://www.stripes.com/news/military-retirement-system-broken-board-says-1.113754.

11 *See* Tyrone C. Marshall, *Panetta: U.S. Military Best in World, But Threats Remain*, U.S. DEP'T OF DEF., Jan. 20, 2012, http://www.defense.gov/News/NewsArticle.aspx?ID=66878.

12 *See* Donna Miles, *Obama, Panetta Praise Military Veterans' Service*, U.S. DEP'T OF DEF., Nov. 9, 2011, http://www.defense.gov/News/NewsArticle.aspx?ID=66021.

manage force structure more efficiently); (2) adequately compensates servicemembers for sacrificing twenty or more years serving their country (immediate annuity); and (3) is generous enough to induce high-quality personnel to remain in the military beyond the twenty-year mark (incentivizing servicemembers to serve to thirty years).

This article has four main sections broken down in the following manner: Parts II-IV discuss historical background of the retirement system; Parts V-VII provide analysis that is critical to understanding the current system and proposals for change; Parts VIII and IX address the proposals from the past eight years; and Part X introduces a new proposal—the vesting plan.

This article focuses on reviewing the military retirement system from its inception to its modern form in Part II. The 1948 Hook Commission, a comprehensive review of the military compensation system, established the current retirement system.[13] Further, Part III analyzes the most significant military retirement legislative reforms that have occurred during the past thirty years and how they have affected retention, force management, cost, and efficiency. Analyzing past legislative changes will provide the necessary background on how to properly create a new system.

Part IV of this article highlights and discusses criticism of the current military retirement system. When the Hook Commission proposed the current system, the Commission unwittingly established a system that has proven to be unfair to servicemembers who serve less than twenty years.[14] One of the main arguments against the current system is that it is patently unfair to the majority of servicemembers, many of whom performed combat operations in Iraq and Afghanistan.[15] The DoD estimates that less than 20 percent of servicemembers will become eligible for the military retirement system.[16] Critics also describe the

[13] ADVISORY COMM'N ON SERV. PAY, CAREER COMPENSATION FOR THE UNIFORMED FORCES A REPORT AND RECOMMENDATION FOR THE SECRETARY OF DEFENSE (Dec. 1948) [hereinafter HOOK COMMISSION].

[14] *See* U.S. DEP'T OF DEF., REPORT OF THE TENTH QUADRENNIAL REVIEW OF MILITARY COMPENSATION, VOLUME II: DEFERRED AND NONCASH COMPENSATION 12 (July 2008) [hereinafter 10TH QRMC].

[15] LAWRENCE J. KORB ET AL., *Reforming Military Compensation*, CTR. FOR AM. PROGRESS, May 2012, at 5.

[16] OFFICE OF THE ACTUARY U.S. DEP'T OF DEF., VALUATION OF THE MILITARY RETIREMENT SYSTEM 24 (Sept. 30 2010).

military retirement system as "unwieldy, ineffective, and expensive"[17] or "inequitable, inflexible and inefficient."[18]

To better grasp the retirement system and its cost, it is important to understand the military personnel compensation part of the defense budget. As stated above, critics tend to focus on the cost of the system as a driving force for change. Part V reviews the three major components that make up personnel compensation in the defense budget—basic pay, Tricare, and retirement—and discusses ways to lower costs. Some of the criticisms have merit and any new proposal must take some of their well-reasoned suggestions into account.

When drafting a new proposal, it would behoove the drafter to consider the Federal Employee Retirement System (FERS) as a possible solution. Indeed, some of the proposals that are discussed later in this article highlight certain aspects of FERS. Part VI reviews the FERS system and compares it to the current military retirement system. In some aspects, the Special Provisions for Law Enforcement Officers and Firefighters under the FERS system would be an improvement to the current military retirement system, but even that system falls short of what servicemembers deserve.

In understanding why previous proposals, if implemented, will break faith with troops, it is imperative to acknowledge the uniqueness of serving in the military. Seldom do critics refer to the many sacrifices that servicemembers make to serve the nation. More importantly, rarely if ever, do critics consider the sacrifices that family members make and the financial and emotional toll that serving in the military takes on both family members and servicemembers. Part VII presents the uniqueness of the military and explains why a modernized retirement system must consider the financial hardship that families endure during a twenty-year career and must compensate them adequately for their sacrifices. Such a system must be more financially generous than what is available to the general public or federal employees.

Past proposals, to include those of the Defense Business Board, have attempted to include changes that will make the new system more efficient, less costly, equitable to most servicemembers and provide the DoD with the tools to manage the force properly. Part VIII discusses

---

[17] KORB ET AL., *supra* note 15, at 31.
[18] 10TH QRMC, *supra* note 14, at 12.

these proposals and highlights their key components. Despite some of the advantages of these new proposals, Part IX explores why each would result in a system that ultimately falls short and damages the DoD's ability to retain and recruit qualified servicemembers.

Based on the criticism of the current system, and, more importantly, the need to provide for servicemembers and their dependents, the proposal in Part X is an alternative to the Board's and others' proposals currently under consideration. The vesting plan includes several key concepts. First, for the first time in U.S. history, servicemembers would contribute toward their defined benefit plan at a rate close to that of Social Security—five percent. Second, servicemembers would receive an immediate annuity of 40 percent of pay instead of the traditional 50 percent of pay after twenty years of service. Servicemembers who serve more than ten years would vest into the defined benefit plan and receive a reduced annuity at the age of sixty-two. Third, all servicemembers would enjoy a government match up to ten percent of pay into a TSP account. Servicemembers would vest in the TSP after five years of service. Finally, as a way to better manage force structure, the DoD would have the option of separating servicemembers at the fifteen-year mark. These changes will ensure the financial security that servicemembers and their dependents deserve and will properly reward them for their honorable service to this nation.

II. History of the Military Retirement System

A. The Military Retirement System from the Civil War to World War II

Throughout the nation's history, the military retirement system can best be described as an attempt by the government to provide for the safety and security of those who served the nation and to maintain a young and vigorous force. The first instance of such a pact was an 1855 statute that gave the Secretary of the Navy the right to involuntarily terminate officers who were deemed incapable or unfit for duty, place them on a "reserved list," and provide them with either 50 percent or 75 percent of their pay.[19] The 1861 Act authorized the President to

[19] U.S. DEP'T OF DEF., MILITARY COMPENSATION BACKGROUND PAPERS 685 (6th ed. May 2005) [hereinafter 2005 DEPARTMENT OF DEFENSE BACKGROUND PAPERS]. The Act of February 28, 1855, ch. 127, § 1, 10 Stat. 616 (1855).

voluntarily retire regular officers of all branches of service after completing forty years of service.[20]

Despite the 1861 Act that treated all branches of service the same, the period between 1855 and 1949 marks differences among the branches regarding when servicemembers could retire voluntarily or involuntarily, compensation upon retirement, and total compensation.[21] Additionally, enlisted members were treated differently from officers, and the first legislative act authorizing voluntary retirement for enlisted personnel came about in 1885.[22] Legislation enacted in 1899 gave the Navy the authority to approve voluntary retirement requests or involuntarily retire certain officers between the pay grades of O-4 and O-6, to ensure that there were sufficient vacancies to enable new promotions.[23] Thus, the system enabled leaders to meet its goal of keeping the force young and vigorous.

The Joint Service Pay Act of 1922[24] resulted in a general pay and allowances readjustment and combined the services under one payscale.[25] Congress felt the change necessary to combat the high number of officer resignations due to lucrative employment opportunities in the private sector.[26] Several modern concepts were introduced as part of this new act, to include: Cost of Living Allowance (COLA); Basic Housing Allowance (BHA) to care for family members; uniform pay

---

[20] 2005 DEPARTMENT OF DEFENSE BACKGROUND PAPERS, *supra* note 19, at 685. The Act of August 3, 1861, ch. 42, § 15 (officers of the Army and Marine Corps), § 21 (officers of the Navy), 12 Stat. 287, 289, 290 (1961).
[21] 2005 DEPARTMENT OF DEFENSE BACKGROUND PAPERS, *supra* note 19, at 685–98.
[22] *Id.* at 695.
[23] *Id.* at 687–88. The pay structure for retired servicemembers also evolved, starting with the 1855 statute. The statute provided pay for separated Navy officers at 75 percent of their sea duty pay. In 1862, Army and Marine Corps officers were entitled to retired pay in the amount of their "pay proper" plus four "rations." In 1871, the system was upgraded from rations to a formula that included base and longevity pay. *Id.* at 685–86. By 1916, the retirement system was standardized among the branches into a pay formula of 2½ percent multiplied by the years of service, up to a maximum of 75 percent. John Christian, *An Overview of Past Proposal for Military Retirement Reform*, RAND NAT'L DEF. RES. INST. 3 (2006).
[24] Joint Service Pay Act of 1922, Pub. L. No. 67-235, 42 Stat. 625 (1922).
[25] *See* ADVISORY COMM'N ON SERV. PAY, CAREER COMPENSATION FOR THE UNIFORMED FORCES A REPORT AND RECOMMENDATION FOR THE SECRETARY OF DEFENSE 7 (Dec. 1948) [hereinafter HOOK COMMISSION APPENDIX].
[26] *Id.* "This act was designed to provide, not pay or allowances for services rendered, but rather a compensation that would allow the officer to maintain himself and his family with reasonable decency under the various conditions of service and at *minimum cost to the government*." *Id.* (emphasis added).

throughout the services; and length of service would determine the rate of pay. The act stated that the purpose of the compensation package was to offer "attractive careers" for young men of character and ability with the enticement of pay.[27]

The Pay Readjustment Act of 1946 gave officers a pay raise between 15 to 20 percent depending on their rank, and enlisted servicemembers also received an increase in pay. The increases in pay were made applicable to retired servicemembers as well.[28] Increases in pay, however, whether to maintain a normal living standard for troops or to keep pace with pay increases in the private sector, have had a profound impact on increasing the cost of the retirement system over time.

B. The Hook Commission

The 1948 Advisory Commission on Service Pay,[29] "colloquially known as the Hook Commission [because it was headed by Charles R. Hook], conducted the first comprehensive review of the military compensation system since 1908."[30] The Commission interviewed experts in the military and in the private sector. It reviewed pay, specialty pay, and allowances and compared them to the private sector to ensure that servicemembers were fairly compensated for their commitment to the nation.[31]

Though the Hook Commission made recommendations to when a servicemember should retire, the seminal piece of legislation on military retirement deviated from that recommendation.[32] The Army and Air

---

[27] *Id.* at 7–8.
[28] *Id.* at 10.
[29] *See* HOOK COMMISSION, *supra* note 13.
[30] CHARLES A. HENNING, CONG. RESEARCH SERV., RL42087, MILITARY RETIREMENT REFORM: A REVIEW OF PROPOSALS AND OPTIONS FOR CONGRESS 1 n.1 (2011).
[31] HOOK COMMISSION, *supra* note 13, at iii, ix.
[32] The Hook Commission understood that there was a social compact between the government and servicemembers. In the letter addressed to the Secretary of Defense and attached to the report, Mr. Hook stated that his commission believed this new system was just and reasonable. He further explained that the retirement and survivor benefits were part of a "total career compensation" package provided as inducement, "as a social obligation of the Government to its employees . . . and as a means of keeping the organization vital." *Id.* at iii. The Commission believed it was equally important to provide benefits to the survivors of those who died in the service of their country. *Id.* at 39. More importantly, the Commission understood that the cost associated with their

Force Vitalization and Retirement Equalization Act of 1948 established the modern-day retirement system.[33] The Act established vesting at the twenty-year mark and maintained the 1916 standard of computing retired pay at 2½ percent per year of service.[34] The Hook Commission envisioned a system where servicemembers would retire after thirty years of service. However, the Act made it possible for servicemembers with more than twenty years of service but less than thirty years, to request retirement and have their request approved.[35]

The Commission recommended a noncontributory retirement system with the Government responsible for all cost on a "pay-as-you-go" basis.[36] This was not a new phenomenon; as early as 1855, the government paid retired servicemembers on a "pay-as-you-go basis," but it was the first time that the issue of whether servicemembers should contribute toward their retirement benefit was considered and discarded as being impracticable. In recommending a noncontributory retirement plan, the Hook Commission noted that Congress had the taxing power available to pay for and meet its obligations to current servicemembers' pay and retirees. In contrast, the Commission noted, the private sector had to put aside money in a retirement fund to meet its future obligations to retirees.[37]

Youth and vigor was a key factor in recommending that servicemembers could request retirement after twenty years of service. The Commission believed that upward promotion for younger troops and maintaining a vigorous force were important to the system.[38] The Commission compared the retirement ages for civilians in the private sector, federal employees, and retirees receiving benefits under the Social Security Act and found them inadequate as a basis for the military.[39]

---

proposed retirement system would be substantial and that taxpayers would be responsible for meeting the obligation. The Commission also sought protection for retiree dependents when it proposed death benefits at no cost to the servicemember. *Id*.

[33] The Army and Air Force Vitalization and Retirement Equalization Act of 1948, Pub. L. No. 80-810, 62 Stat. 1081 (1948).

[34] HENNING, *supra* note 30, at 5.

[35] HOOK COMMISSION, *supra* note 13, at 43.

[36] *Id.* at 39.

[37] *Id.* at 40–41.

[38] *Id.* at 40.

[39] HOOK COMMISSION APPENDIX, *supra* note 25, at 190.

Finally, the Hook Commission's recommendations led to the Career Compensation Act of 1949 and resulted in the current military compensation system for all the services.[40] The Act applied to all military branches and standardized pay for both officers and enlisted members.[41]

C. Modern-Day Military Retirement System (1949–Present)[42]

The modern day retirement system is a non-contributory, defined benefit system that reflects most of the changes the Hook Commission proposed. The main principle of that system is that it is a non-contributory system—servicemembers do not contribute a portion of their salaries toward their retirement benefits.[43] The current system vests for an active duty servicemember after twenty years of service. It is "an all or nothing" system where an active duty servicemember who serves for nineteen years and voluntarily leaves the service will end up with no retirement benefits as a result of that service.[44] The monthly retirement annuity is adjusted annually by a Cost-of-Living Adjustment (COLA) to keep pace with inflation. Military retirees are also entitled to non-monetary benefits, which include exchange and commissary privileges, Space-Available travel on military flights, medical care through TRICARE at minimal cost, and access to Morale, Welfare, and Recreation facilities and programs.[45] Retired pay is subject to federal

[40] Career Compensation Act of 1949, Pub. L. No. 81-351, 63 Stat. 802.

[41] 2005 DEPARTMENT OF DEFENSE BACKGROUND PAPERS, *supra* note 19, at 1058.

[42] The Modern-day military retirement system is codified in various provisions of title 10, U.S. Code.

[43] CHARLES A. HENNING, CONG. RESEARCH SERV., RL34751, MILITARY RETIREMENT: BACKGROUND AND RECENT DEVELOPMENTS 8 (2010).

[44] However, the servicemember may choose to transfer to the Reserve and receive a retirement package based on her reserve status. *See* LAWRENCE KAPP, CONG. RESEARCH SERV., RL30802, RESERVE COMPONENT PERSONNEL ISSUES: QUESTIONS AND ANSWERS (Mar. 14, 2008); *Reserve Retirement*, MILITARYPAY.DEFENSE.GOV, http://militarypay.defense.gov/retirement/reserve.html (last visited Jan. 25, 2013). That same servicemember also has the option of working for the federal government and applying her military service time toward her federal employee retirement time. U.S. OFFICE OF PERS. MGMT., FERS: FEDERAL EMPLOYEES RETIREMENT SYSTEM 5 (Apr. 1998) [hereinafter FERS]. *See* discussion *infra* Parts IV.–A, VI.A.–B. Notably, the system provides survivor benefits for the eligible survivors of deceased retirees. HENNING, *supra* note 30, at 1–2. Active duty members are covered automatically. Though Congress subsidizes part of the cost, retirees must elect and pay. *See* 10 U.S.C. §§ 1447–1460b (2012).

[45] HENNING, *supra* note 43, at 1.

income tax[46] and certain states may tax it as retired income or regular income.[47]

III. Major Legislative Changes to Military Retirement (1980–2007)

In 1965 Congress enacted Section 1008(b) of Title 37, United States Code, which required the President to conduct, at least once every four years, a thorough review of the military compensation system and to submit a detailed report to Congress summarizing the result and any recommendations.[48] In response to 37 U.S.C. §1008(b), President Lyndon B. Johnson convened the first Quadrennial Review of Military Compensation (1st QRMC).[49] Since 1965 there have been eleven iterations of the QRMC. Since the Hook Commission, modifications have been made with an eye toward minimizing the overall cost of the retirement system.[50] This is critical to remember when reviewing key legislative changes over the past thirty years and contemplating the potential impact of any new proposals under consideration.

For active duty servicemembers today, there are three methods of calculating retired pay: the Final Basic Pay (FBP), High-3, and Redux/Career Status Bonus.[51] The applicable retirement calculation is based on the date when the servicemember first entered active duty and his basic pay at the time of retirement, excluding the special calculation

---

46 HENNING, *supra* note 30, at 2.

47 Besides the retirement system available for active duty members discussed in this article, there are two other systems: one for the Reserve Component, and another for those who become disabled while serving and have yet to complete twenty years of service. Both the Reserve and disabled retirement systems include a provision for an annual COLA adjustment. HENNING, *supra* note 43, at 2. The Reserve Component retirement system and the disability system will not be discussed in this article. For more information on the Reserve retirement structure, see LAWRENCE KAPP, CONG. RESEARCH SERV., RL30802, RESERVE COMPONENT PERSONNEL ISSUES: QUESTIONS AND ANSWERS (Mar. 14, 2008); RESERVE RETIREMENT, http://militarypay.defense.gov/retirement/reserve.html (last visited Jan. 25, 2013).

48 2005 DEPARTMENT OF DEFENSE BACKGROUND PAPERS, *supra* note 19, at 1060.

49 *Id*.

50 HENNING, *supra* note 43, at 2. However, Mr. Charles Henning, a Specialist in Military Manpower Policy with the Congressional Research Service, notes, "past modifications intended to save money have had a deleterious effect on military recruitment and retention." *Id.*

51 HENNING, *supra* note 30, at 3.

for Redux, which will be discussed in Part III.C.[52] Basic pay is the servicemember's monthly pay based on her years of service and rank.[53]

A servicemember's overall pay or Regular Military Compensation (RMC) consists of basic pay, Basic Allowance for Housing (BAH), and Basic Allowance for Subsistence (BAS).[54] When computing a servicemember's retirement pay, only the basic pay is calculated as part of the computation. To say that servicemembers receive 50 percent of their "pay," during retirement without explaining a servicemember's total RMC, as most critics of the retirement system note, is somewhat misleading since the only pay that is considered for retirement purposes is the servicemember's basic pay.[55] In actuality, a servicemember's retirement that is 50 percent of basic pay is in fact approximately 33 percent of her RMC.[56]

A. Final Basic Pay

The first major change to the military retirement system since the Hook Commission occurred as part of the Fiscal Year (FY)1981 Defense Authorization Act.[57] This Act caused servicemembers to split between two different types of retirement pay calculations: FBP[58] and High-3.[59]

Servicemembers who entered military service before September 8, 1980, will retire under the FBP system established under the Hook

---

[52] CHARLES A. HENNING, CONG. RESEARCH SERV., RL34751, MILITARY RETIREMENT: BACKGROUND AND RECENT DEVELOPMENTS at 3 n.6 (2008).
[53] HENNING, *supra* note 30, at 3 n.10.
[54] HENNING, *supra* note 52, at 3 n.6. The RMC does not include special pay and bonuses, reimbursements, educational assistance, and any value associated with non-monetary benefits such as Tricare, commissary privileges, access to Morale, Welfare, and Recreation facilities, Space-Available flights, and post exchanges. Basic pay accounts for between 65 to 75 percent of a servicemember's total RMC, depending on individual circumstances. *Id.*; MILITARY RETIREMENT FUND AUDIT, *supra* note 6, at 11.
[55] *See* MOMENT OF TRUTH PROJECT, SHARED SACRIFICE: REFORMING FEDERAL RETIREMENT PROGRAMS 4 (Nov. 16, 2011) [hereinafter MOMENT OF TRUTH PROJECT]; DEF. BUS. BD., *supra* note 5, tab C, at 6; Christian, *supra* note 23, at 1.
[56] HENNING, *supra* note 52, at 3 n.6. *See also* HOOK COMMISSION APPENDIX, *supra* note 26, at 190. The Hook Commission calculated the retirement compensation to be between 1¼ to $1^2/_3$ pay of the overall compensation.
[57] HENNING, *supra* note 30, at 6.
[58] 10 U.S.C. § 1406 (2012); HENNING, *supra* note 30, at 6.
[59] 10 U.S.C. § 1407 (2012); HENNING, *supra* note 30, at 6.

Commission.[60] The FBP is the most expensive of the three systems currently active because the retired pay computation is based on the servicemember's final monthly basic pay at the time of retirement multiplied by 2½ percent for each full year of service and prorated by one-twelfth for each complete month less than a full year.[61] Very few, if any, of the servicemembers who entered active duty under this system remain on active duty today.[62]

B. High-3

During the 1970s, private sector pay increases far outpaced military pay raises, which resulted in problems in recruiting, retention, and readiness.[63] To resolve that pay issue, Congress approved an 11.7 percent pay increase for the Armed Forces as part of the FY1981 Defense Authorization Act[64] and a 14.3 percent pay raise as part of the FY1982 Defense Authorization Act.[65] Those increases had consequences for future retirement budget cost and Congress sought to fix this issue by offsetting the added cost of these raises.

As part of the FY1981 Defense Authorization Act, Congress ended the FBP system and instituted the High-3. Congress wanted to offset the added cost of the pay raise and reduce the growing cost of the retirement system.[66] The committee that worked on the final FY1981 authorization act highlighted the increasing cost of military retired pay under the FBP system and the need to increase current basic pay for military personnel while serving on active duty—instead of during their retirement—as key reasons why the committee recommended the change to the High-3 system.[67]

---

60 HENNING, *supra* note 30, at 3.
61 *Id.*
62 *See id.* at 4. Oddly enough, one servicemember still under this system is Lieutenant Colonel (promotable) Luis O. Rodriquez, who advised on this article.
63 *Id.* at 6.
64 *Id.* (citing Department of Defense Authorization Act, 1981, Pub. L. No. 96-342, 94 Stat. 1077 (1980)).
65 *Id.* (citing Department of Defense Authorization Act, 1982, Pub. L. No. 97-86, 95 Stat. 1099 (1981)).
66 *Id.* (citing Department of Defense Authorization Act, 1981, Pub. L. No. 96-342, 94 Stat. 1077 (1980)).
67 *Id.* (citing S. REP. NO. 96-826, at 130 (1980)).

The High-3 system includes servicemembers who entered the service between September 8, 1980, and July 31, 1986. High-3 uses the same 2½ percent calculation as the FBP, but computes the base as the average of the highest three years (thirty-six months) of basic pay rather than the final month of pay.[68] Therefore, the retired pay formula under High-3 is 2½ percent multiplied by years of service, times the High-3 average.[69] Thus, using the 2013 pay scale, an E-7 servicemember with twenty years of service would receive $24,828, and an O-4 with twenty years would receive $42,504 in retirement pay.[70] The High-3 also saves money by preventing servicemembers who recently received a pay increase or a promotion to simply use their final monthly basic pay as the calculation when they retire. See Appendix A for retired pay compensation using the High-3 system.

C. The Military Retirement Reform Act of 1986 (Redux)

The next major change to the retirement system occurred as part of the FY1986 Defense Authorization Act,[71] which required the Secretary of Defense to develop and submit to Congress two alternative options for reforming the nondisability retirement system with a goal of saving $2.9 billion in the military accrual account.[72] Further, the Act grandfathered those currently serving or already retired into either the FBP or the High-3. Additionally, despite taking money "away" from the system, Congress wanted options that would encourage members to remain on active duty beyond twenty years, and enable the military to manage its career force better.[73]

Responding to Congress, the DoD developed two models that met the targeted savings rate, but they informed Congress that they believed those cuts would "severely hamper the military's ability to retain high

[68] *Id.* at 4.

[69] KORB ET AL., *supra* note 15, at 31.

[70] *2013 Retirement Pay*, ARMYTIMES, Jan. 14, 2013, at 23.

[71] HENNING, *supra* note 30, at 6 (Department of Defense Authorization Act, 1986, Pub. L. No. 99-145, 99 Stat. 583 (1985)).

[72] *Id.* (Department of Defense Authorization Act, 1986, Pub. L. No. 99-145, 99 Stat. 583 (1985)). The Act changed the way the government paid for the military retirement system from a "pay-as-you-go" basis, based on the reasoning under the Hook Commission, to an "accrual accounting" method. The accrual accounting process is discussed in detail below Part V.D.1 as part of the discussion on the cost of the retirement system.

[73] *Id.* at 7.

quality personnel" and would significantly denigrate "future combat readiness."[74] Congress considered the two alternatives and developed a hybrid version of the proposals, thus enacting the Military Retirement Reform Act of 1986 that became known as Redux.[75]

Redux was enacted with the "dual purpose of rewarding longer service and reducing the cost of the military retirement system."[76] In fact, Redux reduced the annual accrual charge of the retirement system by one-third when compared to the pre-1980 system.[77]

Servicemembers who entered service on or after August 1, 1986, became eligible for Redux.[78] To incentivize service beyond twenty years and cut costs, Congress lowered the twenty-year computation base to 2 percent, but increased it by 3½ percent per year for every year beyond the twenty-year mark. Congress also kept the High-3 system of computing the base. As a result, a servicemember who completes exactly twenty years of service will retire with 40 percent of his High-3 monthly basic pay; a servicemember with thirty years of service will retire with 75 percent.[79] Beyond thirty years, however, the computation base increases by an additional 2½ percent per year up to a maximum retirement of 100 percent of the High-3 for forty years of service, similar to the accrual under the High-3 system.[80] Compared with the High-3

---

[74] *Id.* (citing Chapman B. Cox, the Assistant Sec'y of Def. for Force Mgmt. and Pers. during House Armed Servs. Comm. Hearing 99-40, Defense Department Authorization and Oversight Hearings of H.R. 4428, Committee on Armed Services, Feb. 27 and Mar. 12, 1986). *See also id.* (citing Memorandum from Casper Weinberger, Sec'y of Def., to Thomas P. O'Neill, Jr., Speaker of the House, Nov. 15, 1986). Secretary Weinberger stated, "The Department of Defense is steadfastly opposed to the significant degradation in future combat readiness that would result from the changes required to achieve the mandated reduction. I am particularly concerned about the potential loss of mid-level leadership and technical know-how so vital to the defense mission." *Id.* Specifically, the services argued that a drastic change to the military retirement system, i.e., changing the twenty-year vesting period, would negatively affect force structure. Christian, *supra* note 23, at 14.

[75] The Military Retirement Reform Act of 1986, Pub. L. No. 99–348, 100 Stat. 682 (1986); HENNING, *supra* note 30, at 7.

[76] *Id.* at 4.

[77] REX HUDSON, A SUMMARY OF MAJOR MILITARY RETIREMENT REFORM PROPOSALS, 1976–2006, FEDERAL RESEARCH DIVISION, LIBRARY OF CONGRESS 11 (Nov. 2007). Mr. Henning notes that Congress enacted Redux because they felt that retired pay under the pre-Redux system was "too generous." HENNING, *supra* note 30, at 4.

[78] HUDSON, *supra* note 77, at 4.

[79] *Id.*

[80] *Id.* Very few servicemembers can serve beyond 30 years of service due to mandatory retirement requirement. *But see* FY2007 Defense Authorization Act *infra* Part III.E

method, Redux pays less for twenty to twenty-nine years of service but the same for thirty years of service and beyond.[81]

D. Career Status Bonus and Choice of Retirement System

Before any servicemember could retire under the Redux system, however, Congress repealed Redux as part of the FY2000 National Defense Authorization Act (NDAA).[82] This was a momentous event given that the purpose of Redux was to reduce cost while improving retention. But there were four factors that led Congress to repeal Redux.

Starting in 1997, Congress began to notice potential recruiting and retention problems related to Redux and by 1999, Congress decided to take action.[83] By 1999, nine years after the Cold War drawdown started, the total active force had been reduced from roughly two million servicemembers to fewer than 1.4 million, a reduction of 32%.[84] Additionally, the economy was healthy, military pay lagged behind the private sector, military pilots left the force to join airline companies, and service budgets had been significantly reduced. With fewer troops to go around, a greater share of the deployment burden fell on a concentrated number of units, which resulted in greater stress on units, servicemembers, and their families.[85] The looming Redux military retirement system, according to Mr. Henning, "had lost some of its effectiveness as a retention tool."[86] Advocates for a change to the retirement system argued that servicemembers were beginning to "vote

---

(discussing changes to the mandatory retirement service date for very senior servicemembers).

[81] HUDSON or Henning?? *Id.* at 8. Congress also reduced the amount of COLA that retirees would receive under Redux. *Id.* at 4. Cost-of-Living Adjustment (COLA) is discussed in greater detail *infra* Part III.F.

[82] National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106–65, 113 Stat. 512 (1999); HENNING, *supra* note 43, at 4. Those servicemembers who entered active duty under the Redux system would have had thirteen years of service by the time Congress repealed it.

[83] *Id*.

[84] HENNING, *supra* note 30, at 9.

[85] In congressional testimony in 1999, just two years before 9/11, the Chairman of the Joint Chiefs of Staff and the Service Chiefs highlighted a dire situation by noting issues involving "deferred maintenance on military equipment, readiness concerns, and personnel shortages as a main consequence of the services not meeting their recruiting or retention goals." *Id.* at 8.

[86] *Id.*

with their feet."[87] Indeed, the services were experiencing low military morale and fewer civilians considered the military a viable career option.[88] By the fall of 1998, the Clinton Administration announced it supported repealing Redux.[89]

In passing the FY2000 NDAA, Congress wanted to keep some of the cost-saving measures under Redux and solve the ongoing crisis of losing members beyond the twenty-year mark. The NDAA allowed post-August 1, 1986, entrants to retire under the High-3 system or opt for the Redux system plus an immediate $30,000 Career Status Bonus (CSB).[90] This was the first time that servicemembers were granted the opportunity to choose their retirement system.[91] In establishing the CSB, Congress sought to solve two critical issues: (1) the ongoing crisis of losing servicemembers between the fifteenth and twentieth year mark who were leaving the military to seek civilian employment; and (2) reducing the number of servicemembers who retired between their twentieth and twenty-fifth year mark.[92]

Servicemembers would elect the CSB upon reaching their fifteenth year. In exchange for choosing the CSB, the servicemember agrees to a five-year commitment that would take her to twenty years.[93] If the servicemember chooses CSB, she forgoes retiring at twenty years and beyond with the right to use the pre-Redux High-3 option.[94] The servicemember would forfeit a portion of the bonus if she fails to complete the five-year commitment.[95] Further, Under the CSB, Congress steadily increased the retirement multiplier from two percent to 2½ percent per year of service, less one percentage point for each year of service less than thirty. Congress wanted to incentivize servicemembers to remain on active duty until their thirtieth year.[96] Thus, at their twenty-fifth year, a servicemember under basic pay or High-3 would receive 62.5 percent (25 x 2.5%), and under Redux would receive 57.5 percent

---

[87] *Id.*
[88] *Id.* at 9.
[89] HENNING, *supra* note 43, at 4.
[90] *Id.*
[91] HENNING, *supra* note 30, at 9.
[92] *See* Christian, *supra* note 23, at 11.
[93] HENNING, *supra* note 30, at 9.
[94] HENNING, *supra* note 43, at 4.
[95] *Id.*
[96] *Id.* at 5. *But see* Christian, *supra* note 23, at 11 (noting that the "up or out" system would prevent many servicemembers from remaining on active duty up to 30 years even if they wanted to serve).

((25 x 2.5%) minus 5%) of her High-3 monthly basic pay for retirement.[97]

This new Redux formula makes a distinction between retirees who are receiving retirement pay during their second career—those under age sixty-two—and those who are eligible for full retirement—those retirees aged sixty-two and older. For retirees under age sixty-two, the calculation is as described in the previous paragraph. Once a retiree reaches sixty-two, his retired pay will be recomputed based on the High-3 formula with the 2½ percent computation base. Thus, a servicemember who retired under the CSB with twenty years of service would start to get 50 percent of his High-3 monthly basic pay at age sixty instead of the old 40 percent that he received upon retirement. The increase in pay will be reflected as part of the retiree's monthly pay, rather than a one-time lump sum.[98] Additionally, the CSB has different computations for COLA increases, which will be discussed in Part III.F.

Congress also added other benefits, expressing the hope that they would stimulate both recruitment and retention.[99] These included:

1. A 4.8% military pay raise which was 0.5% above the Employment Cost Index (ECI);
2. A commitment to increase basic pay each year through 2006 by 0.5% more than the ECI;
3. A special subsistence allowance for military families eligible for food stamps;
4. Voluntary enrollment of military personnel in the Thrift Savings Plan (TSP) for tax-deferred savings; and
5. A 13% increase in the Montgomery G.I Bill education benefit.[100]

---

[97] *Id*.

[98] HENNING, *supra* note 43, at 5.

[99] HENNING, *supra* note 30, at 9.

[100] *Id.* (Unlike the federal civilian TSP program, the government does not provide matching contributions to servicemembers. However, the Secretaries for the sister services are authorized to make TSP contributions if the member is serving in a critical skill and agrees to continued service.) *See also* Christian, *supra* note 23, at 13. The Congressional Budget Office estimated that these benefits would add $18 billion to the defense budget over ten years. *Id.* (citing Sydney J. Freedberg, *Retirement Redux*, GOV'T EXEC. (Apr. 1, 1999), http://www.govexec.com/ magazine/1999/04/retirement-redux/ 5994/).

Unlike the federal civilian TSP program, the government does not provide matching contributions to servicemembers.[101] However, the Secretaries for the services are authorized to make TSP contributions if the member is serving in a critical skill area and agrees to continued service.[102] In 2009, Congress asked the DoD to assess the cost of a new proposal to provide matching TSP contributions to servicemembers.[103] Using a four-percent match, rather than the traditional five percent match that federal civilian workers receive, the DoD estimated that it would cost an additional $2.8 billion per year, assuming 100 percent enrollment and every servicemember contributed five percent of pay.[104]

Statistically, Redux has proven to be the least popular retirement system with less than one percent of eligible members selecting this option.[105] When Congress enacted the CSB in 1999, Congress did not index the CSB to increase with the rate of inflation.[106] As a result, the $30,000 bonus was worth approximately $26,500 in 2005; $23,000 in 2010; and $21,600 in 2012.[107] If the CSB had been indexed to the Consumer Price Index (CPI), it would have risen to approximately $41,600 in 2012.[108] Based on the decrease in purchasing power, taking CSB today would not be a wise choice when compared to the High-3.[109] Both the Navy and Marine Corps have kept records of the number of its officers and enlisted members from 2003 to 2010 who have chosen the CSB as a retirement choice.[110] In 2003, 41 percent of their members

---

[101] HENNING, *supra* note 30, at 9.
[102] Christian, *supra* note 23, at 13.
[103] HENNING, *supra* note 30, at 23 (citing the Federal Retirement Reform Act of 2009, Pub. L. No. 111-31, 123 Stat. 1852 (2009)).
[104] *Id.* (citing SEC'Y OF DEF., U.S. DEP'T OF DEF., REPORT TO CONGRESS COST AND IMPACT ON RECRUITING AND RETENTION OF PROVIDING THRIFT SAVINGS PLAN MATCHING CONTRIBUTIONS (Feb. 2010), *available at* http://www.tspstrategies.com/wp-content/uploads/2012/04/Cost-and-Impact-on-Recruiting-and-Retention-of-Providing-Thrift-Savings-Plan-Matching-Contributions.pdf).
[105] HENNING, *supra* note 43, at 6.
[106] HENNING, *supra* note 30, at 5.
[107] *Consumer Price Index Inflation Calculator*, BLS.GOV, http://www.bls.gov/data/inflation_calculator.htm (last visited Nov. 14, 2013); U.S. INFLATION CALCULATOR, http://www.usinflationcalculator.com (last visited Nov. 14, 2013).
[108] *Consumer Price Index Inflation Calculator*, BLS.GOV, http://www.bls.gov/data/inflation_calculator.htm. The value of 30,000 in November 2012 if indexed to inflation.
[109] HENNING, *supra* note 30, at 5, 9. Mr. Henning states that to "aid in deciding whether to select the High-3 or Redux with the Career Status Bonus, the DOD offered a calculator that allows an individual to enter their personal situation and do a comparison of the options. The calculator is available at http://www.dod/militarypay/retirement. The Department of Defense does not officially recommend either the High-3 or Redux/CSB."
[110] *Id.* at 9.

selected the CSB; however, by 2010, only 16 percent of their members elected the same choice.[111] Further, while the DoD does not advocate for either retirement choice, it does provide a calculator for servicemembers to see the impact of choosing one over the other.[112]

E. Fiscal Year 2007 National Defense Authorization Act

Before 2007, most military personnel were permitted to serve a maximum of thirty years on active duty and receive their final longevity pay increase at twenty-six years of service.[113] At thirty years of service, the Computation Base was capped at 75 percent. However, the John Warner National Defense Authorization Act of FY2007 extended the military pay table to forty years, allowed additional longevity raises, and provided more retirement credit for service beyond thirty years at the rate of 2½ percent per year. This change was to allow some *very senior* enlisted and officer personnel to be retained and continue serving to forty years.[114] In fact, only a handful of the most senior enlisted members (E-8 and E-9), warrant officers (W-4 and W-5), and officers (O-6 through O-10) may be retained.[115] A servicemember who retires after forty-one years of service would receive 102.5 percent of her final basic pay in retirement (41 years of service X the 2.5% multiplier = 102.5%).[116] While this change ensured that those higher-ranking officers and enlisted

---

[111] *Id*. The Marine Corps has made it a point to educate its members as to why choosing the CSB option may not be in their best interest financially. *See* ALINE QUESTER ET AL., *Retirement Choice: 2012*, CNA ANALYSIS SOLUTION (June 2012), *available at* http://www.cna.org/sites/default/files/research/DRM-2012-U-000276-Final.pdf.

[112] *High-3 vs. CSB/REDUX Retirement Comparison*, MILITARYPAY.DEFENSE.GOV, http://militarypay.defense.gov/mpcalcs/Calculators/compare.aspx (last visited Feb. 14, 2013).

[113] HENNING, *supra* note 30, at 3. Longevity pay is an incremental increase in pay to servicemembers for every two years of service. U.S. DEP'T OF DEF., MILITARY COMPENSATION BACKGROUND PAPERS: COMPENSATION ELEMENTS AND RELATED MANPOWER COST ITEMS, THEIR PURPOSES AND LEGISLATIVE BACKGROUNDS 15-17, 35 (7th ed. Nov. 2011) [hereinafter MILITARY COMPENSATION BACKGROUND PAPERS]. The longevity pay ceases to increase when a servicemember has reached a set combination of rank and years of service. *Id. See also Military Pay Tables 1949 to 2013*, DFAS.MIL, http://www.dfas.mil/militarymembers/payentitlements/militarypaytables.html (last visited Feb. 14, 2013).

[114] HENNING, *supra* note 30, at 3–4 (emphasis added).

[115] *Id.* at 4 n.13. *See* the John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, 120 Stat. 2083 (2006).

[116] HENNING, *supra* note 43, at 3 (citing the John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, 120 Stat. 2083 (2006)). Section 642 of the act was enacted as 10 U.S.C. § 1409(b).

servicemembers would remain in the force to fight the nation's wars in Iraq and Afghanistan, it increased the overall cost of the retirement system by a few million dollars per year.[117] The cost implications to this subtle change to the system, affecting probably less than one percent of the entire force, will be addressed in the section analyzing the overall cost of the compensation system in Part V.D.

F. Retired Pay and the Cost-of-Living Adjustment

The modern military retirement pay system is statutorily protected against inflation.[118] The Uniformed Services Pay Act of 1963 links adjustments to retirement pay based on increases in the cost of living as measured by the Consumer Price Index (CPI).[119] Before the Act, increases in retired pay would sometimes occur after active duty servicemembers received an increase in pay. Although retirement pay increases were infrequent, they were expensive and Congress sought a new system that would not substantially add to the cost of the military retirement system.[120]

Yearly adjustment to the Cost of Living Adjustment (COLA) for retirees is based on the CPI and whether the servicemember retired under the FBP, High-3, or the Redux/CSB system. For military personnel who first entered military service before August 1, 1986, and those who joined on or after August 1, 1986, but opted to have their retired pay computed based on the pre-Redux (High-3 formula), their COLA adjustment are based on the full CPI increase.[121] Those personnel who

---

[117] OFFICE OF THE ACTUARY, U.S. DEP'T OF DEF., VALUATION OF THE MILITARY RETIREMENT SYSTEM SEPTEMBER 30, 2006, at ii (Nov. 2007) [hereinafter 2007 VALUATION OF THE MILITARY RETIREMENT SYSTEM].

[118] 10 U.S.C. § 1401a (2012); HENNING, *supra* note 43, at 9.

[119] 2005 DEPARTMENT OF DEFENSE BACKGROUND PAPERS, *supra* note 19, at 760. The Uniformed Services Pay Act of 1963, Pub. L. No. 88-132, 77 Stat. 210 (1963).

[120] *Id.* at 760–61.

> When a retiree reaches age 62, there will be a one-time recomputation of his or her annuity to make up for the lost purchasing power caused by the holding of COLAs to the inflation rate minus one percentage point. After the recomputation at 62, however, future COLAs will continue to be computed annually on the basis of the inflation rate minus one percentage point.

Id.

[121] HENNING, *supra* note 43, at 9.

opted for the Redux/CSB formula will have their COLAs held one percentage point below the actual CPI rate.[122] Withholding COLA increases for retired servicemembers under the REDUX/CSB option further illustrate why the CSB is a poor option for servicemembers.

The Bipartisan Budget Act of 2013[123] will reduce COLA payments to retired servicemembers during the second phase of their career—those retirees under the age of sixty-two.[124] According to retired Air Force Col. Michael F. Hayden, director of government relations for Military Officers Association of America, a typical enlisted member retiring at age 40 after 20 years of service can expect to lose $83,000, and an officer retiring at age 42 would lose about $124,000 in retirement pay. Similar to REDUX, this Act reduces COLA payment to second-phase retirees by one-percentage point below inflation.[125] While the Bipartisan Budget Act did not grandfather those already retired and those currently serving, Congress quickly realized the impact and passed legislation to ensure that only troops entering the service after January 1, 2014 would be impacted.[126]

Despite several congressional hearings and legislative acts between 1980 and 2007, Congress has failed to solve the most basic problem with the retirement system—a system that leaves the vast majority of servicemembers with no retirement benefits. Attempts at bringing cost under control have resulted in retention problems for the services. More tellingly, Congress repealed the biggest change to the system before any of its provisions would take effect. Congress's inability or unwillingness to solve the key issues in the retirement system has led to increased criticism. Part IV highlights the main criticisms of the military retirement system.

---

[122] *Id.* at 10.
[123] The Bipartisan Budget Act of 2013, Pub L. No. 113-67, 127 Stat. 1165 (2013).
[124] Tom Philpott, *Ryan-Murray Deal Hits Younger, Future Military Retirees*, STARS & STRIPES**,** Dec. 11, 2013, http://www.stripes.com/news/us/ryan-murray-deal-hits-younger-future-military-retirees-1.257099?utm_source=twitterfeed&utm_medium=twitter#.Uq1j4OaESKM.facebook.
[125] *Id*. *See* HENNING, *supra* note 43, at 9.
[126] An Act, Pub L. No. 113-82, 128 Stat. 1009 (2014).

IV. Common Criticism of the Modern-Day Military Retirement System

The military retirement system has traditionally been "viewed as a significant incentive in retaining a professional career military force."[127] Over the past few years, however, criticism of the military retirement system has risen to a fevered pitch, given the state of the U.S. economy and national budget deficit. Common criticism of the modern-day military retirement system is that the system is unable to retain qualified service members beyond twenty years; further, it is considered to be inequitable, inflexible, overly generous, and too costly.[128] The first four criticisms will be addressed in this section; however, cost of the retirement system, as a major component of the overall pay compensation, will be addressed as part of the discussion on the DoD budget in Part V.D.

A. Retirement Inequality

Critics argue that the retirement system is unfair because a majority of servicemembers will end up serving less than twenty years and will receive no retirement benefits upon leaving the service.[129] Currently, only 19 percent of military personnel serve for twenty years or more.[130] According to Defense Department statistics, only 17 percent of enlisted personnel and 49 percent of officers will eventually become eligible for the retirement annuity.[131] The vast majority of enlisted servicemembers, those ground combat troops in the Army and Marines, "the men and women who have borne the brunt of the fighting in Iraq and Afghanistan—are among the least likely to achieve any retirement benefits."[132] Further, the Board notes that the current retirement system does not compensate those who take on the tough assignments, serve combat or hardship duty tours, or spend time away from their families due to service obligations.[133]

---

[127] HENNING, *supra* note 43, at 1.
[128] KORB ET AL., *supra* note 15, at 27, 33; DEF. BUS. BD., *supra* note 5, at 3.
[129] KORB ET AL., *supra* note 15, at 27.
[130] OFFICE OF THE ACTUARY, U.S. DEP'T OF DEF., VALUATION OF THE MILITARY RETIREMENT SYSTEM 24 (Sept. 30, 2010) [hereinafter 2010 VALUATION OF THE MILITARY RETIREMENT SYSTEM].
[131] *Id.*
[132] KORB ET AL., *supra* note 15, at 4.
[133] DEF. BUS. BD., *supra* note 5, tab C, at 7.

The Center for American Progress (CAP) believes that the military retirement system disproportionately favors officers.[134] As noted above, 49 percent of officers as compared to just 17 percent of enlisted servicemembers serve the twenty years necessary to retire.[135] The CAP argues, "Because officers tend to be vastly better compensated and better educated than most enlisted personnel while in the service, the retirement program fails to take care of the veterans with the highest risk of suffering from poverty, unemployment, or homelessness upon leaving the service."[136]

The main issue with inequality comes down to a system that requires servicemembers to vest after twenty years of service. In marked contrast to the civilian world, most workers in the private sector are eligible for some type of pension or 401(k)-style pension benefit as part of their retirement packages after three or five years of work.[137] In 1974, the Employee Retirement Income Security Act (ERISA) eliminated long-tenure vesting, except for in the military retirement system.[138]

Servicemembers who are involuntarily separated due to no fault of their own, having served honorably for a minimum of six years, are eligible for separation pay.[139] In the rare instances where the military must reduce members, a special retirement program such as the Temporary Early Retirement Authority (TERA) has been authorized.[140]

---

[134] KORB ET AL., *supra* note 15, at 33.
[135] 2010 VALUATION OF THE MILITARY RETIREMENT SYSTEM, *supra* note 130, at 24.
[136] KORB ET AL., *supra* note 15, at 34.
[137] BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, NATIONAL COMPENSATION SURVEY: EMPLOYEE BENEFITS IN PRIVATE INDUSTRY IN THE UNITED STATES 2005, at 67 (May 2007).
[138] Christian, *supra* note 23, at 8; Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (1974).
[139] 10 U.S.C. § 1174 (2012); 2005 DEPARTMENT OF DEFENSE BACKGROUND PAPERS, *supra* note 19, at 786–97.
[140] HENNING, *supra* note 30, at 1.

> The Temporary Early Retirement Authority (TERA) was included in the FY1992 Defense Authorization Act to provide a drawdown tool for the services during the force drawdown of the 1990s. Selected officers with between fifteen and twenty years of service were permitted to retire with full benefits but with a reduction in their retired pay.

Id. at 1 n.5; The National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, 106 Stat. 2315 (1992). In the mid-1990s, in the midst of a strong economic swing, many qualified and experienced servicemembers jumped at the chance to leave the service under TERA while maximizing their income potential in the private sector.

Although a servicemember who decides to leave active duty before vesting will not receive a retirement under the active duty version, she has other ways of capitalizing on her active duty service. The servicemember can join the Reserve Component and serve to 20 years to receive benefits under the Reserve Component.[141] Another option available to servicemembers is to work for the federal government and transfer their military time by paying into the Federal Employees Retirement System (FERS).[142] The ideal option, however, is to revise the military retirement system and allow earlier vesting into a pension system.

While several presidential and congressionally authorized commissions, DoD reviews, and independent research studies have concluded that the system is unfair to those who serve fewer than twenty years, Congress has failed to resolve this issue. Therefore, Congress should revamp the system to allow servicemembers to vest at an earlier date, thereby providing retirement benefits to more servicemembers. Doing so is more efficient and simplifies managing the force.

This drop in quality Servicemembers also played a factor in Redux being repealed. The TERA is again being offered to troops as part of the FY2012 Defense Authorization Act. 10 U.S.C. § 1293 note (2011) (Temporary Early Retirement Authority). However, having learned from the 1990s, the Army announced that only officers and warrant officers who have failed to be selected for promotion twice and noncommissioned officers who have been denied continued service due to the Qualitative Service Program, will be targeted for separation. *See* David Vergun, *Army Offers Early Retirement Opportunity for Soldiers*, U.S. ARMY, Oct. 16, 2012, http://www.army.mil/article/89286/Army_offers_early_retirement_opportunity_for_Soldiers/; *Army Directive 2012-25 (Temporary Early Retirement Authority)*, ARMYPUBS.ARMY.MIL, http://armypubs.army.mil/epubs/pdf/ad2012_25.pdf (last visited Mar. 15, 2013); *Army Directive 281/2012-Temporary Early Retirement Authority (TERA)*, BENNING.ARMY.MIL, http://www.benning. army.mil/garrison/DHR/content/PDF/ALARACT_281_2012_army.mil/garrison/DHR/content/PDF/ALARACT_281_2012_Temporary_Early_Retirement_Authority_(TERA)[1].pdf (last visited Mar. 15, 2013); Jim Tice, *15-Year Retirement Returns QSP Boards Will Choose Which NCOs Will Go Early*, ARMYTIMES*,* Oct. 22, 2012, at 16.

[141] *See* LAWRENCE KAPP, CONG. RESEARCH SERV., RL30802, RESERVE COMPONENT PERSONNEL ISSUES: QUESTIONS AND ANSWERS (Mar. 14, 2008). Reserve component servicemembers do not draw an immediate annuity until age 60, or potentially sooner based on the FY 2008 National Defense Authorization Act.

[142] U.S. OFFICE OF PERS. MGMT., FERS: FEDERAL EMPLOYEES RETIREMENT SYSTEM ch. 22 (Apr. 1998). However, servicemembers cannot buy into the special retirement options for federal law enforcement and other specialized duties.

B. Efficiency and Force Management

Force management has been a factor in the retirement debate since the 1970s. In the late '70s, President Jimmy Carter commissioned the President's Commission on Military Compensation (PCMC), also known as the Zwick Commission.[143] The PCMC found that the twenty-year vesting rule made it difficult to separate ineffective personnel because managers were reluctant to separate servicemembers who were close to retirement.[144]

Force management involving servicemembers who have reached the ten-year mark is a critical problem, most observers argue.[145] The Board pointed out that most servicemembers who have reached the ten-year mark are reluctant to leave because they will leave with no retirement benefits and are incentivized to stay until they become eligible for retirement.[146] Similarly, "Pentagon managers are reluctant to separate personnel from the armed forces who have served more than 10 years but less than 20 years, not wanting to leave service members without a job or retirement savings."[147] Where force drawdown occurs due to manning, the Board points out that the DoD must seek special payment authority, like TERA, to ease servicemembers out of the military.[148] Notably, the Board concludes that only seven percent of servicemembers leave the military between their 15th and 20th years of service.[149]

In 2000 the Defense Science Board Task Force on Human Resource Strategy (DSB) conducted an in-depth study on the military compensation system and concluded that the retirement system was "expensive, inefficient, inflexible, and unfair."[150] The DSB found that too many officers were promoted to O-4, between their 10th and 12th years, and remained in the service until they were eligible for retirement at twenty years of service.[151]

---

143 Christian, *supra* note 23, at 13.
144 *Id.* at 14.
145 DEF. BUS. BD., *supra* note 5, at 3; KORB ET AL., *supra* note 15, at 34.
146 Novak, *supra* note 10.
147 KORB ET AL., *supra* note 15, at 34.
148 DEF. BUS. BD., *supra* note 5, at 3.
149 *Id.* tab C, at 11.
150 Christian, *supra* note 23, at 7 (quoting U.S. DEF. SCI. BOARD TASK FORCE ON HUMAN RES. STRATEGY, DEFENSE SCIENCE BOARD TASK FORCE ON HUMAN RESOURCES STRATEGY 73 (2000)).
151 *Id.* at 15 (citing U.S. DEF. SCI. BOARD TASK FORCE ON HUMAN RES. STRATEGY, DEFENSE SCIENCE BOARD TASK FORCE ON HUMAN RESOURCES STRATEGY 73 (2000)).

Critics point to the "all or nothing" system as the major culprit in the force management issue. The "up or out" system in the military has always been thought to be an effective way of managing personnel.[152] Servicemembers who fail to be promoted after several attempts were involuntarily separated to make room for newly promoted members into that particular rank. Additionally, the normal attrition rate of servicemembers leaving the force, coupled with involuntary separations, was viewed as an effective means of managing the military.[153] To aid in the transitioning of those forced out involuntarily, the member becomes entitled to separation pay.[154] However, as outlined by the Board and past reports on the issue, attrition and involuntary separations have not been effective tools in managing the force.[155]

Critics believe that allowing servicemembers to vest into a defined benefit or contribution plan at five or ten years would incentivize more servicemembers to leave active duty between their tenth and twentieth year.[156] Any plans to tinker with the current system should strongly consider the impact on force management and retention. In the 1990s, although there were high troop deployments, stagnant military wages, and a booming economy, the changes to Redux were cited as a major reason why servicemembers left the force in droves.[157] Thus, if benefits are reduced, then the DoD may have difficulty retaining qualified people.[158]

---

152 *See id.* at 13 (citing HOOK COMMISSION, *supra* note 13, at 44).
153 HOOK COMMISSION, *supra* note 13, at 40–41. The Hook Commission rejected the Services' argument that providing an early retirement date, at twenty years, would be an ideal way of managing the force. The Commission pointed out, "Nor is it necessary or desirable, as urged by some in the Services, that the present early retirement privilege be retained so that it may be used as a tool to eliminate undesirable men from the Services. Good management does not need a crutch of this kind to effect separations that are in the interests of the Services." Thus, the Services were to eliminate servicemembers who underperformed, not let them stay until they became eligible for retirement.
154 *See* 10 U.S.C. § 1174 (1980); U.S. DEP'T OF DEF., MILITARY COMPENSATION BACKGROUND PAPERS: COMPENSATION ELEMENTS AND RELATED MANPOWER COST ITEMS, THEIR PURPOSES AND LEGISLATIVE BACKGROUNDS 649 (7th ed. Nov. 2011) ("The Officer Personnel Act of 1947, ch. 5112, Pub. L. No. 80-381, 61 Stat. 795 (1947), required, as part of its 'up-or-out' promotion system, the involuntary discharge of regular officers of any branch of service who failed of selection for promotion and who were not eligible for retirement.").
155 *See* DEF. BUS. BD., *supra* note 5.
156 *See* discussion *infra* Parts VIII.–IX.
157 HENNING, *supra* note 30, at 8.
158 *See id.* at 24. The Pentagon has always used the retirement system as a major retention tool.

C. Retaining Qualified Personnel

Historically, the military retirement system has been viewed as a significant incentive in retaining servicemembers once they have joined the military.[159] However, retention is an issue that has several different layers. While the retirement system may serve as a strong retention tool for servicemembers between the ten-and twenty-year mark, it is not the same for those in years one through ten, or for those who have vested after reaching twenty.[160] The Board highlights that surveys consistently show that the retirement system has little value for recruiting or retaining members during their first ten years of service.[161] But once a servicemember crosses over that ten-year threshold, it appears that for some servicemembers it is a matter of waiting out their time for retirement. As previously noted in the Force Management section,[162] only seven percent of servicemembers leave between the 15th and 20th year of service.[163]

The real retention issue comes from the service's ability to retain members who have crossed over the twenty-year mark. The Board and the CAP believe that the twenty-year vesting system provides a strong incentive for servicemembers to leave once they have reached their twentieth year.[164] 76 percent of servicemembers leave the service between their twentieth and twenty-fifth years of service.[165] This is more important, critics argue, when considering that a servicemember may just be reaching his peak of performance and true expertise in his field when he opts to leave.[166] There is no marginal financial benefit to the

---

[159] HENNING, *supra* note 43, at 1.
[160] DEF. BUS. BD., *supra* note 5, tab C, at 7.
[161] *Id. See also* Novak, *supra* note 10.
[162] *See* discussion *supra* Part IV.B.
[163] DEF. BUS. BD., *supra* note 5, tab C, at 11. *See infra* Part VIII. Most of the proposals to reform the current system suggest that if we move to a 401k style system and allow servicemembers to vest between three and ten years in service, and provide them with a series of gate pay and separation pay, that we would see a more gradual and sustainable rate or servicemembers leaving the service between their ten to twenty-year mark.
[164] *Id.* at 3; KORB ET AL., *supra* note 15, at 28, 35 (citing 10TH QRMC, *supra* note 14, at 3).
[165] DEF. BUS. BD., *supra* note 5, tab C, at 11. *But see infra* Part VII.B.–C (highlighting several reasons why servicemembers may leave the service soon after reaching their twentieth year).
[166] MOMENT OF TRUTH PROJECT, *supra* note 55, at 6.

servicemember, the Moment of Truth Project contends, to serve beyond twenty years.[167]

Congress sought to fix the post-twenty-year retention issue by providing servicemembers a choice between the High-3 and Redux with the $30,000 Career Status Bonus (CSB).[168] However, fewer servicemembers are choosing the CSB as a retirement option due to its declining value and services' efforts to educate the troops about its financial impact during retirement.[169] Further, the high number of servicemembers leaving the force after the twentieth year highlights the CSB's lack of success as a retention tool. With an increasing number of servicemembers shunning the CSB and choosing High-3, the retention statistic for post-twenty-year members will continue to be high.

D. Proper Compensation

One of the main drivers of military retirement reform is the belief that the system is overly generous. The Moment of Truth Project notes, "The military retirement system is arguably the best retirement deal around,"[170] not because of its fairness, nor because it takes care of servicemembers, but because it is one of "the most generous retirement system in the country."[171] Both the CAP and the Board support the notion that the military system is too generous.[172] But this generosity has historically been a reflection of the potential retiree serving away from his family for months or years at a time, even placing his life on the line.

The view of excessive generosity developed long ago. In 1965 the first Quadrennial Review of Military Compensation (1st QRMC)[173] viewed the compensation system as being divided into two phases, the active duty phase and the second career phase.[174] They also distinguished the second-career phase from an "old-age phase" where the servicemember would venture into full retirement, typically at or after reaching age sixty-two. The 1st QRMC concluded that the military

---

[167] *Id.*
[168] HENNING, *supra* note 43, at 4–5.
[169] *See* HENNING, *supra* note 30, at 9–10. *See infra* Part IV.D.
[170] MOMENT OF TRUTH PROJECT, *supra* note 55, at 4.
[171] *Id.* at 2.
[172] KORB ET AL., *supra* note 15, at 31; DEF. BUS. BD., *supra* note 5, at 2.
[173] 2005 DEPARTMENT OF DEFENSE BACKGROUND PAPERS, *supra* note 19, at 1060.
[174] Christian, *supra* note 23, at 4.

retirement system subsidized retirees too generously during the second phase of their careers. They recommended that the retirement benefit be lowered from the range of 50–75%, to 24–51%. Congress did not approve their recommendation.[175] Nonetheless, subsequent reviews and research studies have echoed the charge that the system is too generous.[176]

1. Why the System Is Believed to Be Too Generous

Critics highlight five main reasons why the system is believed to be too generous. First, "the Defense Department essentially pays [retirees] 40 years of retirement for 20 years of service. In addition, for those who receive them, military retirement benefits are 10 times greater than those in the private sector."[177] The average enlisted member is forty-two years old and has twenty-two-and-one-half years of service, and the average officer is almost forty-five years old and has nearly twenty-four years of service at retirement.[178] Second, both the CAP and the Board highlight that the system is outdated since the current retirement system was designed in an era when active duty pay was less than that in the private sector and life expectancies were shorter.[179] Third, the CAP points to the fact that today the vast majority of retirees go on to have second careers while enjoying their military retirement and government health care benefits that far exceed what is available in the private sector.[180] Fourth, the increase in COLA, provided to keep pace with inflation post-retirement, is also argued to be extremely generous when compared to that in the private sector.[181]

---

[175] *Id.*

[176] *See id.* at 4–6 (discussing the Interagency Committee on Uniformed Services Retirement and Survivor Benefits (IAC) (1971), U.S. Defense Manpower Commission (1976), and the President's Commission on Military Compensation (PCMC also known as the Zwick Commission) (1978)); KORB ET AL., *supra* note 15, at 31; DEF. BUS. BD., *supra* note 5, at 2. *But see* 10TH QRMC, *supra* note 14, at 21 (citing U.S. DEP'T OF DEF., REPORT OF THE FIFTH QUADRENNIAL REVIEW OF MILITARY COMPENSATION, vol. 1 (1984)). The 5th QRMC in 1984 rejected previous reviews and reports that argued that the system was too generous and concluded that a change to the retirement system would adversely impact retention. *Id.*

[177] KORB ET AL., *supra* note 15, at 32 (citing DEF. BUS. BD., *supra* note 5, at 6).

[178] HENNING, *supra* note 43, at 1 (citing OFFICE OF THE ACTUARY, U.S. DEP'T OF DEF., DEPARTMENT OF DEFENSE FISCAL YEAR 2009 DOD STATISTICAL REPORT ON THE MILITARY RETIREMENT SYSTEM 120 (May 2008)).

[179] DEF. BUS. BD., *supra* note 5, at 2; KORB ET AL., *supra* note 15, at 30–31.

[180] KORB ET AL., *supra* note 15, at 31.

[181] MOMENT OF TRUTH PROJECT, *supra* note 55, at 8.

Finally, both the Moment of Truth Project and the Board contend that the military retirement system is based on an outdated assumption that military skills are not transferable to the private sector.[182] They argue that one of the factors in making retirement annuity immediately available to retirees was to counter the lost income that servicemembers would experience once they moved into the private sector because they would earn less compared to their civilian counterparts with similar education and work experience.[183] They also contend that recent research shows that retired servicemembers now earn similar incomes to their civilian counterparts based on the same education and work experience.[184] Thus, servicemembers who retire in their early forties with a military pension also have the option of earning similar incomes to their civilian counterpart, once they leave the military, all the while working for an additional twenty years, which will likely earn them a second pension, or more likely, savings in a 401(k)-style plan.[185]

Despite the Moment of Truth Project's, the Board's, and the CAP's conclusions that the retirement system is too generous, Part VII of this article explains why the system fairly compensates servicemembers and their dependents for their sacrifices and the hardship that they endure during a twenty-plus years of service. Moreover, Part VII explores in greater detail why serving in the military is a unique experience and should be compensated differently than retiring in the private sector, or as a federal or state civilian employee.

2. A Shift from Defined Benefit to Defined Contribution

Perhaps the reason why the military system appears to be "overly generous" is because it is being compared to the private sector that has in general drastically reduced retirement benefits over the past few decades.[186] The civilian sector has moved away from providing pensions

---

[182] DEF. BUS. BD., *supra* note 5, at 2; THE MOMENT OF TRUTH PROJECT, *supra* note 55, at 9.

[183] MOMENT OF TRUTH PROJECT, *supra* note 55, at 9.

[184] *Id.* (citing 10TH QRMC, *supra* note 14, at 8; U.S. DEP'T OF DEF., REPORT OF THE TENTH QUADRENNIAL REVIEW OF MILITARY COMPENSATION, VOLUME I: CASH COMPENSATION 35 (Feb. 2008)).

[185] *Id.* at 9.

[186] *Id.* at 2 (pointing to "the growing disparity between government and private sector pension plans").

to their workers while the military has maintained the system.[187] According to the Bureau of Labor Statistics, only nine percent of private employers provide a traditional pension benefit to their workers.[188] In fact, in times of financial hardship, private sector companies choose to discontinue providing matching contributions to their employees as part of 401(k)-style retirement benefits.[189]

Private sector companies now rarely provide defined benefit packages to their employers and have shifted a higher amount of cost to their employees. According to the Bureau of Labor Statistics, only 47 percent of private businesses offer both a defined benefit and a defined contribution package; 45 percent offer defined contribution plans; and only 10 percent (and declining) offer defined benefit plans.[190] Further, less than one-third of the Fortune 100 companies offer some type of a traditional pension plan to new employees.[191] Critics of the military retirement system have seized these statistics as further proof as to why the federal government should abolish the pension system and champion a 401(k)-style system.[192] Moreover, the Defense Business Board points out that no private sector employers provide an immediate annuity payout after twenty years of service.[193] The CAP views private sector employers' move from defined benefit plans toward defined contribution plans as a way for companies to manage personnel costs more effectively.[194] More critically, the Department of Labor notes that over the past ten years, private sector employees have contributed about 45 percent of the cost toward their retirement while their employers contributed about 55 percent.[195] In marked contrast, federal employees contribute less than one percent and servicemembers do not contribute any amount toward their defined benefit plan.[196]

---

[187] Emily Brandon, *Top Companies Continue to Drop Pensions*, U.S.NEWS & WORLD REP., Oct. 26, 2012, http://money.usnews.com/money/blogs/planning-to-retire/2012/10/26top-companies-continue-to-drop-pensions.
[188] *Id.*
[189] Christine Dugas, *Most Companies Restore 401(k) Contributions*, USA TODAY, Nov. 30, 2011, http://usatoday30.usatoday.com/money/perfi/retirement/story/2011-11-30/401-k-contributions/51512964/1.
[190] MOMENT OF TRUTH PROJECT, *supra* note 55, at 8.
[191] Brandon, *supra* note 187.
[192] *See generally* KORB ET AL., *supra* note 15.
[193] DEF. BUS. BD., *supra* note 5, tab C, at 6.
[194] KORB ET AL., *supra* note 15, at 36 (citing DEF. BUS. BD., *supra* note 5, at 23).
[195] DAVE KENDALL & JIM KESSLER, FREQUENTLY ASKED QUESTIONS ABOUT FEDERAL RETIREMENT REFORM, THIRD WAY 2 (June 2011).
[196] *Id.*

In light of these changes, which are no fault of the individual servicemember or the current military system itself, the military retirement system only appears to be "overly generous" or "the best retirement deal" in the nation.

3. Overly Generous or Just Compensation?

The Hook Commission understood the importance of providing a set of benefits to servicemembers that properly compensated them for their sacrifice and years of service, and be starkly different from what was available to the ordinary citizen in the private sector.[197] One of the goals that Secretary of Defense James Forrestal had for the Hook Commission in 1948 was to devise a compensation system that would attract and retain the best kind of men for all the varieties of jobs within the different services.[198] The Hook Commission acknowledged that the services found it difficult to recruit qualified people, and the services faced a high number of officer resignations due to more lucrative employment opportunities in the private sector.[199] Thus, the system had to be different to retain servicemembers when the government would compete with the private sector to attract and retain qualified people.[200] The Hook Commission expressly believed that the retirement benefit should be immediately available upon retirement. The system should compensate servicemembers because the "up or out" system (the need to keep a young, vigorous and efficient armed forces) would compel servicemembers to retire from the military before they would reach full retirement age.[201]

In 1986, Congress sought to implement changes to the retirement system because they believed it was too generous.[202] Led by Representative Les Aspin, a democrat from Wisconsin, then-Chairman of the House and Armed Services Committee, Congress passed Redux.[203] Representative Aspin strongly believed that the overly generous benefits encouraged servicemembers to leave the service once they passed the

[197] HOOK COMMISSION, *supra* note 13, at 39–41.
[198] *Id.* at vii.
[199] *Id.* at ix; HOOK COMMISSION APPENDIX, *supra* note 25, at 7.
[200] HOOK COMMISSION, *supra* note 13, at ix.
[201] *Id.* at 39–40.
[202] HENNING, *supra* note 30, at 4.
[203] Sydney J. Freedberg, *Retirement Redux*, GOV'T EXEC., Apr. 1, 1999, at 36.

twenty-year mark, and discouraged them to serve to thirty years.[204] Redux, however—the law reducing the "second-career phase" compensation from the traditional 50 percent to 40 percent—depleted the force of the midcareer troops who might have served beyond the twenty-year mark. Those same troops started to leave the service well before they would become eligible under Redux.[205]

When critics declare the retirement system is overly generous, they typically think of the colonel and general who might receive 75 to 100 percent of their pay after serving more than thirty years in military service. The current system may appear to be "generous" for a colonel with twenty-six years of service who will likely retire with a yearly pension worth more than $75,000, but not for an E-6 enlisted member, with twenty-six years of service who would only receive approximately $28,000 annually.[206] Retirees (most with college-aged children) need a second income to provide for their families' future.[207] A reduction in retirement compensation would disproportionately impact enlisted members, furthering the inequality the critics' claim as a factor for advocating a change.

Although military skills may be prized in the private sector, those servicemembers who have served twenty years in the military are at a disadvantage when it comes to joining the private sector. Despite their experience, they will lack seniority in most instances. As the last person being hired, they will likely be the first person fired during difficult economic times. To illustrate, two servicemembers in identical career fields decide to leave the military and enter the private sector at different points in their careers; the first servicemember leaves after ten years and joins a firm, the second leaves after twenty years of service and joins the same firm. Ten years later, the first servicemember now has ten years with the company, will have accumulated seniority and income commensurate with the time that he has spent with the company. The servicemember with twenty years of service will have no seniority and will start from the bottom; his salary would likely be substantially lower than that of the servicemember who joined the firm ten years earlier. This is typically the case for military attorneys who leave the service and

---

[204] *Id.*

[205] *Id.*; *see also infra* Part V.D (discussing the repeal of REDUX and the passing of the Career Status Bonus).

[206] *2013 Retirement Pay*, *supra* note 70, at 23; *see* Dao & Walsh, *supra* note 9.

[207] HENNING, *supra* note 30, at 20.

join a firm starting at or near the bottom of the firm ladder; or a doctor or dentist who leaves military service and then builds a practice from scratch. The retirement annuity compensates the second servicemember for sacrificing the time he would have spent in the private sector building seniority and income. By moving to a 401(k)-style system or delayed annuity, there would no longer be a clear incentive for a servicemember to continue serving beyond eight or ten years. As a result, the military would have a higher turnover rate, which would lead to an increase in training and other personnel costs.

While the military system should be modernized to provide some level of benefits to the 81 percent of servicemembers who leave the service before reaching the twenty-year mark, the fundamental premise of providing an immediate annuity after completing twenty years of service must remain in place. The defense budget can and should accommodate this ideal.

V. The Defense Budget

The Defense budget comprises about 20 percent of the overall federal budget.[208] "The United States spends about five times as much on defense as China, the country with the second highest military budget in the world. We spend more than *twice the combined total* of the countries with the four highest military budgets after ours [China, Russia, the United Kingdom, and France]."[209] Shockingly, even when considering Sequestration, the deal that calls for a decrease of $500 billion in defense spending over ten years,[210] the United States still spends "as much on defense as the next 17 countries combined."[211] The

---

[208] CONGRESSIONAL BUDGET OFFICE, http://www.cbo.gov/topics/national-security (last visited Dec. 2, 2013); R.M., *Always More, or Else*, ECONOMIST, Dec. 11, 2011, http://www.economist.com/blogs/democracyinamerica/2011/12/defence-spending; *Where Do Your Taxes Go?*, YOURMONEY.BLOGS.CNN.COM, http://yourmoney.blogs.cnn.com/2012/04/20/ (last visited Feb. 17, 2013); *Federal Budget Breakdown*, CNN.COM, http://cnnyourmoney.files.wordpress.com/2012/04/ybl_federal_budget_breakdown.png (last visited Feb. 17, 2013).

[209] David Brodwin, *How to Safely Cut U.S. Defense Spending*, U.S.NEWS.COM, June 21, 2012, http://www.usnews.com/opinion/blogs/economic-intelligence/2012/06/21/how-to-safely-cut-us-defense-spending (emphasis in the original).

[210] Tami Luhb, *Fiscal Cliff Countdown: Automatic Spending Cuts*, CNNMONEY, Nov. 29, 2012, http://money.cnn.com/2012/11/29/news/economy/fiscal-cliff-spending-cuts/index.html.

[211] R.M., *supra* note 208.

U.S. defense budget is made up of three key areas: (1) personnel spending, (2) operation and maintenance, and (3) acquisition of military equipment. While this article is not about the federal budget or the overall defense budget, it is important to note that every line item on the defense budget should be scrutinized when it comes to moving toward a more fiscally responsible budget. This section focuses on reducing personnel cost, the first key area of the defense budget.

A. Background

Speaking at the Wilson Center in October 2011, Defense Secretary Leon Panetta said, "'The fiscal reality facing us means that we have to look at the growth in personnel costs, which are a major driver of budget growth and are, simply put, on an unsustainable course.'"[212] Personnel costs consist of (1) retirement cost; (2) compensation for the troops (basic pay, BAH, BAS, and special pay[213]); and (3) healthcare cost for retirees and dependents.[214] Even if modest changes are made to control the three areas listed above, critics believe that personnel costs will continue to grow and divert funds from training and weapons acquisitions.[215] Reigning in compensation, increasing the premiums that

---

[212] Arnold Punaro, *Tame the Pentagon's Personnel Costs*, U.S. DEP'T OF DEF., Dec. 5, 2011, http://www.defensenews.com/article/20111205/DEFFEAT05/112050306/Tame-Pentagon-s-Personnel-Costs. Many share Secretary Panetta's belief that personnel cost, if left unchecked, will consume the entire defense budget by 2039. *See* KORB ET AL., *supra* note 15, at 1.

[213] MAREN LEED, KEEPING FAITH CHARTING A SUSTAINABLE PATH FOR MILITARY COMPENSATION, CTR FOR STRATEGIC & INT'L STUD. 12–14 (Oct. 2011). Special pay includes special and incentive pays for specific skills and technical expertise, education benefits, unemployment insurance, adoption expenses, death gratuities, transportation subsidies, and pay associated with serving in a combat zone. *Id.* at 12–13. The 10th QRMC includes under the rubric of military compensation the following items: cash (basic pay, housing & subsistence allowance, special incentive pays, tax advantage, and other cash), noncash (health care, education, housing, and other noncash), and deferred (retired pay accrual, health care accrual, veterans affairs-health, veterans affairs-other, and other deferred). 10TH QRMC, *supra* note 14, at 2.

[214] *See* KORB ET AL., *supra* note 15, at 1.

[215] *Id.* According to Mr. Lawrence Korb of the CAP, "Military personnel costs have nearly doubled since fiscal year 2001 and now consume one-third of the Pentagon's base budget—about $180 billion per year." *Id.* (citing Elisabeth Bumiller & Thom Shanker, *Defense Budget Cuts Would Limit Raises and Close Bases,* N.Y. TIMES, Jan. 26, 2012, http://www.nytimes.com/2012/01/27/us/pentagon-proposes-limiting-raises-and-closing-bases-to-cut-budget.html?pagewanted=all&_moc.semityn. www&_r=0); 10TH QRMC, *supra* note 14, at 1–2 (noting that the federal government spent $173 billion on military compensation). Underlying all the reasons is a desire to drive down personnel cost to

retirees pay for their health care and making adjustments to COLA payments are all viewed as sensible ways that the DoD can reduce costs while keeping faith with those who have served and are now serving in the armed forces.[216]

B. Military Health Care

1. Rising Cost

Military health care represents the single most expansive growth in military compensation cost.[217] According to the CAP, "[b]etween fiscal year 2001 and fiscal year 2012, the military health care budget grew by nearly 300 percent, up from $19 billion in 2001 to $52.8 billion in 2012."[218] The Center for Strategic & International Studies (the Center) points to four causes for the rise in health care cost:

> 1. Shifts in health care accounting practices;
> 2. The expansion of benefits and of beneficiary populations;
> 3. Capped or reduced patient cost shares; and
> 4. Changes in coverage, utilization, and general medical inflation.[219]

The shift in health care accounting practices has led to an increase in the amount of funds allocated to pay for future retiree military health care in the defense budget. Before 2002, health care cost for Medicare-eligible retirees was paid for by allocating funds in the year in which the services were delivered. Starting in October 2002, however, Congress initiated the Medicare-Eligible Retiree Health Care Fund (MERHCF), requiring the DoD to allocate funds today to cover future costs and to

---

ensure that funds can be used to pay for more expensive weaponry. *See generally* KORB ET AL., *supra* note 15, at 28 (noting that "retirement costs will consume an increasing percentage of the defense budget and begin diverting funds away from other key national security priorities such as weapons acquisition or research and development"). *See also* DEF. BUS. BD., *supra* note 5, tab C at 9 ("The cost of military retirement will seriously undermine future military warfighting capabilities").

[216] *See* KORB ET AL., *supra* note 15; MOMENT OF TRUTH PROJECT, *supra* note 55.

[217] LEED, *supra* note 213, at 17.

[218] KORB ET AL., *supra* note 15, at 14 (citing EXEC. OFF. OF THE PRES. OF THE U.S., FISCAL YEAR 2012 BUDGET OF THE U.S. GOVERNMENT, at 61 (Feb. 2011), *available at* http://www.whitehouse.gov/sites/default/files/omb/budget/fy2012/assets/budget.pdf

[219] LEED, *supra* note 213, at 17.

create transparency of the future cost of health care on current-year personnel decisions. The Center concludes that this shift in accounting practices "added $10 billion—$7.7 billion for active duty retirees and $2.3 billion for Reserve retirees" to the defense budget.[220]

Several trends have converged to increase the number of beneficiaries using military health care benefits, two of which have emerged as the most prominent trends. First, starting in 2001, Congress expanded the number of servicemembers, family members, and retirees eligible for benefits.[221] This expansion was partly due to fighting two wars and recognizing the sacrifices by active duty and reserve servicemembers and their families. There has also been an increase of injuries, both physical and mental, and life-saving measures that were not available in prior wars.[222] The DoD does not list a separate line item within the budget to show the health care cost associated with expanding the number of beneficiaries and the cost of taking care of specific ailments related to the two wars, which makes it mostly impossible to determine an amount associated with the overall cost of the military health care system.[223] Second, in years past, the number of unemployed servicemembers also played a role in increasing costs, as those servicemembers have sought medical care through the military system.[224] The low cost of fees as compared to those in the private sector has provided a financial incentive for retirees eligible for the military health care system to remain under that care.[225]

With the added increases in the number of beneficiaries, the cost share for those beneficiaries and current retirees has remained stagnant

---

[220] *Id.* While the change in the accrual accounting method increased the defense budget, expanding the number of beneficiaries also played a significant role. The Center for Strategic & International Studies notes that "[t]hroughout the 2000s, the DoD and Congress created new programs, added new benefits to existing programs, and extended eligibility to new categories of beneficiaries." *Id.*

[221] *Id.* at 20; KORB ET AL., *supra* note 15, at 19.

[222] LEED, *supra* note 213, at 17; David Wood, *Iraq, Afghanistan War Wounded Pass 50,000*, HUFFINGTON POST, Oct. 25, 2012, http://www.huffingtonpost.com/2012/10/25/iraq-afghanistan-war-wounded_n_2017338.html?view=screen.

[223] LEED, *supra* note 213, at 17.

[224] *Id.* at 20; Gregg Zoroya, *Veterans' Jobless Rate Falls but Remains High*, USA TODAY, Jan. 6, 2013, http://www.usatoday.com/story/news/nation/2013/01/06/vets-jobless-rate-drops/1812667/ (noting that the jobless rate for veterans has dropped to an annual average of 9.9 percent in 2012 from 12.1 percent in 2011. However, more than 200,000 veterans who served in or during the Iraq and Afghanistan wars are without work).

[225] LEED, *supra* note 213, at 20.

from 1994 to 2012. According to the CAP, in 1996 working-age retirees between the ages of forty-two and sixty-five paid 27 percent of their health care cost; today they pay approximately 11 percent.[226] Between 1994 and 2012, retirees eligible for Tricare coverage paid $230 for an individual and $460 for a family, regardless of size.[227] The CAP found that "[h]ad the fees been adjusted to reflect nationwide increases in health care costs, the family enrollment fee would have risen from [$460] in 1995 to something closer to the average U.S. worker contribution in 2011 for an employer-sponsored family plan: $4,129."[228] Retirees who are over the age of 65, on the other hand, enroll without cost in Tricare for Life, a program that augments Medicare coverage.[229] Though the cost to provide this system continues to rise, Congress has repeatedly blocked the DoD's effort to charge an enrollment fee.[230] Even where retirees[231] have access to private sector health care packages, a majority of them choose the military health system because it is much cheaper,[232] saving the retiree thousands of dollars while costing the Pentagon and taxpayers billions.[233]

---

[226] KORB ET AL., *supra* note 15, at 3 (citing OFFICE OF THE UNDER SEC'Y OF DEF., U.S. DEP'T OF DEF., OVERVIEW FISCAL YEAR 2013 BUDGET REQUEST 45 (Feb. 2012)).

[227] LEED, *supra* note 213, at 18, 18 n.26.

[228] KORB ET AL., *supra* note 15, at 17 (citing GARY CLAXTON ET AL., THE KAISER FAMILY FOUND., EMPLOYER HEALTH BENEFITS 2011 ANNUAL SURVEY 1 (2011)). There was a typographical error ($520) in the original report, which this author corrected to $460.

[229] *Id.* at 14.

[230] *Id.* This is likely due to the strong power of the retiree lobbying groups and Congress's attempt to provide free health care to retirees as they were promised when they entered the service. *See generally* Schism v. United States, 316 F.3d 1259, 1262 (Fed. Cir. 2002) (Department of Defense conceding that military recruiters promised free lifetime health care to servicemembers as inducement to join the armed forces). *Id.* The United States Court of Appeals, Federal Circuit ruled that despite this promise, Congress did not authorize the Services to make such promises and the promise for free health could not be enforced. However, the court noted that Congress could take action by providing free health care. *Id.* at 1264. Additionally, the CAP believes that retirees and their dependents account for the majority of the military health care spending. KORB ET AL., *supra* note 15, at 20 (citing DON J. JANSEN, CONG. RESEARCH SERV., RS22402, INCREASES IN TRICARE COSTS: BACKGROUND AND OPTIONS FOR CONGRESS (May 14, 2010)).

[231] KORB ET AL.¸*supra* note 15, at 19. According to the Center for American Progress, retirees choosing Tricare over their employer health care package includes retirees making six-figure salaries with defense companies and also one member of Congress. *Id.*

[232] *Id.* at 14.

[233] *Id.* at 19 (citing Elisabeth Bumiller & Thom Shanker, *Defense Budget Cuts Would Limit Raises and Close Bases,* N.Y. TIMES, Jan. 26, 2012, http://www.nytimes.com/2012 01/27/us/pentagon-proposes-limiting-raises-and-closing-bases-to-cut-budget.html?page wanted=all&_moc.semityn.www).

2. Suggested Changes

Retirees should contribute a greater share of the cost for their health care. With the change to the accounting method and the number of servicemembers receiving care, by 2015, analysts estimate, the military health care system will account for 28 percent of the budget—about $64 billion.[234] The fear is that health care expenses for retirees will consume a greater share of the defense budget and will begin to divert funds away from other DoD programs.[235] For the first time in eighteen years, Congress approved an increase in the enrollment fee of $2.50 for individuals and $5.00 for families per month, which raised the fees from $230 to $260 a year for an individual, and from $460 to $520 a year for a family, as part of the FY 2012 defense budget.[236] However, these changes will only stem the tide, and will not bring military health care cost under control.

The Pentagon's 2007 Task Force on the Future of Military Health Care, the 10th QRMC, the Congressional Budget Office's analysis of military health care options, and President Barack Obama's Deficit Commission have all identified four basic strategies that Congress and the DoD should adopt to control the rise of military health care cost:

1. Restore a fair cost-sharing balance between taxpayers and beneficiaries;
2. Establish procedures to ensure fair future cost sharing;
3. Limit double coverage for working-age retirees above a certain income level; and
4. Create incentives to reduce the oversuse of Tricare for Life services.[237]

The DoD's FY2013 budget proposed several cost-saving measures to lower overall cost to the military health care system. The proposals include higher enrollment fees and deductibles for working-age retirees; indexing enrollment fees to the National Health Expenditure (NHE)

---

[234] *Id.* at 14. Note, however, that the amount allocated from the defense budget to pay for future retirees should decrease as current active duty servicemembers begin to retire and the cost of their care is paid from the Medicare-Eligible Retiree Health Care Fund (MERHCF).
[235] *See id.*
[236] *Id.* at 17–18.
[237] *Id.* at 21.

index, to ensure the long-term fiscal viability of the Tricare program; implementing an enrollment for Tricare for Life recipients; and incentivizing generic and mail-order[238] purchases for prescription drugs. These measures are estimated to save the Pentagon $12.9 billion between FY2013 and FY2017.[239] The CAP concluded, "Should the Pentagon's recommendations be implemented by Congress, military retirees would still contribute just 14 percent of their health care costs, about half of what they did in 1996."[240]

Congress approved some, but not all, of the DoD's request. As part of the FY2013 Defense Authorization Bill, Congress increased the annual enrollment fee for military retirees to $269 for an individual and $538 for a family.[241] The fee increase represents a 3.6 percent increase from 2011.[242] The rise in health care cost, coupled with a rise in basic pay, could mean that funds will eventually have to be diverted from basic pay, retirement pay, or other defense line items to meet the demand.

C. Rise in Base Pay

Paying an all-volunteer standing armed force is expensive. This is especially true considering the military must compete with the private sector to attract the best and the brightest to carry out the nation's strategic military objectives. Where Congress has failed to maintain military wages on par with those in the private sector, servicemembers have left the services for more lucrative careers or have simply not joined the services.[243]

---

238 Retirees who receive their prescriptions from military facilities will continue to use the facilities as an option. *See generally id.* at 15.
239 *Id.*
240 *Id.* at 3.
241 Kelly Lunney, *Military Retirees See Tricare Fee Hike*, GOV'T EXEC., Oct. 2, 2012, http://www.govexec. com/pay-benefits/2012/10/military-retirees-see-tricare-fee-hike/58519/. National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, 126 Stat. 1632 (2013).
242 Lunney, *supra* note 241.
243 *See* HOOK COMMISSION, *supra* note 13; 2005 DEPARTMENT OF DEFENSE BACKGROUND PAPERS, *supra* note 19; HENNING, *supra* note 30. While this article only discusses basic pay and its impact on future retirement cost, it is important to remember that basic pay accounts for 65 to 75 percent of a servicemember's total Regular Military Compensation (RMC). HENNING, *supra* note 52, at 3 n.6; MILITARY RETIREMENT FUND AUDIT, *supra* note 6, at 11. Additionally, servicemembers can receive non-cash subsistence in gaining access to the commissary, subsidized childcare or tax exemptions. LEED, *supra* note 213, at 8; KORB ET AL., *supra* note 15, at 9.

1. Congressionally Mandated Increases in Base Pay

About 20 percent of the DoD budget goes toward salaries and allowances for the 2.3 million active duty and Reserve members of the armed forces.[244] "In 2012, the DoD requested $56.6 billion for basic pay for active duty forces, $9.2 billion more than in 2000."[245] The rise in cost cannot be attributed to a greater number of servicemembers (their number have remained relatively constant) or simply because Congress, in 2007, extended the pay table from thirty years to forty years as part of the FY2007 NDAA.[246] Rather, the change has to do with the number of raises that Congress has authorized since 2000—raises that were part of the Redux repeal in 1999, discussed in Part III.D of this article.

Starting with the FY2000 NDAA, Congress began to increase military pay by approving a series of pay increases. This was due to the pay gap between military and civilian pay that occurred for most of the 1990s and the resultant problems the services were experiencing with recruitment and retention.[247] Further, fears about recruitment and retention once the war in Afghanistan started prompted Congress to enact "multiple pay raises between 2002 and 2004 that averaged between 4.2 and 6.9 percent (both across-the-board and targeted at certain pay grades)."[248] Additionally, starting with the 2004 NDAA,[249] Congress mandated that future increases in military basic pay would be tied to civilian salaries, as measured by the Employment Cost Index[250] (ECI).[251] Congress also mandated a pay raise of half a percent above the ECI, from 2004 to 2006, to bring military pay in line with private sector pay.[252]

In 2007, Congress again authorized a half a percent pay increase above and beyond the ECI. The Center believes that Congress chose to

---

[244] *See* KORB ET AL., *supra* note 15, at 1.
[245] LEED, *supra* note 213, at 8.
[246] *Id.* at 4, 8.
[247] HENNING, *supra* note 30, at 9; LEED, *supra* note 213, at 8.
[248] LEED, *supra* note 213, at 8.
[249] National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, 117 Stat. 1392 (2003).
[250] "The Employment Cost Index (ECI) is a quarterly measure of the change in the price of labor, defined as compensation per employee hour work . . . . The index measures changes in the cost of compensation not only for wages and salaries, but also for an extensive list of benefits." John Ruser, *Employment Cost Index*, MONTHLY LAB. REV. 3 (Sept. 2001), http://www.bls.gov/opub/mlr/2001/09/art1full.pdf.
[251] LEED, *supra* note 213, at 8.
[252] KORB ET AL., *supra* note 15, at 11.

continue the practice as a gesture of reward for the troops fighting on two different war fronts.[253] In fact these raises surpassed what the DoD requested.[254] In 2011, Congress approved a pay raise to the index standard.[255] Even when considering the increases to the housing allowance, due to the rise in housing cost during the height of the housing bubble, basic pay remained the principal driving force of the increase in cost.[256]

2. Potential Solution to Base Pay Raises

The raises authorized by Congress between 2001 and 2012 significantly increased the cost of military compensation.[257] Many believe that the pay increases were unwarranted. Mr. Korb notes that the pay raises that Congress authorized after 2006 were unnecessary since military pay surpassed that of the civilian workforce and because the DoD had, in previous years, met its recruiting and retention numbers.[258] The Board notes that in 2011, military compensation was "higher than that of average civilians with the same level of education."[259] Further, the Board found that enlisted pay ranks in the top quartile of that of high school graduates and officer pay ranks in the top quartile of that of college graduates.[260] However, there are distinctions between the military and the private sector that should warrant a difference in the way servicemembers are compensated.[261]

Critics of the retirement system argue that there are long-term consequences to increasing basic pay above what civilians with similar educational background earn for comparable work in the private sector. Basic pay and cost of living adjustments are the most important factors in the cost of future military retirement pay.[262] Therefore, the pay hike that

[253] LEED, *supra* note 213, at 8.
[254] KORB ET AL., *supra* note 15, at 8.
[255] *Id.* at 12.
[256] LEED, *supra* note 213, at 4, 8.
[257] *Id.* at 8.
[258] KORB ET AL., *supra* note 15, at 8, 11–12.
[259] DEF. BUS. BD., *supra* note 5, at 2.
[260] *Id.* tab C, at 4.
[261] U.S. DEP'T OF DEF., MILITARY COMPENSATION BACKGROUND PAPERS: COMPENSATION ELEMENTS AND RELATED MANPOWER COST ITEMS, THEIR PURPOSES AND LEGISLATIVE BACKGROUNDS 2–5 (7th ed. Nov. 2011) [hereinafter 2011 DEPARTMENT OF DEFENSE BACKGROUND PAPERS]. Some of those differences are highlighted in Part VII.
[262] HENNING, *supra* note 30, at 19.

Congress instituted will trigger higher retired pay as more servicemembers retire.[263]

The theory of shared sacrifice means that pay raises that go beyond the ECI should not be mandated and will become unsustainable.[264] "In its FY2013 budget, the DoD proposes a plan to bring military pay back in line with the Employment Cost Index by implementing reduced pay raises beginning in FY2015, allowing military personnel time to adjust."[265] The DoD believes that slowing pay raises could save the government $16.5 billion over five years.[266] Mr. Korb believes that Congress will likely oppose it.[267] However, the long-term impact on the defense budget, coupled with the impact on future cost of retirement pay for servicemembers, means that Congress should think carefully before providing pay increases above the ECI.[268] But granting pay raise control to the DoD and allowing the DoD to dictate when troops should get a raise and how much, as suggested by the Center, is an avenue that would lead to servicemembers receiving less pay than their civilian counterparts.[269] The plan to reduce troop strength over the next five years should have a significant impact on the overall compensation cost and a direct impact on future retirement cost.[270]

D. Future Retirement Cost

Before discussing how much it costs the government to pay for the retirement system, it is important to note how and where the money comes from. As discussed in Part II.B, the Hook Commission believed that the taxing power of the government would be sufficient to meet its

---

263 *Id.*
264 *See* MOMENT OF TRUTH PROJECT, *supra* note 55.
265 KORB ET AL., *supra* note 15, at 9.
266 *Id.*
267 *Id.* at 12–13 (noting that political pressure on Congress would make it difficult for them to approve a plan that resulted in lower pay for servicemembers).
268 *Id.* at 12.
269 *See id.* at 12–13. *See also* LEED, *supra* note 213, at 10–11 (highlighting that the DoD has in the past diverted funds from maintaining housing on military installations, which resulted in sub-standard housing, to pay for other items on the budget). It is likely that the DoD would limit raises and use the funds to pay for other items. *Id.*
270 *See* Elisabeth Bumiller & Thom Shanker, *Defense Budget Cuts Would Limit Raises and Close Bases,* N.Y. TIMES, Jan. 26, 2012, http://www.nytimes.com/2012/01/27/us/pentagon-proposes-limiting-raises-and-closing-bases-to-cut-budget.html?pagewanted=all&_moc.semityn.www.

burden to pay for the yearly cost of the retirement system.[271] Indeed, before FY1984, the government paid retirees by appropriating the funds needed for that year.[272]

1. The Accrual Accounting Method and the Military Retirement Fund

Starting in FY1985, however, Congress, following a recommendation by the Fifth Quadrennial Review on Military Compensation, established the "accrual accounting" concept as part of the DoD Authorization Act of 1984.[273] The concept is that each year the government would allocate an amount that it believed would cover the cost of future retirees.[274] This would ensure that the future cost of retirees would be paid in today's dollars,[275] which has the added benefit of providing "transparency to the DoD budgeting" by explicitly noting how current year personnel decisions would impact future retirement cost.[276]

The money for future retirees is put in the Military Retirement Fund (MRF).[277] However, there is one small drawback. Unlike private-sector companies that contribute to their employees' pension plans and perhaps invest the funds in equities, the money accruing in the MRF is invested in a variety of U.S. Treasury-based instruments such as bills, notes, bonds, Treasury Inflation-Protected Securities (TIPS), and overnight investment certificates.[278] Such investments barely keep pace with inflation. The MRF, the Board points out, is "not able to be invested in higher yielding equities and bonds."[279]

An independent, presidentially appointed Department of Defense Retirement Board of Actuaries (Retirement Board) decides how much the DoD needs to contribute to the MRF each year to cover future retirement cost.[280] The Retirement Board considers factors like

---

271 HOOK COMMISSION, *supra* note 13, at 40–41.
272 HENNING, *supra* note 43, at 10.
273 Department of Defense Authorization Act, 1984, Pub. L. No. 98–94, 97 Stat. 614 (1983); Christian, *supra* note 23, at 6.
274 HENNING, *supra* note 43, at 10.
275 *Id.*
276 Christian, *supra* note 23, at 6.
277 10 U.S.C. §§ 1461–1467 (2012); HENNING, *supra* note 43, at 10–11.
278 MILITARY RETIREMENT FUND AUDIT, *supra* note 6, at 19.
279 DEF. BUS. BD., *supra* note 5, tab C, at 5.
280 HENNING, *supra* note 30, at 11.

"retirement rates and patterns, life expectancies and mortality rates, future pay levels, and other factors that will determine retirement pay obligations in the future."[281] The DoD then sets aside the amount suggested by the Retirement Board with projected interest earned in the low-yield government bonds *paid from the United States Treasury Department* that the DoD estimates will cover future retirement costs.[282] "Approximately thirty percent of military basic pay costs must be added to the DOD personnel budget each fiscal year to cover the future retirement costs of those personnel who will ultimately retire from the military."[283]

The military retirement system includes both funded and unfunded costs. The unfunded cost includes future retired pay costs incurred before Congress created the MRF in FY1985.[284] Money is allocated from the General Fund of the Treasury, *not from the DoD*, and is transferred to the MRF to pay for the unfunded portion.[285] Money is then disbursed from the MRF to pay current active duty and Reserve retirees, cover disability retirement benefits, and pay out survivor benefits.[286] To meet its obligation to pay for both the funded and unfunded portions, the Fund receives income from three sources: (1) the DoD funds under the accrual method, (2) General Funds from the U.S. Treasury as appropriated by Congress; and (3) investment income from the interest earned from the Treasury Department.[287] But there is something fundamentally wrong with the government appropriating funds, then borrowing money from those funds and paying itself interest, which will have to be paid for by appropriating more funds.[288]

2. All Roads Lead to the Taxpayer

There is good news and bad news in regards to the unfunded portion of the MRF. The good news is that the unfunded portion will be fully

---

281 LEED, *supra* note 213, at 15.
282 *Id.* at 15 (emphasis added). The government is actually paying itself for keeping funds in its vault. Taxpayers are basically paying twice.
283 HENNING, *supra* note 43, at 11.
284 *Id.*
285 *Id.* (emphasis added).
286 MILITARY RETIREMENT FUND AUDIT, *supra* note 6, at 1.
287 *Id.*
288 LEED, *supra* note 213, at 4.

paid by FY2026.[289] This is an actual improvement because the 2010 projection was that the fund would be fully funded by 2033—an improvement of seven years.[290] The bad news is that the unfunded portion is a substantial amount—$1.1 trillion in FY2012.[291] While the unfunded amount is substantial, it is a cumulative amount to be paid to retirees over a 42-year period, which started in 1984 and is due to be paid in full by FY2026.[292] Unlike the private sector, military retirees do not have the option to claim immediate payment of their future benefits, so there is no fear that the unfunded portion will have to be paid all at once.[293] In fact, the DoD comptroller points out that the system is solvent and that they are well capable of meeting expenses now and in the future.[294] This proves the Hook Commision's point that so long as Congress has the taxing power, Congress will continue to meet its obligation. Despite its claim of solvency, it is important to remember that *all* of the funds come from taxpayers.

3. Arguing for Change to the Retirement System

Critics of the retirement system often cite to the ballooning unfunded portion of the system as the main reason why the system should be revamped. Their claim is inaccurate, and somewhat misleading. Both the CAP[295] and the Board[296] cite to the $1.3 trillion unfunded portion without explaining that the amount is not due in 2012, that the entire fund does not come from the Defense budget, or, more importantly, that it will all be "paid" for by FY2026. By highlighting the yearly cost of the retirement system, costing "the federal government more than $100 billion each year" and stating that if changes are not made, then the system will divert funds from "key national security priorities such as weapons acquisition or research and development," the CAP creates the impression that somehow changes to the retirement system would significantly decrease the burden on the defense budget.[297]

289 MILITARY RETIREMENT FUND AUDIT, *supra* note 6, at 22.
290 HENNING, *supra* note 43, at 11.
291 MILITARY RETIREMENT FUND AUDIT, *supra* note 6, at 22.
292 *Id.*
293 HENNING, *supra* note 43, at 12.
294 MILITARY RETIREMENT FUND AUDIT, *supra* note 6, at 16–17.
295 KORB ET AL., *supra* note 15, at 28.
296 DEF. BUS. BD., *supra* note 5, at 3.
297 KORB ET AL., *supra* note 15, at 28.

Nevertheless, the assumption of such a direct connection is misleading. For example, the CAP rightly points out that only $20 billion of the $100 billion for retirement cost comes from the defense budget.[298] Further, changes to the current system will likely have no impact on either the approximately 2.2 million retirees and annuitants who are currently receiving retirement pay, or on the unfunded portion of the system.[299] The real argument should be to point out that the entire $100 billion—regardless of the accounting method used by Congress or whether the line item comes from the Treasury or Defense—ultimately comes from taxpayers.[300] Further, the cost will continue to rise, increasing the burden on taxpayers, unless the MRF is restructured, allowing the board to invest funds in equities.[301] Additionally, changes to the retirement system—while impacting future cost of retirement for new recruits—will likely not impact retirement costs for those currently serving who may be grandfathered under the current system.

Other notable criticisms are that raises in military basic pay or changes to the compensation system have an immediate impact on future retirement cost. In FY2007, Congress extended the pay table from thirty years to forty years, allowing very senior servicemembers to serve up to forty years, and extended the pay and longevity tables to forty years. "The change increased the unfunded liability by $1.5 billion."[302] Additionally, current pay raises, especially those approved between 2000 and 2006, will impact future retirement costs, as they increase the eligible pay for future retirees.[303] Poor economic conditions may also impact the number of servicemembers who choose to remain on active duty, increasing the number of potential retirees, and may lead to

---

[298] *Id.*
[299] MILITARY RETIREMENT FUND AUDIT, *supra* note 6, at 13.
[300] *Id.* at 1.
[301] For additional information regarding this point, see *infra* Part X.A.2.
[302] 2007 VALUATION OF THE MILITARY RETIREMENT SYSTEM, *supra* note 117. *But see* KORB ET AL., *supra* note 15, at 31. The Center for American Progress notes, with seeming astonishment, that based on the FY2007 NDAA, "a four-star general or admiral retiring after 43 years of service can receive 100 [sic] percent of his or her salary, up to $272,892 every year for the rest of his or her life." *Id.* When compared to what senior level executives receive in compensation and retirement packages in Fortune 500 companies, the amount above does not shock the conscience. Perhaps Congress struck this bargain to ensure that those higher-ranking officers and enlisted servicemembers would remain in the force to fight the nation's wars in Iraq and Afghanistan. One has to assume that Congress knew the cost, both now and in the future, when they made the choice to pass this law, and can always go back to reduce the maximum years of service at a later date.
[303] LEED, *supra* note 213, at 15.

retirement-eligible servicemembers serving longer, which also increases future retirement cost.[304]

The second most significant determinant of the cost of future military retirement is the annual Cost of Living Allowance (COLA) received after retirement.[305] Finally, the rise in life expectancy due to medical advances and rise in inflation will also increase military retirement benefit costs.[306] The Board estimates that each year added to average life expectancy will result in an additional $300 million, and every percentage point added to inflation will result in $3 billion in retirement benefit service cost increase.[307] Thus, increases in pay will definitely have a substantial impact on overall personnel budget and retiree pay in the future.

4. Troop Drawdown as a Potential Solution

There are approximately 2.2 million retirees and annuitants.[308] About two-thirds of them receive funds based on the Final Basic Pay (FBP) system.[309] It is important to note that changes to the retirement system may not impact their retirement pay. Further, the consensus is that any new retirement system would not impact the troops who are already in the service.[310] Thus, any changes with an eye toward reducing cost will take years, if not decades, to be realized.[311] But a crucial way the DoD can save funds is to have a troop drawdown similar to the post-Cold War drawdown.[312] If the DoD decreases the number of troops in

---

[304] *Id.* The MRF Board does make yearly adjustments to reflect projected costs based on the retention behavior of the current force. *Id.*

[305] HENNING, *supra* note 30, at 19.

[306] DEF. BUS. BD., *supra* note 5, at 3.

[307] *Id.* tab C, at 9.

[308] MILITARY RETIREMENT FUND AUDIT, *supra* note 6, at 13.

[309] HENNING, *supra* note 43, at 6.

[310] Justin Fishel & Jim Crogan, *Panetta: 'You Have to Consider' Military Retirement Reform*, FOX NEWS, Aug. 16, 2011, http://www.foxnews.com/politics/2011/08/16/panetta-have-to-consider-military-retirement-reform/ (noting that Defense Secretary Leon Panetta stated that current troops would be grandfathered into the current system). *But See* KORB ET AL., *supra* note 15, at 30 (arguing for a gradual shift into a new system, while grandfathering those with more than ten years of service).

[311] *See* Sydney J. Freedberg Jr., *DoD Leaders Mull Retirement Sleight of Hand*, AOL DEF., Oct. 3, 2011, http://defense.aol.com/2011/10/03/dod-leaders-mull-retirement-sleight-of-hand/.

[312] HENNING, *supra* note 43, at 12. *See generally* ANDREW FEICKERT & CHARLES A. HENNING, CONG. RESEARCH SERV., R42493, ARMY DRAWDOWN AND RESTRUCTURING:

the next few years, as projected, the costs of future retirement will also decline. More importantly, revising the system as outlined in Part X will reduce the overall burden on taxpayers and the cost of the unfunded portion of the system.

The last two Parts discussed the major criticism of the retirement system. Two key issues—immediate annuity upon retirement and employment during the "second-phase"— could be viewed as being unique to the military, but it is not. The Federal Employee Retirement System (FERS) for law enforcement officers and firefighters also has similar benefits and issues, although they are not discussed as frequently in the media. Critics of the military retirement system—those who want to make subtle changes to the military retirement system—may look to the next Part for inspiration.

VI. Special Provisions Under the Federal Employee Retirement System

The FERS and the Special Retirement Provisions accorded to Law Enforcement Officers, Firefighters, Air Traffic Controllers, and Nuclear Waste Management Personnel is a defined benefits plan in the public sector that approximates the military retirement system.[313] This section reviews the benefits accorded to general federal employees, and those under the Special Retirement Provisions for law enforcement and firefighters,[314] and compares them to the current military system. This is a useful comparison because any revision of the military pension plan should consider not only retirement plan trends in the private sector, but also those in the public sector.

A. Federal Civilian Employees—Details and Benefits of the Plans

Federal employees have two retirement systems available to them. Civilian federal employees who were hired before 1984 are covered by

---

BACKGROUND AND ISSUES FOR CONGRESS (2012) (providing an initial look at the potential issues with a troop drawdown).

[313] HENNING, *supra* note 30, at 20.

[314] *See* U.S. OFFICE OF PERS. MGMT., FERS: FEDERAL EMPLOYEES RETIREMENT SYSTEM ch. 46 (Apr. 1998) [hereinafter SPECIAL RETIREMENT PROVISIONS FOR LAW ENFORCEMENT OFFICERS].

the Civil Service Retirement System (CSRS),[315] and post-1984 employees are covered under the FERS.[316] The FERS is a three-tiered retirement plan consisting of (1) social security; (2) the Basic Benefit Plan (BBP) or pension; and (3) the Thrift Savings Plan (TSP) for federal civilians.[317] The belief is that by using all three components, a retired federal employee will be able to have a strong financial foundation during her retirement years.[318] Under both FERS and CSRS, a worker with thirty years of service can retire between age fifty-five and fifty-seven; a worker with twenty years can retire at age sixty; and a worker with five or more years of service can retire at age sixty-two.[319] The employee may receive reduced benefits if she does not meet certain years of service and age requirements.[320] Under the BBP, employees contribute 0.8 percent of their pay toward their pension. Employees are eligible for the BBP after five years of service.[321]

---

[315] KATELIN P. ISAACS, CONG. RESEARCH SERV., 98-810, FEDERAL EMPLOYEES' RETIREMENT SYSTEM: BENEFITS AND FINANCING 2 (2012). Additionally, "Under CSRS, employees do not pay Social Security taxes or earn Social Security benefits." *Id.* However, CSRS employees may contribute to the TSP. *Id.*

[316] *Id.* (citing Federal Employee Retirement System Act, Pub. L. No. 99-335, 100 Stat. 514 (1986)); 5 U.S.C. pt. III, subpt. G, ch. 84 (2012).

[317] FERS, *supra* note 44, at 2. The social security component is not discussed in this article.

[318] *Id.* There is an underlying belief that the individual will take personal responsibility in contributing an amount in her TSP account, during twenty-plus years of working, that will afford her the lifestyle that she desires during retirement.

[319] *Id.* at 6–7; MOMENT OF TRUTH PROJECT, *supra* note 55, at 3. ISAACS, *supra* note 315, at 3 (noting that the minimum retirement age for workers began to increase in 2003 for workers born after 1947).

[320] FERS, *supra*, note 44, at 7.

[321] *Id.* at 5–6. Military veterans can receive credit toward the BBP for their years of service if they meet certain criteria and pay a deposit of three percent of their base pay. *Id.* Upon retirement, employees can receive an annuity based on one percent of their High-3 years of average pay multiplied by the number of years of creditable service or 1.1 percent of the average of their High-3 years multiplied by the number of years they worked if retiring at age sixty-two with twenty or more years of service. (The High-3 means using the average of the last three years of monthly pay to calculate pay for retirement purposes. It is similar to the High-3 system for servicemembers.) *Id.* at 8. "For the average federal worker who earns $80,000 and retires after 30 years, that works out to $26,400 a year." *Pension Reform Goes to Washington-Federal Retiree Benefits Deserve a Scrub,* WALL ST. J., June 6, 2011, http://online.wsj.com/article/SB10001424052748703421204576331531370098682.html. *See* ISAACS, *supra* note 315, at 5 (noting that under FERS an employee with thirty years of service can receive thirty to 33 percent of her High-3 average while under CSRS, the same employee would be eligible for 46 percent of her High-3 average).

Employees under FERS also receive a government match up to five percent of their pay—one percent[322] is automatically deposited into the employee's account notwithstanding any contribution by the employee. Under FERS, the first percent is automatically deposited, the next three percent are matched dollar for dollar, and the next two percent receive $.50 for each dollar contributed—totaling a five percent match. Employees' contributions and the government match are automatically vested; however, the one percent automatic contribution is the employee's after three years of service.[323] Retirees begin to receive COLA adjustments starting at age sixty-two.[324] They also are eligible for a Special Retirement Supplement if they meet the minimum retirement age and have thirty years of service or are aged sixty with twenty years of service. The supplement is paid until the age of sixty-two and is slightly lower than the Social Security benefit that they will receive starting at age sixty-two.[325]

B. Federal Law Enforcement Officers and Firefighters

The FERS Special Retirement Provisions (FERS-SRP) benefit package for Law Enforcement Officers, Firefighters, Air Traffic Controllers, and Nuclear Waste Management Personnel is slightly different from those of the general federal employee and has several components that mirror the military retirement system. This special group of retirees contributes 1.3 percent of their pay toward their pension rather than the traditional 0.8 percent.[326] They are eligible for retirement at age fifty with twenty years of service or at any age with twenty-five or more years of service. Like the military retirement system, they can receive their monthly annuity immediately, without invoking a reduction in their annuity for retiring before age sixty-two, as is typically the case with regular federal employees. Also akin to the military system, they begin receiving COLA adjustments immediately upon retirement.[327] Under FERS-SRP, this special group accrues benefits at the rate of 1.7

---

[322] The 1 percent contribution could be considered a payment back to the employee for the 0.8 percent contribution to the pension.
[323] FERS, *supra* note 44, at 13–14.
[324] *Id.* at 11.
[325] *Id.* at 8; ISAACS, *supra* note 315, at 5. However, if they have earned income that exceeds the social security annual exemption amount, then their supplement would be reduced or stopped.
[326] FERS, *supra* note 44, at 17.
[327] *Id.*

percent per year for each year of service for their first twenty years of service and one percent for each year thereafter.[328] They are also eligible for a Special Retirement Supplement up to age sixty-two that is slightly lower than the social security benefit that they will receive starting at age sixty-two.[329]

Law enforcement officers and firefighters who retire at age fifty with twenty years of service or before age fifty after serving twenty-five or more years of service face the same issues of a "second career" or the "second phase" of their lives prior to full retirement. Part of the Special Retirement Provision is the supplemental income that they receive if they are not gainfully employed. They face the same dilemma that most military members face after retiring—finding employment until they can fully retire.[330] A law enforcement officer who retires at age fifty will likely face between ten and fifteen more years of work, to add to his current retirement savings, before he can retire. Appendix B offers a quick-view comparison of the two FERS systems and the current military retirement system.[331]

C. Criticism of the Federal Employee Retirement System

The FERS benefit package is not without its critics. The Moment of Truth Project believes that it is one of the most generous retirement systems available.[332] Critics point to the fact that federal government employees receive both a pension and up to five percent matching contributions to their TSP accounts. The Wall Street Journal notes that private workers typically make do with just a three percent match and

---

[328] ISAACS, *supra* note 315, at 5. However, under CSRS, those same employees would accrue benefits at the rate of 2½ percent per year for each year of service for their first twenty years of service and 2 percent for each year thereafter. *Id.* Thus CSRS employees could enjoy a replacement rate of 75 percent after thirty years of service, while under the FERS-SRP those same employees would receive just 44 percent. *Id.*

[329] FERS, *supra* note 44, at 17. However, if they have earned income that exceeds the Social Security annual exemption amount, then their supplement would be reduced or stopped. *Id.*; ISAACS, *supra* note 315, at 5. Additionally, military service cannot be credited under the special provisions for law enforcement and firefighters. SPECIAL RETIREMENT PROVISIONS FOR LAW ENFORCEMENT OFFICERS, *supra* note 314, at 23.

[330] *See generally* HENNING, *supra* note 30, at 20.

[331] 10TH QRMC, *supra* note 14, app. A, at 135. 10th QRMC's Appendix A provides a comparative view of cities that provide special retirement provisions to their police and firefighters.

[332] MOMENT OF TRUTH PROJECT, *supra* note 55, at 6.

pensions are going the way of the dinosaurs.[333] Their main point of contention, however, is that federal employees contribute less than one percent of their pay toward their pension or 1.3 percent for law enforcement and firefighters. According to the Wall Street Journal, House Republicans want to increase the employee contribution amount to six percent, saving the federal government $51 billion through 2020.[334] The Third Way, a left-leaning think tank, estimates even greater savings in the neighborhood of $117 billion over the next decade and $300 billion in twenty years.[335]

The Debt Reduction Task Force proposes calculating pension benefits using the average of an employee's highest five-year earnings average rather than the current system of highest three consecutive years of earnings.[336] The task force estimated that from 2020 to 2040, this change would save the government $49 billion.[337] While those proposals would result in modest savings individually and could make a significant change if implemented as a whole, a more draconian measure advocated by Republican Senators Tom Coburn of Oklahoma and Richard Burr of North Carolina would eliminate completely the defined-benefit component for new hires.[338]

Due to recent fiscal crises facing the nation, there will always be critics who seek ways to reduce the deficit by either increasing the required employee contribution amount or advocating for outright abolishment of the defined benefit component. While asking employees to contribute more toward their pensions has merit, abolishing the pension system altogether as a cost-saving measure is unwarranted and

---

[333] *Pension Reform Goes to Washington*, *supra* note 321.

[334] *Id*. Based on estimates from the Moment of Truth: Report of the National Commission on Fiscal Responsibility and Reform, produced in 2010. In 2012, those seeking to raise the contribution amount won a small victory with the passing of the Middle Class Relief and Job Creation Act of 2012, Pub. L. No. 112-96, 126 Stat. 156 (2012), which resulted in an increase of 2.3 percent in the employee contribution rate for most federal employees newly hired or rehired with less than 5 years of service. ISAACS, *supra* note 315, at 15-16. This same law also lowers the benefit accrual rate from 1.7 percent for the first twenty years of service to just 1 percent for Members of Congress and congressional staff who are hired or rehired with less than five years of service. *Id.* at 16.

[335] KENDALL & KESSLER, *supra* note 195, at 2.

[336] PETE DOMENICI & ALICE RIVLIN, THE DEBT REDUCTION TASK FORCE RESTORING AMERICA'S FUTURE 111 (Nov. 2010).

[337] *Id.*

[338] *Pension Reform Goes to Washington*, *supra* note 321.

would make attracting and retaining highly qualified personnel to serve as public servants more difficult.

Critics who believe the current military system is unfair and costly should consider revamping the system to match what is offered under the FERS-SRP benefit package. Mr. Henning believes that the FERS-SRP could be considered as a viable choice given that law enforcement, firefighters, and military personnel perform physically demanding, hazardous duty.[339] The 10th QRMC considered the FERS-SRP package and other state police and firefighter plans and found them to be inadequate for the military environment.[340] The 10th QRMC concluded that these systems failed to provide the flexibility and manning levels that the military needs at a reasonable cost.[341]

Although the FERS-SRP system could be strongly considered, there are special circumstances that would make such a move inadequate as fair compensation for the sacrifices and hazardous nature of military life for servicemembers and their families. While law enforcement officers and firefighters do face peril every day, they go home at the end of their shift, and may receive overtime pay for time spent beyond their forty-hour workweek. More importantly, they live in the same neighborhood for most of their lives if they so desire, their children grow up with the same set of friends, their spouses work in the same community, and they are not subject to deployments that last months. This next section discusses why, despite its high cost, an immediate annuity after twenty years of service should be part of a compensation package for servicemembers.

VII. Military as a Unique Institution

The credit belongs to those who sacrifice their lives daily to protect our nation. While the general public may appreciate the sacrifice that servicemembers make, few share in that sacrifice. About one-half of one percent of American adults have served in the military since 9/11.[342] This statistic only exacerbates the growing divide between civilians and

---

[339] HENNING, *supra* note 30, at 20.
[340] 10TH QRMC, *supra* note 14, at 24.
[341] *Id.*
[342] *The Military-Civilian Gap: Fewer Family Connections*, PEW RESEARCH SOCIAL & DEMOGRAPHIC TREND, Nov. 23, 2011, http://www.pewsocialtrends.org/2011/11/23/the-military-civilian-gap-fewer-family-connections/.

the military. A Pew Research Center study showed that a majority of the public does not understand the problems that servicemembers face in the military.[343] Retired Navy Admiral Mike Mullen, former Chairman of the Joint Chiefs of Staff, believed there was a "worrying disconnect" between civilians and the military.[344] Admiral Mullen told the 2011 graduating class at the U.S. Military Academy at West Point, "I fear [civilians] do not know us. I fear they do not comprehend the full weight of the burden we carry or the price we pay when we return from battle."[345] For a nation that asks so much of a selected few, when it comes to providing a retirement system worthy of their sacrifice, a lack of understanding of the hardship that servicemembers and their family members endure may lead to a system that is inadequate.

The DoD and supporters of the retirement system cite several reasons why servicemembers should maintain their current retirement system, to include the following: (1) The need for a "socially acceptable" level of payment for servicemembers during their old age; (2) a system that is comparable to what is available to the private and federal service sectors; (3) a system that would allow retired servicemembers to return to active duty seamlessly; and last, but most important, (4) a means to keep the force "young and vigorous thereby ensuring promotion opportunities for younger members."[346] Additionally, the DoD notes that servicemembers are subject to recall[347]

---

[343] Donna Miles, *Survey Shows Growing Gap Between Civilians, Military*, U.S. DEP'T OF DEF., Nov. 28, 2011, http://www.defense.gov/News/NewsArticle.aspx?ID=66253.

[344] *Id.*

[345] *Id*. In the 2012 Military Family Lifestyle Survey of military family members, 95 percent of respondents agreed with the statement, "The general public does not truly understand or appreciate the sacrifices made by service members and their families." VIVIAN GREENTREE ET AL., DEP'T OF RES. & POL'Y, BLUE STAR FAMILIES, *2012 Military Family Lifestyle Survey* 8 (May 2012).

[346] 2011 DEPARTMENT OF DEFENSE BACKGROUND PAPERS, *supra* note 261, at 571.

[347] The Center for American Progress notes that the Defense Department pays retirees for forty years after completing twenty years of service. KORB ET AL., *supra* note 15, at 32. However, the Defense Department highlights the retainer of troops as a major reason why servicemembers are paid a retirement income. 2011 DEPARTMENT OF DEFENSE BACKGROUND PAPERS, *supra* note 261, at 571. In 2002, the Defense Department started to accept retirees onto active duty to assist with Operation Enduring Freedom in Afghanistan. Jeff Schweers, *Military Retirees Volunteer for Active* Duty, USA TODAY, Feb. 17, 2010, http://usatoday30.usatoday.com/news/military/2010-02-17-oldsoldiers_N.htm. By 2004, then-Secretary of Defense Donald Rumsfeld authorized mobilizing up to 6,500 Individual Ready Reserve soldiers to fill vacancies in units mostly bound for Iraq and Afghanistan. *Id.* Since 9/11 3,077 U.S. Army, 300 Marines, 386 Air Force, and 378 Navy retirees have returned to active duty. *Id*. As of February 2010, Mr. Schweers notes that two recalled retirees have lost their lives while serving in Iraq and Afghanistan,

to active duty and are subject to the Uniform Code of Military Justice while retired.[348] Retired servicemembers are also limited on the type of employment that they can take after retiring.[349] Supporters of the system highlight that servicemembers are being compensated "for a career of arduous, and frequently hazardous, service and sacrifice for the nation."[350] With only half of one percent of Americans bearing the brunt of the nation's wars[351] by serving in the military, the military retirement system should reflect the sacrifices that the very few are making for the rest of the U.S. population.

A. Hazardous Duty

Serving in the military is not a safe career choice. Since 9/11, more than 4,600 servicemembers have died during combat operations.[352] Those numbers are low compared to Vietnam or the Korean War because of the more advanced medical treatment that troops now receive on the battlefield.[353] As a result of the strides made medically, more than 50,000[354] servicemembers have been wounded in Iraq and Afghanistan and have survived their physical wounds.[355] Notably, 16,000 of those 50,000 wounded servicemembers would likely have died on the battlefield a generation ago but for new medical procedures, protective

---

respectively. *Id. See also* the Defense Officer Personnel Management Act, Pub. L. No. 96-513, 94 Stat. 2835 (1980); 10 U.S.C. § 688 (2012) (establishing that retired members of regular components of the armed forces could be recalled to active duty at any time).

[348] 2011 DEPARTMENT OF DEFENSE BACKGROUND PAPERS, *supra* note 261, at 571.

[349] HUDSON, *supra* note 77, at 13.

[350] HENNING, *supra* note 30, at 1.

[351] Andrew Bacevich, *Reducing Military Benefits Unfair to Those Who Served*, ATL. J. CONST., Aug. 23, 2011, http://www.ajc.com/news/news/opinion/reducing-military-benefits-unfair-to-those-who-ser/nQK53/.

[352] *Department of Defense U.S. Casualty Status*, U.S. DEP'T OF DEF., http://www.defense.gov/news/casualty.pdf (last visited Mar. 12, 2014). This website provides daily updates on the number of U.S. military, civilian casualty and those wounded in action.

[353] David Wood, *Iraq, Afghanistan War Wounded Pass 50,000*, HUFFINGTON POST, Oct. 25, 2012, http://www.huffingtonpost.com/2012/10/25/iraq-afghanistan-war-wounded_n_2017338.html?view=screen.

[354] *Department of Defense U.S. Casualty Status*, U.S. DEP'T OF DEF., http://www.defense.gov/news/casualty.pdf (last visited Mar. 12, 2014).

[355] Luis Martinez & Amy Bingham, *U.S. Veterans: By the Numbers*, ABCNEWS, Nov. 11, 2011, http://abcnews.go.com/Politics/us-veterans-numbers/story?id=14928136# ("In the decade since the Sept. 11, 2001, terrorist attacks on the World Trade Center, 2,333,972 American military personnel had been deployed to Iraq, Afghanistan or both, as of Aug. 30,2011. Of that total, 1,353, 627 have since left the military and 711,986 have used VA health care between fiscal year 2002 and the third-quarter fiscal year 2011.")

gear, and faster medical evacuations.[356] An unknown number of servicemembers suffer from Post-Traumatic Stress Disorder (PTSD) or Traumatic Brain Injury (TBI) due to their combat experience in those two conflicts. According to DoD statistics, more than 43,000 servicemembers have been diagnosed with TBI, but many more may have gone undiagnosed. During 2012, the Department of Veterans Affairs took in 4,000 new cases of veterans with PTSD each month.[357] Linda Bilmes, a Harvard economist, estimates that caring for the wounded could cost half a trillion dollars over the next few decades.[358]

Every servicemember knows that when he is volunteering to serve, he may have to make the ultimate sacrifice, or, as is most likely to occur given our medical advances, be lucky enough to survive an attack but lose a limb in the process. Families, too, take the same risks, for they would bear the brunt of the loss when their spouses, fathers, or mothers die or return from war disfigured or with scars unseen by the naked eye.

Another devastating issue is the rate of suicidal death by servicemembers. In the first 155 days in 2012, the Pentagon reported 154 suicidal deaths in the military.[359] In 2012, there were 349 suicides in the military, more than the number of servicemembers who died during combat in Afghanistan—295.[360] More troubling, however, is the fact that in 2008 there is evidence to believe that the Department of Veterans Affairs downplayed the number of completed and attempted suicides by

---

[356] Wood, *supra* note 353.

[357] *Id. But see* Terri Tanielian & Lisa H. Jaycox eds., *Invisible Wounds of War*, RAND CTR. FOR MIL. HEALTH POL'Y RES., at xxi (2008) ("Assuming that the prevalence found in this study is representative of the 1.64 million servicemembers who had been deployed for OEF/OIF as of October 2007, we estimate that approximately 300,000 individuals currently suffer from [Post-Traumatic Stress Disorder] PTSD or major depression and that 320,000 individuals experienced a probable [Traumatic Brain Injury] TBI during deployment.").

[358] Wood, *supra* note 353. *See VA Budget Request Tops $140 Billion for Veterans Programs*, OFFICE OF PUB. & INTERGOVERNMENTAL AFF., U.S. DEP'T OF VETERANS AFF., Feb. 13, 2012, http://www.va.gov/opa/pressrel/pressrelease.cfm?id=2263 (noting that the Department of Veterans Affairs (VA) estimates that more than 1 million active duty servicemembers will become veterans in the next five years and will join the 22 million veterans now receiving benefits from the VA).

[359] Robert Burns, *Military Suicide Rate Surges to Nearly One Per Day This Year*, HUFFINGTON POST, June 7, 2012, http://www.huffingtonpost.com/2012/06/07/military-suicide-surges-_n_1578821.html.

[360] Bill Chappell, *U.S. Military's Suicide Rate Surpassed Combat Deaths In 2012*, NPR, Jan. 14, 2013, http://www.npr.org/blogs/thetwo-way/2013/01/14/169364733/u-s-militarys suicide-rate-surpassed-combat-deaths-in-2012.

veterans.[361] The CAP notes, "The deployment of men and women without sufficient time at home has resulted in higher incidence of mental problems, domestic violence, alcoholism, and suicide."[362] This is the toll of war and a consequence of serving in the military. But even outside of war, servicemembers still face hardship.

B. Military Hardship

Serving in the military means sacrifice. While there may be jobs with similar titles in the civilian world like nurse, doctor, or lawyer,[363] the similarities end there because of the extrinsic requirements of serving in the military. There are few jobs in the world that require a person to leave his family for a year or eighteen months at a time. "Civilians likely take for granted waking each morning to see their baby boy grow a little larger, whereas someone in the military might leave an infant on assignment, and come back to a walking, talking toddler."[364] Servicemembers pay a special price whenever they are deployed and miss a birth, a child's birthday, a graduation, or a wedding. For servicemembers, those circumstances when they are apart from family can never be repaid. Petty Officer 1st Class Ethan Gurney notes, "The continuous deployments, living conditions, remote and hazardous duty stations are unique to the military."[365] Both the Defense Business Board and the CAP recognize the arduous nature of military life when they advocate for increased deferred compensation for servicemembers serving hardship duty tours, deployed, or those serving away from their families.[366]

The military is unique because of the demands placed on the servicemember. Servicemembers learn very quickly during basic training, officer candidate school, or at the Academy, that the military has total control over every critical decision they will make. Civilians take for granted that they can simply wake up one morning and decide to take a day off simply because they feel like it. That is virtually

---

[361] Gene Gomulka, *Saving Military Families*, MILITARY REV., Jan.–Feb. 2010, at 111.
[362] KORB ET AL., *supra* note 15, at 40.
[363] *See* 2005 DEPARTMENT OF DEFENSE BACKGROUND PAPERS, *supra* note 19, at 6.
[364] Jennifer Wright, *Military Life Vs. Civilian Life: Advantages and Disadvantages*, YAHOO VOICES, May 3, 2008, http://voices.yahoo.com/military-life-vs-civilian-life-advantages-disadvantages-1404623.html?cat=9.
[365] Novak, *supra* note 10.
[366] DEF. BUS. BD., *supra* note 5, at 12–13, 15; KORB ET AL., *supra* note 15, at 36.

impossible in the military. Civilians take for granted that they can quit their jobs today and travel the world; in the military, that would be considered AWOL, or absence without leave. While those things may seem minor, military life is not for them. This realization is a major factor why only 19 percent of new recruits will serve long enough to retire in the military.[367]

C. Loss of Spousal Income

The critical issue that most families endure during an extended period of service in the military is handling the family finances through constant relocation. A number of those who oppose the current military retirement system believe it to be overly generous.[368] However, few considers the lost income and, ultimately, the lost retirement income of a spouse who follows the servicemember from location to location as the servicemember pursues a military career, as part of the compensation package.[369]

More than half of all active duty personnel are married.[370] Military spouses[371] are ten times more likely to move across state lines than their civilian counterparts.[372] Typically, a military family will stay on a military installation between one to three years.[373] If a family averages two and one-half years per location, then the typical military member would move an average of eight times during a twenty-year period. Consider the fact that on average a working military spouse loses six to nine months of employment per relocation.[374] Thus, a spouse may lose

---

[367] 2010 VALUATION OF THE MILITARY RETIREMENT SYSTEM, *supra* note 130, at 24.
[368] HENNING, *supra* note 30, at 19.
[369] *See* JAMES HOSEK ET AL., RAND NAT'L DEF. RESEARCH INST., MARRIED TO THE MILITARY 1 (2002).
[370] U.S. DEP'T OF TREASURY & U.S. DEP'T OF DEFENSE, SUPPORTING OUR MILITARY FAMILIES: BEST PRACTICES FOR STREAMLINING OCCUPATIONAL LICENSING ACROSS STATES LINES 6 (Feb. 2012) [hereinafter SUPPORTING MILITARY FAMILIES].
[371] *See id.* (noting that 95 percent of military spouses are woman).
[372] *Id.* at 7.
[373] REPORT BY THE U.S. CONGRESS JOINT ECONOMIC COMMITTEE CHAIRMAN'S STAFF, STRENGTHENING MILITARY HOUSEHOLDS BY DECREASING THE BARRIERS TO WORK 2 (Aug. 2012) [hereinafter STRENGTHENING MILITARY HOUSEHOLDS].
[374] Letter from Mark B. Souci, Office of the Deputy Assistant Sec'y of Def. (Military Cmty. and Family Policy) to Idaho State Legislature-House Veterans Affairs Committee (Aug. 30, 2012) [hereinafter Souci Memorandum], *available at* http://www.leg.state.or.us/committees/exhib2web/2011interim/HVETS/09122012meetingmaterials/DSLO%20Letter%20to%20OR%20House%20VACmtAug12.pdf. Major Adam W. Kersey, *Ticket to*

one-third of her working time being unemployed at each duty station.[375] Over a twenty-year period, that equates to four to six years of lost income, not to mention the loss of retirement income and the difficulty spouses have in finding employment overseas or while their military spouses are deployed.

The frequent moves required of military families interferes with the military spouse's and the family's ability to save toward retirement. If a spouse averages between two to three years at each location, that spouse will seldom stay long enough to vest into a 401(k) matching contribution system that requires three or more years of employment, and will likely never vest in any retirement pension system that requires a minimum of five years of service.[376] Moreover, the average company requires a worker to be employed with the company between nine to twelve months before becoming eligible to contribute to a 401(k) plan.[377] This is assuming that a spouse who moves every two to three years will be able to find a job once the family has settled into the new area. It also assumes that an employer will take on the risk of hiring someone who could move only a few months after being fully trained and proficient at a new job.[378] Melissa Rothenburg, a pediatric nurse and military spouse who moved from Washington, D.C., to California said, "I didn't want to say that I was military, even though I'm very proud, just because a lot of people don't want to hire somebody who's only going to stay for two or three years."[379]

Ride: Standardizing Licensure Portability for the Military Spouse, 218 MIL. L. REV. 115 (2013).

[375] *Id.*

[376] Also consider the scarcity of those pension plans being available and the chances of working toward a pension from an organization that offers such a plan dwindles even more.

[377] Hilery Z. Simpson, *How Does Your 401(k) Match Up?*, BUREAU OF LAB. STATISTICS, U.S. DEP'T OF LAB., May 26, 2010, http://www.bls.gov/opub/cwc/cm20100520ar01p1.htm.

[378] *See generally* GREENTREE ET AL., *supra* note 345, at 33 (noting "One common theme is that employers frequently hesitate or even resist hiring military spouses due to the likelihood that they will move within two to four years").

[379] Neil Demause, *Move. Certify. Repeat.*, USAA MAG. 17 (Winter 2012). Even where the spouse was able to find a job at their new location, that spouse may have to take a pay cut or take on a job where there are no retirement benefits. In 2010, the unemployment rate for military wives was 50 percent compared to just over seven percent for civilian wives. STRENGTHENING MILITARY HOUSEHOLDS, *supra* note 373, at 3. Frequent moves make it difficult for military spouses to build their careers, and makes building seniority almost impossible. *See id.* at 2.

D. Retirement Compensation as Supplemental Income

During the 1950s and 1960s, having the servicemember as the sole breadwinner in the family was a sufficient way of carving out a living for most military members.[380] The cost of living in the 1950s was far less than it is today and retired servicemembers could possibly survive with their retirement check. Today that is a different story. For a majority of retired servicemembers, finding employment during the "second-phase" of their lives is absolutely necessary to adequately provide for their family.[381]

Wages have remained stagnant over the past twenty or more years[382] and American families have coped with the decline in income by relying heavily on both spouses working.[383] The military family is no different. In fact, "many military families rely on two incomes to maintain financial stability."[384] But when you consider that for a majority of a servicemember's military career that their spouse will likely suffer long periods of unemployment and thus an inability to save for retirement, you begin to see that the retirement income is just compensation for the many years of lost income (unemployed or underemployed) endured during the twenty or more years of military service. By taking away the immediate annuity as an option, critics will force families to consider whether having one primary wage earner, who will be responsible for saving for retirement for both spouses, saving toward their children college education, a down payment on a home, or other items of interest, will be the right move financially. Perhaps one of the reasons why so many servicemembers decide to leave after reaching the twenty-year mark is because they can now stop, get a regular job, have their spouses work alongside them so that they can start "getting ahead."[385]

---

[380] *Id.*
[381] *See* HENNING, *supra* note 30, at 20.
[382] Annalyn Censky, *How the Middle Class Became the Underclass*, CNNMONEY, Feb. 16, 2011, http://money.cnn.com/2011/02/16/news/economy/middle_class/index.htm; Ray Sanchez, *Will Middle Class America Ever See a Real Raise Again?*, ABCNEWS, Aug. 6, 2010, http://abcnews.go.com/Business/strangling-middle-class-america/story?id=11325933&page=2.
[383] *See* STRENGTHENING MILITARY HOUSEHOLDS, *supra* note 373, at 2.
[384] *Id.*; SUPPORTING MILITARY FAMILIES, *supra* note 370, at 6.
[385] Getting ahead means using the retirement income, servicemember's new job, and the spouse's job to save towards buying a new home, saving for college, and preparing financially for retirement. It is important to remember that for a servicemember retiring after twenty years of service, her retirement pay is slightly more than a third of her active duty income. MILITARY RETIREMENT FUND AUDIT, *supra* note 6, at 11. Retiring

Most critics of the retirement system point out that servicemembers tend to leave the services upon reaching the twenty-year mark. They underscore that 76 percent of servicemembers leave the service between twenty and twenty-five years.[386] What they fail to realize is that after more than twenty years of hardship and sacrifice, most servicemembers and family members are worn down and exhausted.[387] Family members are also tired of moving every few years; kids are tired of leaving their friends and making new friends;[388] parents start to think of places where they want to settle so that their children can have a stable high school experience and set up residency so that their kids can apply for in-state tuition for colleges; and the thought of yet another deployment also looms in the back of their minds. All those issues, coupled with the military's spouse ability to continue a career, play a factor in deciding whether to leave the military.

The military is incomparable to any institution in the private sector and as such deserves a retirement system that is different from what is available to the general public or the federal civilian workforce. An immediate annuity upon retirement provides both financial security and adequately rewards those who endure a life-long commitment to the nation—doing the job that very few have chosen. The twenty-year retirement date is an important milestone that honors those who have served and those who have fallen while serving the country. Make no mistake, however, there should be revisions to the system to make it fairer to those who serve fewer than twenty years, while maintaining the twenty-year vesting of an immediate annuity for those who have persevered.

Additionally, such a plan should incentivize mid-level enlisted members and officers to remain in the service between years ten and

---

Ssrvicemembers may find it difficult to find a job that pays them as much as they received in the latter stages of their military career when factoring in the tax advantages of the housing and food allowances.

[386] KORB ET AL., *supra* note 15, at 35.

[387] *See generally* Robert L. Goldich, *A Few Words About Military Retirement 'Reform' and Social Class in America*, FOREIGN POL., Sept. 6, 2011, http://ricks.foreignpolicy.com/posts/2011/09/06/a_few_words_about_military_retirement_reform_and_social_class_in_america.

[388] *See generally* GREENTREE ET AL., *supra* note 345, at 14 (citing CTR. FOR NAVAL ANALYSIS (CNA), *Educational Experiences of Military Children Presentation, Workshop on the Scientific Study of Military Children* (Nov. 16, 2011) (noting that on average military children transfer schools between six and nine times during primary and secondary educational years).

twenty, and once they have reached twenty years, reward them with additional incentives to remain for an additional five to ten years. Incentivizing servicemembers to remain in the service beyond twenty years would decrease the talent drain that occurs once a member has reached the twenty-year milestone and now can start their second careers.[389] These requirements set up the backdrop on how to properly judge the past proposals from 2005 to 2012.

VIII. Past Proposals to Reform the Military Retirement System

From the First Quadrennial Review of Military Compensation (1st QRMC) that took place from 1967 to 1969, presidential and congressionally authorized commissions, DoD reviews, and independent research studies have called for substantial changes to the military retirement system. Between 1967 and 2000, the majority of those studies focused on two main ideas: eradicating the inequality inherent in the retirement system by allowing servicemembers to vest into the retirement system after ten years of service coupled by delaying payouts until sometime after age sixty as a way to lower cost.[390] The analysis in this section focuses on the most prominent reports that have tackled the issue of military retirement reform over the past eight years. Starting with the Defense Advisory Committee on Military Compensation (DACMC) in 2005, and ending with the CAP, most major reviews of the military retirement system have recommended moving from the current system of a defined benefit plan to a 401(k)-style system. Specific recommendations from these reports are tabulated at Appendix C as a comparison guide.

A. The Defense Advisory Committee on Military Compensation

On March 14, 2005, then-Secretary of Defense Donald H. Rumsfeld chartered the Defense Advisory Committee on Military Compensation (DACMC) to identify ways to balance the military pay and benefits while sustaining recruitment and retention of highly qualified

---

[389] *See* MOMENT OF TRUTH PROJECT, *supra* note 55, at 6.
[390] 10TH QRMC, *supra* note 14, at 20; HUDSON, *supra* note 77, at 4-8.

servicemembers, as well as suggested improvements on cost-efficiency and a ready military force.[391]

Admiral Donald L. Pilling, U.S. Navy (Retired), headed the committee. The Committee noted the same criticisms described in Part IV of this article, mainly that the system is inefficient, inflexible, and unfair to the majority of servicemembers who do not retire.[392] The Committee highlighted three main changes that would address the issues plaguing the current system: (1) early vesting of some components within the system; (2) lesser compensation during the "second career" phase, but increasing compensation once the servicemember has fully withdrawn from the labor force; and (3) greater flexibility in managing the force.[393]

Based on the criticism of the system and the suggested changes, the Committee made several recommendations. First, early vesting of government contributions to the Thrift Savings Plan (TSP) no later than the ten-year mark, but not sooner than the fifth year. Second, a defined benefit pension that would begin at age sixty, and would also vest at the tenth year.[394] At age sixty the servicemember would receive an annuity similar to the High-3 formula, and would allow servicemembers to receive 100 percent of their basic pay after serving for forty years.[395] Providing the annuity starting at age sixty also aligned the active duty retirement system with that of the Reserve retirement system.[396] Third, the Committee concluded that the lifetime annuity provided a large amount in deferred compensation that could be rectified by giving servicemembers either separation pay or transition pay at certain points of their career, or additional pay at key years of service milestones—at

---

[391] REPORT OF THE DEF. ADVISORY COMM. ON MILITARY COMP., THE MILITARY COMPENSATION SYSTEM: COMPLETING THE TRANSITION TO AN ALL-VOLUNTEER FORCE app. F, at 137 (Apr. 2006) [hereinafter DACMC].

[392] *Id.* at 22. Each review, report, or study has highlighted the same issues and thus will not be discussed in this part of the article. This section of the article deals with the recommendations from each of the reports.

[393] *Id.* at 27.

[394] *Id.* at 34–35.

[395] *Id*. This is similar to the legislation that was passed as part of the FY2007 defense budget that extended the basic pay tables to forty years and allowed senior officers and enlisted members to serve beyond forty years. The key difference with the Defense Advisory Committee on Military Compensation (DACMC) recommendation is that it would allow fewer senior servicemembers to serve beyond thirty years and would require changes to the "up and out" force management style. *Id.*

[396] *Id.* at 33.

10-, 15-, 20-, 25- and 30-year marks.[397] As a result of the Committee's recommendations, the twenty-year immediate annuity would be abolished.[398] Lastly, the Committee noted that the first two recommendations would be consistent across all the services while the separation and transition pay would allow each service to tailor them for greater flexibility and management needs.[399]

By providing separation pay and transition pay at different stages of the servicemembers' careers, the Committee hoped that those payments would result in the DoD being able to separate servicemembers more efficiently between the ten- to twenty-year mark and provide greater incentives for servicemembers to serve beyond the twenty-year mark.[400] The Committee also believed that their system would save money by abolishing the twenty-year immediate annuity which would free funds to pay for the TSP matching contributions, gate pay, and separation pay.[401] Finally, the Committee recommended that current servicemembers be grandfathered in to the current system or be allowed to transition into their proposal, provided servicemembers agree to an additional service obligation.[402]

B. 10th Quadrennial Review of Military Compensation

In August 2005, President George W. Bush commissioned the tenth Quadrennial Review of Military Compensation (10th QRMC). Brigadier General Jan D. (Denny) Eakle, U.S. Air Force (Retired), headed the review and formed a senior advisory board and two working groups that focused on compensation and health professionals.[403] The Compensation Working Group that focused on making recommendations about the military retirement system included twenty-six members, representing all the services, the office of the Secretary of Defense, and the Joint Staff.[404] As a starting point for its analysis, the 10th QRMC evaluated the DACMC's conclusions and "carefully considered each of its

[397] *Id.* at 24, 35.
[398] *Id.* at 31.
[399] *Id.* at 35.
[400] *Id.* at 35–36.
[401] *Id.* at 31.
[402] *Id.* at 36.
[403] HENNING, *supra* note 30, at 11.
[404] *Id.* at 11–12.

recommendations for change."[405] Further, the working group used previous reports, starting with the 1st QRMC through the DACMC, as a foundation for its own analysis.[406] The 10th QRMC submitted the final portion of its report in July 2008.[407]

1. Defined Benefit and Defined Contribution Plan

The 10th QRMC believed that its recommendations would result in a more flexible, equitable, and efficient retirement system.[408] To that end, they recommended earlier vesting of the defined benefit plan, but delaying when servicemembers could receive payment. The defined benefit plan would be the same as the current High-3 system but would vest at ten years of service and not be payable until age sixty for those who retired with fewer than twenty years of service or at age fifty-seven for those with twenty or more years of service.[409] Retirees could opt to receive the retirement annuity immediately upon retirement but the annuity would be reduced by five percent for each year under age fifty-seven.[410] Using 2013 pay figures, an O-5 with twenty years of service who retires at age forty-five and makes the decision to receive an immediate annuity would be penalized by having his annuity reduced by 60 percent (12 YRS X 5%) and would receive $18,845 per year.[411] In contrast, that same retiree would receive $47,112 under the High-3 system.[412]

The reduced annuity is an even worse proposition for enlisted members who tend to retire, on average, between the age of thirty-eight and forty. An E-7 enlisted member who retires at age forty would have his annuity reduced by 85 percent and receive $3,724; such a result should shock the conscience.[413] In contrast, that same retiree would receive $24,828 under the High-3 system.[414] However, the 10th QRMC

---

405 10TH QRMC, *supra* note 14, at x.
406 *Id.* at 19.
407 HENNING, *supra* note 30, at 12.
408 10TH QRMC, *supra* note 14, at 7.
409 *Id.* at 28–29.
410 *Id.* at 29. *See* ISAACS, *supra* note 315, at 4 (reducing retirement benefits by a multiple of 5 percent is similar to the reduced benefits offered to federal employees who retire without the proper combination of the minimum retirement age and years of service).
411 *2013 Retirement Pay*, *supra* note 70, at 23.
412 *Id.*
413 *Id.*
414 *Id.*

recommended providing separation pay to retirees who serve at least twenty years of service.

The 10th QRMC also recommended government contributions of up to five percent into the servicemember's TSP.[415] The contribution would start at two percent for those with two years of service and increase incrementally until it reached five percent for those with five or more years of service. This plan would also vest at ten years of service and begin payout at age sixty.[416] The defined benefit and defined contributions plans would be standard across the services.

2. Gate Pay and Separation Pay

The next two items recommended by the 10th QRMC—gate pay and separation pay, both current compensation incentives—would be left to the Services to fashion as a way to enhance force management flexibility and efficiency.[417] Gate pay is like a bonus paid to a servicemember as she reaches specified years-of-service milestones. Payments would be made regardless of whether the servicemember decides to leave the service after reaching the milestone.[418] Servicemembers would also be eligible for separation pay either as a form of incentive to leave the service or as a reward for serving more than twenty years.[419] The Services would determine whether their particular organizations would provide one or both to their servicemembers. Separation Pay would be calculated in the following manner: monthly basic pay multiplied by years of service and a (undetermined) multiplier.[420] The QRMC noted, "The years of service necessary to qualify for these pays—as well as pay amounts—would depend on retention patterns and force-shaping needs of the individual services. It is expected, therefore, that the requirements

---

[415] 10TH QRMC, *supra* note 14, at 29.
[416] *Id.*
[417] *Id.* at 30.
[418] *Id.* at 29.
[419] *Id.* at 31. Currently, servicemembers who are discharged involuntarily under 10 U.S.C. § 1174 for failing to be promoted, substandard performance, misconduct, or for the good of the service may receive separation pay in the following manner: "ten percent of the product of the member's years of active service and 12 times terminal monthly basic pay or 50 percent of that amount, as determined by the Secretary of the member's military department." 2011 DEPARTMENT OF DEFENSE BACKGROUND PAPERS, *supra* note 261, at 653 (citing 1991 National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, § 501(b), 104 Stat. 1549-1550 (1990)).
[420] 10TH QRMC, *supra* note 14, at 29.

would vary across the services and by occupation."[421] However, for the system of gate and separation pays to work effectively, the services would have to learn and be willing to adjust how they use them as a tool to manage the force.

As an example of how the services could manage gate pay and separation pay to reach the desired force structure, the 10th QRMC modeled a plan in which servicemembers would receive gate pay at a rate of 40 percent of annual basic pay at years 12, 14, 16, or 18; and separation pay at a rate of 175 percent of monthly basic pay multiplied by years of service, starting after twenty years of service. Based on the 2013 military basic pay chart, an E-6 with twelve years of service would receive $16,777; an E-7 $18,603; an O-3 $29,235; and an O-4 $32,894 in gate pay.[422] Similarly, the same group, after being promoted to the next rank, would receive the following in separation pay after twenty years of service (175% of monthly basic pay x 20): E-7 $151,494; E-8 $169,670; O-4 $254,930; O-5 $291,858.[423]

Despite the separation pay, servicemembers would earn less under the 10th QRMC than they would under the High-3 system. For example, an E-7 with twenty years of service who retires at age forty would receive $151,494 in separation pay and either opt to receive the reduced annuity and be penalized by losing 85 percent and receive just $3,724, or simply wait until age fifty-seven and receive the full amount of $24,828 (likely more due to inflation).[424] Under the current High-3 system, the same servicemember would receive $24,828 after retiring, and something slightly higher due to COLA adjustments every year thereafter.[425] Without adjusting for COLA, by age fifty-seven, that same servicemember would have received $422,076, a difference of $270,582 when compared to simply receiving the separation pay under the 10th QRMC.[426] As illustrated in Appendix D, the QRMC proposal would drastically reduce what a servicemember would receive as total

---

[421] *Id.* at 30.

[422] *Defense Finance and Accounting Services, Military Pay Tables 1949–2013*, DFAS.MIL, http://www.dfas.mil/militarymembers/payentitlements/militarypaytables.html (last visited Feb. 7, 2014) [hereinafter *Military Pay Tables*]; *2013 Retirement Pay*, *supra* note 70, at 14.

[423] *2013 Retirement Pay*, *supra* note 70, at 14; *Military Pay Tables*, *supra* note 422.

[424] *2013 Retirement Pay*, *supra* note 70 at 14, 23; *Military Pay Tables*, *supra* note 422.

[425] *2013 Retirement Pay*, *supra* note 70, at 23.

[426] *Id.* at 14, 23; *Military Pay Tables*, *supra* note 422. The difference is $207,274, if the servicemember opts to receive the reduced annuity for the next seventeen years.

compensation post retirement when compared to the current High-3 system.

3. The Personal Discount Rate and the Impact on Retirement Compensation

A driving factor in the 10th QRMC's analysis of gate and separation pay is the belief that military members value current compensation in the form of bonuses and basic pay more than deferred compensation, even where they would receive more at a later time.[427] This process is referred to as the "personal discount rate," that is, "the rate at which individuals or organizations, such as the government, compare the value and cost of money over time. *For individuals, it is the rate at which they are willing to trade current dollars for future dollars.*"[428] The 10th QRMC provided an example where an individual with a discount rate of 15 percent would choose to receive $100 today rather than wait a year from now and receive $115.[429]

Conversely, someone with a discount rate of less than 50 percent would choose to wait a year and receive the $115. This theory is a driving force in the 10th QRMC's decision to provide separation pay and gate pay at a rate that is anywhere from 15 percent to 40 percent of what servicemembers would receive had they received the deferred amount at retirement. Thus, the 10th QRMC concludes that servicemembers would be happy to take the gate pay and separation pay because they value the cash on hand more than the deferred retirement benefit, which would cost the government substantially more.[430]

The discount rate theory explains why so many servicemembers jumped at the opportunity to get the $30,000 bonus that was offered as part of Redux when it was first introduced in 1999. But more tellingly, the discount rate also explains why servicemembers continue to take the bonus today, though the numbers have shrunk considerably, despite the bonus's declining dollar value and available information explaining why taking the bonus is not the best move financially.[431] Moreover, although

---

[427] 10TH QRMC, *supra* note 14, at 17.
[428] *Id.* (emphasis added).
[429] *Id.*
[430] *Id.* at 17–18.
[431] HENNING, *supra* note 30, at 5, 9.

not explicitly stated in the Defense Business Board's analysis, the personal discount rate also explains the drive to give servicemembers a 16.5% contribution rate as compensation to be used in the TSP. Younger servicemembers tend to value the cash on hand (16.5%) more than what they would have received twenty years down the road.[432]

Lastly, the 10th QRMC believes that the active and Reserve components should receive the same type of retirement benefits. The logic behind providing the same retirement system for both active and Reserve component servicemembers stems from the viewpoint that the Reserve component deployed more frequently to Afghanistan and Iraq and had taken on more of an operational role than originally envisioned.[433]

Despite its thoroughness in reviewing past proposals and modeling aspects of the proposals to see how each would impact force retention and management, the 10th QRMC failed to answer some basic questions. First, the report does not make clear whether current servicemembers would be grandfathered in to the current system.[434] Next, the report does not address the cost impact of COLA in the current system and how its proposals would lower cost. Lastly, the 10th QRMC does not explain whether retirees who wait to receive their pay at age fifty-seven or become eligible at sixty-two would be paid based on their monthly basic pay at the time of retirement/left the service, or based on the pay scale at the time they begin receiving their annuity—the difference in pay is substantial.[435] Nonetheless, as a credit to the 10th QRMC, they recommend that the DoD conduct a multiyear demonstration project of their proposals to see the impact on force structure, retention, recruitment, vesting, and cost before implementing the new system fully.[436]

---

[432] 10TH QRMC, *supra* note 14, at 17–19.
[433] *Id.* at 14, 30; HENNING, *supra* note 30, at 12.
[434] *But see* HENNING, *supra* note 30, at 13 (noting that current servicemembers would be grandfathered).
[435] *See* 10TH QRMC, *supra* note 14, at 10. The 10th QRMC notes that under the Reserve retirement system, Reservist receive their retired pay based on the pay table in effect at the time the retired pay begins. *Id.*
[436] *Id.* at 38.

C. Debt Reduction Task Force

On January 25, 2010, the Bipartisan Policy Center established the Debt Reduction Task Force and asked former chairman of the Senate Budget Committee Pete V. Domenici and Dr. Alice M. Rivlin, Senior Fellow at the Brookings Institute and former Vice Chair of the Federal Reserve Board, to head the Task Force.[437] The goal of the Task Force was to "develop a long-term plan to reduce the debt and place our nation on a sustainable fiscal path."[438] One of the many issues that the Task Force analyzed was reforming the military retirement system.

The Task Force proposed a gradual shift of the current military system into one modeled after the Federal Employees Retirement system (FERS).[439] Under FERS, federal employees receive a defined benefit plan pension and a defined contribution plan with government match. The Task Force recommended that servicemembers with more than fifteen years of service be grandfathered in to the current system. All other servicemembers would transition in to the new system. Moreover, servicemembers would vest in the pension system after ten years of service. Servicemembers with twenty or more years of service could receive their benefits starting at age fifty-seven.[440] Mr. Henning notes that the Task Force "would retain a defined benefit equal to 2.5 percent times years of service but the pay base would be High-5 rather than High-3." [441] The Task Force also suggested making modest changes to the way COLA is calculated by using the Consumer Price Index for All Urban Workers (CPI-U) rather than the current method of using the Consumer Price Index for Urban Wage Earners (CPI-W).[442] The Task Force estimated that from 2020 to 2040, this new system, excluding the changes made to COLA, would save $131 billion.[443] Finally, the Task Force recommended an increase in current pay and separation pay to incentivize servicemembers to remain in the service.[444]

---

[437] DOMENICI, *supra* note 336, at 2–3.
[438] *Id.* at 2.
[439] *Id.* at 112.
[440] *Id.*
[441] HENNING 2011, *supra* note 30, at 16–17. *See* DOMENICI, *supra* note 336, at 111.
[442] DOMENICI, *supra* note 336, at 118. CPI-U is also referred to as the "chain-weighted CPI. *Id.*
[443] *Id.* at 112.
[444] *Id.*

D. Defense Business Board

The Secretary of Defense, under the provision of the Federal Advisory Committee Act (FACA) of 1972, established the Defense Business Board (the Board) to provide independent advice and recommendations on critical matters concerning the DoD.[445] In May 2010, Secretary of Defense, Robert M. Gates, asked the Board to recommend ways to modernize the military retirement system.[446] In response to the Secretary's request, the Board established a Task Group to assess the military retirement system, and develop potential alternatives with the dual purpose of remaining fiscally sustainable while recruiting and retaining the highest performing personnel required for our Nation's defense. The Task Group reviewed past studies and recommendations from both the private and government sectors on the military retirement system over the past thirty years.[447] The Board approved the Task Group's findings and recommendations on July 21, 2011.

1. Recommendations

Under the Board's new system, the immediate annuity after twenty years of service would be abolished. In its place, the board recommended that the DoD establish a defined contribution plan for all servicemembers modeled after the TSP. The government would contribute an amount at a rate to support retention and force structure. The Task Group believed that contribution should be at a percentage level comparable to the highest end of the private sector pension plans.[448] While the Board did not pick a specific rate amount, they used 16 percent of annual base pay for modeling purposes. They contended that 16 percent represented twice the amount of annual contribution in the private sector. Servicemembers could also contribute to the same account. Upon leaving the military, servicemembers could transfer their account out of the TSP.[449]

---

445 *The Defense Business Board Charter*, DBB.DEFENSE.GOV, http://dbb.defense.gov/charters.shtml (last visited Jan. 10, 2013). The Board is made up of twenty-five members from the private sector who are experienced in leading Fortune 500 companies. *Id.* Federal Advisory Committee Act of 1972, Pub. L. NO. 92-463, 86 Stat. 770 (1972)/

446 DEF. BUS. BD., *supra* note 5, tab A.

447 *Id.* at 1.

448 *Id.* tab C, at 13.

449 *Id.* at 5.

The Board pointed out that the services should be able to set different contributions limit based on the needs of the services to shape the force. For example, deployed service-members or servicemembers within certain career fields could receive a higher contribution amount.[450] The Task Group found that the current system does very little to reward those who take on high-risk situations such as combat duty, hardship tours, or separation from family).[451] Similar to the 10th QRMC, this new defined contribution plan would apply equally to the active and reserve component.

The Board did not make specific recommendations as to vesting and payout dates but suggested that a servicemembers could vest upon completing their first service obligation and could withdraw funds at age sixty, sixty-two, or sixty-five. The plan could allow for partial withdrawals or loans to cover education, healthcare, or other specified unplanned events or emergencies. To transition servicemembers out of the military, the Board recommended separation pay for those servicemembers eligible for retirement.[452] However, the Board failed to define "retirement." Finally, the Board did not make specific recommendations as to whether current troops should be grandfathered in to the current system or transferred to the new system.[453] They did note, however, that a rapid transition to the new system would save the government the most money.[454]

2. Cost Savings

The government would save a substantial amount under the Board's proposal. The difference between the amount that a servicemember would receive over forty years under the High-3 system and what the government contributes over a twenty-year period is the amount that the government saves from the retirement system. Under the Board's proposal and if all current servicemembers transitioned into the new

---

[450] *Id.* tab C, at 12.

[451] *Id.* tab C, at 7. Arnold Punaro, a senior Defense Business Board member and retired U.S. Marine Corps Major General, told board members the current system "encourages our military [members] to leave at 20 years when they are most productive and experienced, and then pays them and their families and their survivors for another 40 years." Novak, *supra* note 10.

[452] DEF. BUS. BD., *supra* note 5, at 5.

[453] *Id.* at 6.

[454] *Id.* tab C, at 14–15.

plan, the government could save between $200 and $300 billion by FY2034.[455]

Lastly, the Board believed that the retirement system would create a more effective way for leaders to shape the force. They maintained that mid-career servicemembers between years ten and twenty would leave voluntarily or would be involuntarily separated without the services having to provide separation pay because the new system would provide sufficient funds to compensate them.[456] Granted, the current separation pay package for early retirement is more like a severance package.

E. Center for American Progress[457]

The CAP modeled their recommendations after the work of the 10th QRMC and the Defense Business Board.[458] They believed that the DoD would manage the troops more efficiently and lower cost more effectively if it transitioned to a 401(k)-style system as recommended by the Board.[459]

---

455 *See* Tilghman, *supra* note 9; Carmen Gentile & Gregg Zoroya, *Proposed Changes in Military Benefits Worry Troops*, USA TODAY, Sep. 8, 2011, http://www//usatoday 30.usatoday.com/news/military/story/2011-09-07/Proposed-changes-in-military-benefits-have-troops-worried/50305324/1. The Board does not provide an estimate for total savings; however, they do project that the Military Retirement Trust fund liability would decrease from $2,720.3 trillion to $1,800 trillion. On the one hand, Mr. Tilghman notes in his article that the plan would save $300 billion over ten years. Tilghman, *supra* note 9. On the other hand, Ms. Gentile projects savings of $250 billion over twenty years. Gentile & Zoroya, *supra*. It is fair to say that the amount will be substantial. Appendices F & G provide tables to illustrate the different contribution amounts for both an enlisted and officer member over a twenty-year period. An E-7 who retires at age thirty-eight after twenty years of service would earn $993,120 over a forty-year period. Under the Board's plan and assuming a 16.5% contribution, the government would only contribute $125,085. The difference of $868,034 is what the government saves over the lifetime of one servicemember.

456 DEF. BUS. BD., *supra* note 5, tab C.

457 *See Center for American Progress*, AMERICANPROGRESS.ORG, http://www.american progress.org /about/mission/ (last visited Feb. 6, 2014). The Center for American Progress describes itself as a "nonpartisan research and educational institute dedicated to promoting a strong, just, and free America that ensures opportunity for all." *Id.* Its stated goal is to find "progressive and pragmatic solutions to significant domestic and international problems and develop policy proposals." *Id.*

458 *Id.* at 29.

459 *Id.* at 36.

After adopting the Board's recommendations, the CAP added the following items. The CAP recommended that the government contribute 16 percent, as the starting point, of each servicemember's base pay to the new TSP retirement account. Servicemembers would be vested in the new system sometime between three and five years. Their benefits would become payable between ages 60 and 65.[460] The CAP also supported the proposal that servicemembers who are on hardship tours, in combat, or in certain specialties receive an increase in their government match.[461] The CAP further recommended, similar to the 10th QRMC, that the DoD institute compensation incentives such as gate pay and separation pay to assist with force shaping.[462]

The CAP advocated a gradual shift to the new system. Servicemembers with more than ten years of service would have the option to transition to the new system or remain under the old system. Servicemembers with fewer than ten years of service would have the option of transitioning to the new system or vest at ten years into a transitional system that would provide them with an annuity worth 40 percent of their base pay, at twenty years of service, payable upon reaching the age of sixty.[463] Upon leaving the military, servicemembers could transfer their TSP accounts to the private sector, and their benefits would become payable between ages sixty and sixty-five.[464]

With a new system, the CAP notes that Congress might decide to grandfather the current troops in to the old system. However, such a move, the CAP believed, would ensure that a vast majority of them would exit the military with no retirement system, since 83 percent of troops end up with no retirement benefits under the old system.[465] Therefore, they advocate that the DoD transition troops based on their recommendation.[466] The CAP believed that implementing their proposals would enable annual savings of up to $13 billion in the near term and as much as $70 billion annually by the mid-2030s.[467]

---

[460] *Id.* at 37.
[461] *Id.* at 36.
[462] *Id.* at 29.
[463] *Id.* at 30.
[464] *Id.* at 37.
[465] *Id.* at 38 (citing DEF. BUS. BD., *supra* note 5, at 39).
[466] *Id.* at 39.
[467] *Id.* at 30.

IX. Advantages and Criticism of Past Proposals

The DACMC, 10th QRMC, the Board, and the CAP proposals have several advantages. First, early vesting would ensure that a greater number of servicemembers receive some type of retirement benefit. Setting the vesting date for government contributions in the defined contribution plan (TSP-style plan) at three or five years, as suggested by the Board and the CAP, would bring the military to the standard of the private sector and solve one of the inequality issues that plagues the current system.

Another advantage to the past proposals is the increase in current compensation to servicemembers. Providing servicemembers contributions under the Board's or the CAP's proposals, or matching contributions under the DACMC and the 10th QRMC proposals, would allow troops greater current compensation, albeit towards their eventual retirement.

The DACMC and the 10th QRMC proposals to allow servicemembers to vest into a defined benefit plan after ten years of service is also a major improvement. Most servicemembers will want to vest in the defined benefit plan at the three or five-year mark, similar to the defined contribution plan; however, allowing earlier vesting would substantially increase cost without providing any added benefit to the services in retention or force management. While most private sector employees vest in their pension systems at the five-year mark and current law requires all civilians to vest by the seven-year mark,[468] the military is a unique institution that the services should continue to be exempt from an earlier vesting requirement.

Another clear advantage for the government in moving from the current system into a delayed pension or defined contribution plan is overall savings. From the outset, the government would realize a significant decrease in cost of the retirement system if Congress implemented the Board's defined contribution plan immediately. Grandfathering some and transitioning others, as the CAP suggests, would still lead to significant savings. On the other hand, the 10th QRMC and the DACMC plans would result in moderate savings,

---

[468] *Id.* at 13; Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (1974).

particularly if separation pay and gate pay were instituted as part of the new system.

Despite these advantages, particularly cost savings, the disadvantages of the plans far outweigh their benefits.[469] If the proposals above were to be implemented, the services would find it difficult to recruit and retain qualified individuals; servicemembers would lose the immediate annuity, which would lead to mid-career servicemembers leaving the force before they reached fifteen or twenty years; and, military family finances would take a major blow. The crux of the problem has to do with whether abolishing the immediate annuity in exchange for receiving gate pay and separation pay with either (1) higher government contributions towards a defined contribution plan or (2) a delayed pension benefits until age fifty-seven, sixty, or sixty-two is a fair exchange for the sacrifices that servicemembers and their families make. It is very likely that servicemembers would answer with leaving the force.

A. Proposals Benefit Younger Soldiers

With any change to a system, there will likely be those who benefit and those who will not fare as well. Under the Board's or the CAP's proposals, servicemembers who would normally not save toward their retirement, particularly younger troops, would have a substantial advantage over their civilian peers. On the other hand, providing young troops with matching contributions may lead to a fair number not taking advantage of the match because of a variety of reasons—especially financial issues. In the private sector, for example, 30 percent of employees who are eligible to receive a match fail to take full advantage of the opportunity.[470] Nonetheless, under any of the proposals that provide funds toward the TSP, those servicemembers who planned to serve more than three to five years but less than twenty stand to benefit the most.

Particularly younger enlisted servicemembers who have borne the brunt of the two wars and are more likely to leave the service by the end

---

[469] Based on the analysis above, the 10th QRMC proposal provides the best options for servicemembers because of its combination of a defined benefit plan and a defined contribution coupled with gate pays and separation pay as current compensation.
[470] Dugas, *supra* note 189.

of their second term would be the biggest winners.[471] Conversely, the Board's and the CAP's proposals to abolish the immediate annuity would adversely impact officers who on average tend to remain in the service until retirement—49 percent of officers serve until retirement age.[472] Enlisted members, who tend to retire on average five years before officers, would do slightly better than officers under the Board or the CAP's plan, but will still receive less than under the High-3 system.[473]

Though the numbers may appear to be close at first glance, it is important to remember that under the Board or the CAP's plan, servicemembers will lose the income that they would have received between their military retirement date to age sixty-five when they can withdraw the funds without penalty (or age 59 and a half under current Internal Revenue Code-though there are a number of exceptions).[474] Therefore, the O-5 officer would have lost $942,240, and the E-7 enlisted member would have lost $670,356 in retirement income. According to Robert L. Goldich, formerly senior military manpower analyst for the Congressional Research Service, the enlisted member depends far more

---

[471] Andrew Tilghman, *Hatching a New Nest Egg*, ARMYTIMES, Sept. 18, 2011, http://www.armytimes.com/money/retirement/military-retirement-overhaul-091411w/; *see generally* KORB ET AL., *supra* note 15. Under the Board's or the CAP's proposals to provide servicemembers with 16.5% in TSP contributions, an enlisted member who makes it to the E-3 paygrade and then leaves after four or five years will depart the military with about $21,000 in retirement savings, and if properly invested and averaging five percent return yearly, it could grow to more than $170,000 by age sixty-five. *See infra* Appendix E for results and figures. *See also* Tilghman, *supra* note 471 (noting a similar analysis resulting in $100,000 in total investment at sixty-five years old).

[472] MILITARY RETIREMENT FUND AUDIT, *supra* note 6, at 24. For example, an O-5 officer retiring after twenty years of service, at the age of forty-five could receive approximately $942,240 by age sixty-five in retirement benefits under the High-3 system; and would receive approximately $1.9 million after forty years of receiving benefits. *Id.* Under the Board's or the CAP's proposals, assuming 16.5% contributions over a twenty-year period and a five percent investment return, that same officer would receive approximately $400,000 after twenty years, and would have an account valued at $1,130,347.06 when that officer reaches age sixty-five. *See infra* Appendix F (providing results and figures).

[473] Under the High-3 system, an E-7 enlisted member who retires at age thirty-eight with twenty years of service would receive approximately $670,356 by the age of sixty-five. *2013 Retirement Pay*, *supra* note 70, at 23. The estimate is based on the 2013 retirement pay chart and is not adjusted for future inflation. *See* Appendix G. After forty years of retirement benefits, the estimated value is $993,120. Under the Board's or the CAP's proposals, assuming 16.5% contributions over a twenty-year period and a five percent investment return, that same E-7 would have $215,119 after twenty years of service, and $827,481.89 at the age of sixty-five.

[474] I.R.C. § 72 (2012); INTERNAL REVENUE SERV., U.S. DEP'T OF TREASURY, PUB. 590: INDIVIDUAL RETIREMENT ARRANGEMENTS (IRAS) 55–58 (Jan. 2013).

on retirement pay as a supplemental income.[475] Enlisted members tend to earn less than their officer counterparts once they leave the service.

B. Immediate Annuity vs. Thrift Savings Plan Contributions

Servicemembers sacrifice greatly during a twenty-year career, and expect to receive due compensation at the end of their journey. Critics who advocate abolishing the immediate annuity are extolling cost savings measures while shortchanging the future financial security of servicemembers as well as sacrificing the need for professional, career servicemembers. By moving from a defined benefit plan to a defined contribution plan, the government shifts the burden of providing retirement security from the federal government to the individual servicemember.[476] Kevin Wagne, a senior retirement consultant at Towers Watson, argues that the shift from defined benefit plans to defined contributions plans has led to the next generation of retirement-age workers being unable to retire when they would like.[477] The end result of a move to a 401(k)-style system is that servicemembers will be on their own, and ultimately responsible for how much savings they are able to generate by the time they are ready to retire without the safeguard of a steady income in the form of an annuity from the federal government.

Under the Board's or the CAP's plans, there is no way of knowing how much a servicemember will receive after twenty years of service. Under the current retirement system, servicemembers can project what they will receive upon retirement based on their rank and years in service. This new version will depend largely on the performance of the stock market.[478] A servicemember could very well serve twenty years and have very little to show for it because of poor allocation, poor performance in the stock market, improper use of loans, or a combination

---

[475] Robert L. Goldich, *A Few Words About Military Retirement 'Reform' and Social Class in America*, FOREIGN POL'Y, Sept. 6, 2011, http://ricks.foreignpolicy.com/posts/2011/09/06/a_few_words_about_military_retirement_reform_and_social_class_in_america.

[476] *See* Susan J. Stabile, *Is It Time to Admit the Failure of an Employer-Based Pension System?*, 11 LEWIS & CLARK L. REV. 305, 306 (2007).

[477] Brandon, *supra* note 187.

[478] *See* HENNING, *supra* note 30, at 21–22 (citing Robert Hiltonsmith, *Cuts, Fees Can Drain Even the Best Retirement Plans*, POLITICO, Dec. 17, 2010, http://www.politico.com/news/stories/1210/46491.html.

of all the above.[479] Moreover, investors who invested their funds in a Standards and Poors (S&P) 500 fund or similar between 2000 and 2010 saw no real gain during that period.[480] Additionally, it takes fortitude not to pull money out when the stock market tumbles 100, 200, or 500 points during a single session, or perhaps a steady decline over several weeks. By moving from a defined plan to a 401(k)-style plan, the government is divesting itself of any responsibility to provide for those who have provided for the nation over an extended period of time. By choosing such a system, the federal government is asking servicemembers to trust not in them, but in future performances in the stock market. In light of the financial meltdown of 2008, servicemembers might be hesitant to place their trust in such a system. While civilians bear these kinds of risks, the government should not ask servicemembers to share those same risks after endangering their lives on the battlefield.[481]

C. Impact on Retention

To put it bluntly, a move to a 401(k)-style system that abolishes the immediate annuity would annihilate the service's ability to retain mid-career servicemembers—those needed to train and mold young recruits, and lead in fighting the nation's wars.[482] Major David Eastburn, with twelve years in the service, voiced to USA Today what a majority of mid-career servicemembers felt about the Board's proposal: "I love the military, and I love my job, but right now, if the new plan [the Defense Business Board's proposal] goes into place, there is no financial incentive for me to stay in."[483]

---

[479] *See* Robert Schmansky, *A Lost Decade? Not The Case For All Investors,* FORBES, Aug. 21, 2012 http://www.forbes.com/sites/feeonlyplanner/2012/08/21/a-lost-decade-not-the-case-for-all-investors/; Stablile, *supra* note 476, at 312–13.

[480] Schmansky, *supra* note 479. After leaving the TSP system, Servicemembers could also see their savings disappear due to fraudulent, unscrupulous financial planners, or even simple negligence on their part. There will be servicemembers who are savvy enough to handle investing their portfolio; however, there will be some who will fall victim.

[481] *See* ISAACS, *supra* note 315, at 1 (noting "An important difference between the two types of retirement plans is that in a defined benefit plan it is the *employer* who bears the risk, whereas in a defined contribution plan it is the *employee* who bears the financial risk") (emphasis in original).

[482] *See* Tilghman, *supra* note 9.

[483] Gentile & Zoroya, *supra* note 455.

The Pentagon will likely oppose a move to a defined contribution plan. Similar to 1986 when Congress passed Redux, should Congress consider the Board's or the CAP's plans, the services will likely argue that abolishing the immediate annuity would severely hamper the Pentagon's ability to retain high-quality personnel and would significantly denigrate future combat readiness.[484] Moreover, in the mid-1980s, the Fifth QRMC conducted "modeling exercises that showed a decrease in enlisted career force strengths" if there was a switch to a defined contribution retirement package.[485]

Veterans and veteran groups also oppose the Board's plan and will likely oppose the CAP's plan due to their similarities. Retired Vice Admiral Norbert Ryan, president of the Military Officers Association of America, an outspoken retiree group that represents the interest of retired officers, believes that without the option of early retirement, leadership will suffer as mid-career troops leave.[486] Critics of the Board's proposal believe there will be a shortage of troops willing to serve twenty or more years.[487] The American Veterans (AMVETS), and the American Legion (the nation's largest veteran organization with 2.4 million members) also oppose the Board's plans.[488] Although the delayed annuity is slightly better than the Board's option, servicemembers and affiliated groups find it inadequate.

The DACMC and the 10th QRMC proposals of providing a delayed annuity will have a negative impact on retention. If servicemembers had to wait until age fifty-seven or sixty-two to receive their annuity, then there would be less incentive to serve to twenty or thirty years. Mr. Steven P. Strobridge, retired Air Force colonel and Director of Government Relations for the Military Officers Associations of America

---

[484] *See generally* HENNING, *supra* note 30.

[485] Christian, *supra* note 23, at 12 (citing U.S. DEP'T OF DEF., REPORT OF THE FIFTH QUADRENNIAL REVIEW OF MILITARY COMPENSATION, VOLUME I, X-5 (1984)); HUDSON, *supra* note 77, at 9.

[486] Gentile & Zoroya, *supra* note 455; *Pentagon Considering Scrapping Traditional Pensions in its Proposed Retirement Program Overhaul*, FOXNEWS.COM, Aug. 15 2011, http://www.foxnews.com/politics/2011/08/15/pentagon-scraps-traditional-pensions-in-its-proposed-retirement-program/.

[487] Gentile & Zoroya, *supra* note 455.

[488] *Id.* Retired Major General Bob Scales, a military analyst for Fox News, called the proposal "a bad deal." Fishel & Crogan, *supra* note 310. He explained, "We reward those who sacrifice when they're young. And the reward is when they retire, they are given a decent retirement pay to carry them over the time they leave the service, and this of course would just remove that." *Id.*

(MOAA), said, "The whole reason military people are willing to pursue a career is because after 20, 30 years of extraordinary sacrifice, there is a package commensurate with that sacrifice upon leaving service."[489] Delaying retirement benefits until age fifty-seven also means that enlisted members who typically retire between age thirty-eight and forty-three would lose between fourteen and nineteen years of post-retirement income. Officers, who tend to retire between age forty-five and fifty, would lose between seven to twelve years of income. While the proposed separation pay would help cover some of the lost income, the difference is substantial.

Moreover, there is no real incentive for servicemembers to risk their lives an additional ten years for just three years of additional retirement pay based on the DACMC & 10th QRMC proposals. Their proposals suggests that servicemembers who serve ten years or more could vest starting at ten years and receive retirement pay at age sixty. On the other hand, those serving more than twenty years could receive benefits starting at age fifty-seven. However, there is no clear incentive for troops to serve longer than ten years, even considering gate pay and separation pay. Indeed, the plans fail to consider why servicemembers would risk their lives and put their family's future in jeopardy for just three additional years of retirement benefit.[490]

D. Spousal Income & Retention

Spousal employment and the level of retirement compensation play a factor in the DoD's ability to retain qualified and experienced servicemembers. The only thing that separates the military retirement system and the private sector pension system is the ability to retire after twenty years and receive an immediate annuity. If Congress was to take away the immediate annuity, then both systems would be about the same or the military could still be viewed as slightly better. But is "slightly better" enough to make servicemembers serve twenty or thirty years in this type of hazardous profession?[491]

---

[489] Dao & Walsh, *supra* note 9.
[490] Dan, Comment on article by Lisa M. Novak, *Military Retirement System Broken, Board Says*, STARS & STRIPES, Aug. 7, 2010, (Nov. 29, 2010, 7:42 PM), http://www.stripes.com/news/military-retirement-system-broken-board-says-1.113754.
[491] In a survey of military families, 31 percent of respondents listed changes to retirement benefits as their top military family life issue. GREENTREE ET AL., *supra* note 345, at 9.

The issue becomes more problematic when considering the hardship that spouses face with maintaining a career while their military spouses relocate every two to three years. "A major part of a servicemember's decision to stay in the military is whether his or her family is able to thrive in the military setting."[492] More than two-thirds of married service members reported that their decision to re-enlist was largely or moderately affected by their spouses' career prospects.[493] For military families, a change in the retirement system would mean financial upheaval.

Servicemembers will have to weigh the difference in retirement benefits between the private sector (typically 6 to 8% match) with what the Board has proposed (16.5% match) and decide whether the additional eight to ten percent match is worth moving every few years, uprooting their children from their homes and friends, spending countless years away from family members, and the other turmoil that are consistent with military life. A decision to stay in the military oftentimes hinges on the servicemember convincing the spouse that the retirement annuity, after twenty years of service, will be worth the loss in income and wealth that they could have enjoyed in the private sector. It is a trade-off. By moving to a 401(k)-style system or a delayed pension system, a servicemember loses that bargaining chip with the spouse and makes the spouse's demand to leave the military more problematic. It is very likely that some servicemembers will forego the military as a long-term career option thereby robbing the services of valuable and experienced personnel.

E. Criticism of Separation Pay and Gate Pay

Servicemembers should be highly skeptical that promises to provide gate pay and separation pay will ever come to pass if left to the DoD or the Services' discretion. In the past, the DoD has failed to take care of troops by allowing servicemembers' pay levels to fall well below what civilians make in the private sector.[494] In the 1980s and 1990s, the DoD neglected to expend the necessary funds to maintain adequate on-post

---

The survey was conducted soon after the Defense Business Board released its proposals and media coverage was at its peak on the issue of military retirement. *Id.* at 12.

[492] STRENGTHENING MILITARY HOUSEHOLDS, *supra* note 373, at 4.

[493] SUPPORTING MILITARY FAMILIES, *supra* note 370, at 6.

[494] *See* HENNING, *supra* note 30, at 6, 8–9.

housing, resulting in sub-standard housing for servicemembers on many installations.[495] Congress gave the Secretaries of each service the power to grant government-matching contributions in the TSP; however, the majority, if not 100 percent, of servicemembers have not received matching contributions.[496] Even at the height of fighting two wars, retention and recruitment problems plaguing the force, fifteen-month deployments or multiple twelve-month deployments within a three year period, the Services failed to use government matching contributions as a retention, recruitment, or reward tool for servicemembers. The flexibility to mold the force by using these payments could potentially lead to low morale, less trust in the DoD, and less control over the servicemember's financial future.[497] Statistics show that very few servicemembers serve to twenty years, despite the "overly generous" retirement benefits.[498] Changing the retirement structure so radically would mean that fewer still would choose to serve to twenty years, robbing the Services of valuable and experienced servicemembers.[499]

Although the past proposals would reduce cost and solve the inequality issue, they fail to keep faith with the servicemembers and their families for their sacrifices. Part X of this article discusses an alternative plan to the current system and the past proposals. This plan would save the government money while keeping faith with servicemembers and their families.

X. An Alternative Plan[500]

This alternative plan, also referred to as the vesting plan, strikes a balance between being generous enough to be worthy of the sacrifice that servicemembers and their families make during a prolonged commitment

---

[495] LEED, *supra* note 213, at 10–11.
[496] *See* HENNING, *supra* note 30, at 22-23 (citing OFFICE OF THE SEC'Y OF DEF., U.S. DEP'T OF DEF., REPORT TO CONGRESS: COST AND IMPACT ON RECRUITING AND RETENTION OF PROVIDING THRIFT SAVINGS PLAN MATCHING CONTRIBUTIONS (Feb. 2010)).
[497] Freedberg, *supra* note 311.
[498] 10TH QRMC, *supra* note 14, at 12–13.
[499] Dao & Walsh, *supra* note 9. Mr. Korb acknowledges, "When the war in Iraq was in terrible shape, it was hard to get people to join the military, and no one wanted to touch any military benefits." His statement highlights the quandary that Congress faces if they pass the Board's or the CAP's proposals. In the midst of war, it would be the worst time to find out that we no longer have the qualified troops to fight because servicemembers decided to leave due to an inadequate retirement system. *Id.*
[500] *See infra* Appendix H.

to our country, but not so generous that it encourages servicemembers to leave as soon as they are eligible for an immediate annuity.[501] The vesting plan focuses on providing proper compensation, fixing the inequality that forms the cornerstone of the current system, and solving the retention issue that the services experience after a servicemember has reached the twenty-year mark. Moreover, it reduces cost by introducing three new concepts: (1) servicemember contributions; (2) reforming the Military Retirement Fund (MRF) investment structure;[502] and (3) means-testing COLA for servicemembers who retire between years twenty and twenty-nine. Lastly, and the most important feature, this plan retains the twenty-year immediate annuity, albeit at 40 percent rather than the traditional 50 percent.

A. Defined Benefit Plan Details

Servicemembers will be eligible to receive a defined benefit plan and vest at their ten-year mark. With the cost of initial training for enlisted members, educating officers either through the academies, colleges, or universities, and the number of combat arms training and qualifications that servicemembers go through during the first five or six years of their careers, the military needs a longer period of commitment from servicemembers to recoup the cost of accession. As such, the vesting date is set at ten years rather than the traditional five or seven years, as is common in the private sector.[503]

The vesting plan will provide servicemembers different benefits at various stages of their careers. Upon vesting at ten years, a servicemember will be eligible to receive a pension based on his pay at the time of leaving the service and at a rate of 20 percent of her High-3 at age sixty-two. The percentage will increase by 2.5% for every year of service thereafter. At the fifteen-year mark, a servicemember will be eligible to receive 30% of pay, based on his High-3 pay at the time of leaving the service, starting at age fifty-seven. Upon reaching twenty years of service, the servicemember will receive 40 percent of pay upon retirement; twenty-five years will result in 50 percent; thirty years at 75

[501] Freedberg, *supra* note 311.
[502] *See supra* Part V.D.1.
[503] BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, NATIONAL COMPENSATION SURVEY: EMPLOYEE BENEFITS IN PRIVATE INDUSTRY IN THE UNITED STATES 2005, 67 (May 2007); Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (1974).

percent; and forty years at 100 percent.[504] Though servicemembers will be eligible to receive 100 percent of their pay at forty years, the pay will be capped at $200,000 and indexed to inflation. Servicemembers who are sentenced to a bad-conduct discharge or worse, despite being vested, will be ineligible to receive benefits under the defined benefit plan.

1. Servicemember Contributions

The defined benefit aspect of the vesting plan requires servicemembers to contribute five percent of their base pay towards their retirement until their twentieth year in the service. This concept is new in the sense that no one in the past thirty years has suggested that servicemembers contribute to their military retirement.[505] The Hook Commission noted, "No previous retired pay arrangements for members of the Armed Forces have been on the basis of requiring contributions."[506] The Hook Commission considered the idea and dismissed it based on how difficult it would be to manage such a fund.[507] The Commission concluded that the expenses to manage the fund would outweigh any savings from having servicemembers contribute to the fund.[508] However, the 1st QRMC, in 1969, recommended that members contribute 6½ percent of their base pay toward their retirements.[509] Federal employees also contribute to their defined benefit plan, albeit less than one percent for federal employees and less than 1.5% for law enforcement and firefighters.[510] On average, civilians in the private sector contribute far more to their defined benefit plans—sometimes as

---

504 10TH QRMC, *supra*, note 14, at 20. "The [3rd] QRMC also recommended reduced retirement pays for members who retire with fewer than 30 years of service, and a graduated retirement pay multiplier that increased with years of service." *Id.* The benefit structure in the defined benefit plan is somewhat similar to the CSB/Redux; the Defense Advisory Committee on Military Compensation (DACMC); and the 10th QRMC. *See supra* Parts IV.C.–D, IX.A., B.

505 *See* HUDSON, *supra* note 77, at 2.

506 HOOK COMMISSION APPENDIX, *supra* note 25, at 190.

507 HOOK COMMISSION, *supra* note 13, at 39.

508 Christian, *supra* note 23, at 12.

509 10TH QRMC, *supra* note 14, at 20; Christian, *supra* note 23, at 12. *See also* 2005 DEPARTMENT OF DEFENSE BACKGROUND PAPERS, *supra* note 19, at 777-84 (discussing the idea that military pay is lower as a way to pay for the military retirement system, and concluding that military pay has not been lowered).

510 *See supra* Part VII.A.–B; ISAACS, *supra* note 315, at 15–16 (noting recent change in 2012 legislation affecting new hires and rehires with less than five years of service that increases the contribution amount to 3.1 percent for FERS and 3.6 percent for FERS-SRP).

much as 45 percent.[511] A five-percent contribution is a modest amount and will ensure that servicemembers continue to receive a defined benefit plan.

The purpose of the contribution is to lower retirement cost and to have servicemembers share in the sacrifice of putting the United States on a fiscally responsible path. Paying for a benefit is not a foreign concept to military members. Servicemembers pay into the Montgomery GI Bill,[512] Tricare Dental program for dependents,[513] the Servicemembers' Group Life Insurance Program,[514] and for their family life insurance coverage. The servicemembers' contribution will be suspended during deployments, hardship tours, and duties resulting in family separation. This is not an attempt to pay for the federal deficit by forcing servicemembers to take less in retirement and contribute more than they have ever done before. Instead, this is based on the belief of shared sacrifice; that is, everyone takes a bit less and contributes a bit more.[515] By contributing a small amount toward the retirement fund, it ensures the solvency of the system, lessens the burden on taxpayers, and puts the country onto a better financial path.

2. Investing Contributions for Solvency

Congress should pass legislation allowing the MRF to invest funds in higher-yielding equities and bonds.[516] The government has to *invest* funds into the marketplace to ensure growth and sustainability.[517] Today the fund generates its income from a variety of U.S. Treasury-based instruments such as U.S. Treasury Inflation-Protected Securities (TIPS), bills, notes, bonds, and overnight investment certificates.[518] Moreover,

---

[511] *See* KENDALL & KESSLER, *supra* note 195, at 2.
[512] 38 U.S.C. § 3011 (2008).
[513] 10 U.S.C. § 1076a (2011).
[514] 38 U.S.C. § 1969 (2012).
[515] Congress should also consider increasing the amount that current federal employees pay into their defined benefit plan. *See* ISAACS, *supra* note 315, at 16–18 (discussing pending legislation to increase FERS employee contribution amounts).
[516] DEF. BUS. BD., *supra* note 5, at 5.
[517] ISAACS, *supra* note 315, at 14. "Many state and local government pension funds invest in stocks, bonds, mortgages, real estate and other private assets." *Id.* "The Railroad Retirement and Survivors' Improvement Act of 2001, Pub. L. No. 107-90 [115 Stat. 878 (2001)], authorizes the Railroad Retirement Trust Fund to acquire corporate stocks, bonds, and other assets to fund railroad retirement benefits. *Id.* at 14 n.24.
[518] *See* MILITARY RETIREMENT FUND AUDIT, *supra* note 6, at 19.

the income is generated from the U.S. Treasury.[519] The MRF receives oversight from the DoD Investment Board,[520] and sets up investment objectives and policies for the fund.[521] Congress should direct the Investment Board to invest in equities and bonds.

The Investment Board should invest funds from the MRF and servicemember contributions in a diversified portfolio to ensure growth while avoiding steep declines during a market downturn. The Investment Board can invest the funds in the fund family that makes up the TSP.[522]

B. Defined Contribution Plan

The second major benefit of the retirement package is a defined benefit plan. Servicemembers will also receive a government match to their TSP. Between years one and fifteen, servicemembers will be entitled to a five-percent match; from years sixteen to nineteen an eight-percent match; and a five-percent automatic contribution and an eight-percent match starting at their twentieth year. The increase in match

---

519 *See id.* at 15, 19; ISAACS, *supra* note 315, at 14.

> A bond is an I.O.U.—that is, a promise to pay. An I.O.U. received from someone else might be considered an asset, provided that the issuer is willing and able to pay the debt when it is due, but writing an I.O.U. to oneself does not create an asset. This analogy applies to the U.S. Treasury bonds held by the federal government's trust funds: they are I.O.U.s issued by one agency of the U.S. government and held by another agency of the same government. Both the issuer and holder are part of the same entity: the U.S. government.

520 MILITARY RETIREMENT FUND AUDIT, *supra* note 6, at 18. The DoD Investment Board consists of the Defense Finance and Accounting Service Director, the Office of the Under Secretary of Defense (Comptroller) Deputy Chief Financial Officer, and a senior military member.

521 *Id.*

522 *Thrift Savings Plans Fund Comparison Matrix*, TSP.GOV, https://www.tsp.gov/investmentfunds/fundsoverview/comparisonMatrix.shtml (last visited Feb. 8, 2014). The TSP has the G fund (non-marketable U.S. Treasury security); the F fund (government, corporate, and mortgage-backed bonds); C fund (stocks of large and medium-sized U.S. companies); S fund (stocks of small to medium-sized U.S. companies (not included in the C Fund)); I fund (International stocks of 21 developed countries); and the L fund (Invested in the G, F, C, S, and I Funds). *Id.* *See* ISAACS, *supra* note 315, at 7 (citing Thrift Savings Plan Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-314, 3000-372, 3009-374 (1996)).

rewards servicemembers for their longevity and commitment to the country. Servicemembers will vest in their fifth year. Further, the government will provide a ten-percent automatic contribution to servicemembers' TSP accounts during deployments, hardship tours, and duties resulting in family separation—rewarding servicemembers who are at greater risk. Servicemembers who are sentenced to a bad-conduct discharge or worse, despite being vested, will forfeit their government matching and automatic contributions and any gains associated with the contributions.

The defined benefit and defined contribution package will initially increase the cost of the retirement system. However, the collective funds from servicemembers, properly invested, should yield a greater return, which will lower the overall appropriation that Congress will make to cover retirement payments. Additionally, there will likely be a number of servicemembers who contribute toward the pension plan but fail to take advantage of the government match due to a variety of reasons, or voluntarily or involuntarily separate before they can vest, and therefore receive no benefits.

C. Cost of Living Adjustments

Servicemembers will be eligible to receive COLA. Servicemembers who served more than thirty years are eligible to receive COLA upon retiring. Servicemembers who served more than twenty years but less than thirty years are eligible to receive COLA at age fifty-seven. All other servicemembers who have vested in the pension system are eligible to receive COLA at age sixty-two.

The goal of the retirement benefit package is to compensate servicemembers for their sacrifice and the lost income that they experience once they transfer to civilian life. The purpose of COLA is to protect the purchasing power of the annuity from rising inflation.[523] Additionally, under this new plan, COLA will be used as an income supplement to assist servicemembers in transitioning to the private sector. Servicemembers who served twenty or more years are eligible for COLA adjustments if their earned income coupled with their retirement pay does not exceed their Regular Military Compensation

---

[523] HENNING, *supra* note 43, at 2. ISAACS, *supra* note 315, at 6. "COLAs do not raise the real value of income. They merely prevent the real value of income from falling." *Id.*

(RMC)[524] by 25 percent, also taking into account the tax advantages of military pay as part of the calculation.[525] The calculation will be indexed to inflation. An E-7 servicemember who retires at twenty years would have to earn a combined income of less than $107,000 (earned income and retirement income) to be eligible for COLA adjustments.[526]

Delaying yearly COLA adjustments to servicemembers who serve between twenty and twenty-nine years will save a substantial amount. Most retirement-eligible servicemembers retire between twenty and twenty-five years.[527] Thus, the majority of the COLA payments go to them. However, if those servicemembers do not qualify for COLA under the special provision described above, the government will save—and the savings should be substantial.

D. Transition

Troops who are in the military and have served more than three years will be grandfathered in to receive either the High-3 or Redux/CSB. However, current troops who would like to take advantage of the opportunity to vest into a pension benefit at ten years or fifteen years will have to contribute into the defined benefit plan and receive benefits under the High-3, and the two and one-half computation base. The contribution rate toward the pension should be phased in over three

---

[524] The RMC includes monthly basic pay, basic allowance for housing and basic allowance for subsistence. *See supra* Part III.

[525] *Office of the Sec'y of Defense, Military Compensation Tax Exempt Allowances*, MILITARYPAY.DEFENSE.GOV, http://militarypay.defense.gov/pay/tax/01_allowances.html (last visited Feb. 5, 2014).

[526] *See infra* Appendix I. Results are based on the *Office of the Secretary of Defense, Military Compensation Tax exempt allowances Calculator*, MILITARYPAY.DEFENSE.GOV, http://militarypay.defense.gov/mpcalcs/Calculators/RMC.aspx (last visited Feb. 5, 2014). The calculation is based on the Basic Allowance for Subsistence rate from the Washington, D.C., area. Servicemembers who served more than twenty years but less than thirty can receive COLA under a special provision. Servicemembers who believe they are eligible under the special provision will forward a copy of their W-2, wage and tax statement, and their tax return to the Defense Finance and Accounting Services (DFAS) to receive COLA payments from the previous year. Once they have filed for payment and have been approved, servicemembers can file an affidavit stating they do not expect their income to go above the 25 percent rate and DFAS will send monthly COLA payments as part of their retirement checks. Servicemembers will have to file yearly W-2 and tax returns while continuing to receive monthly payments.

[527] DEF. BUS. BD., *supra* note 5, tab C, at 11 (noting that 76 percent of servicemembers leave the service between their twentieth and twenty-fifth years of service).

years. All current servicemembers wishing to vest in the pension system and receive benefits at ten or fifteen years must provide contributions for five years. All servicemembers with fewer than three years of service and new recruits will be transferred to the new system.

E. Retention and Force Management

The alternate plan discussed above focuses on retaining career servicemembers and those with twenty years or more. The main retention issue facing the Services now has to do with the high number of servicemembers who leave the military between years twenty and twenty-five.[528] The plan focuses on retaining those servicemembers by providing them with additional compensation. Servicemembers with twenty or more years of service no longer have to provide contribution to the retirement fund (a savings of five percent) and receive a five percent automatic contribution above the government match. This is a net increase of ten percent of pay. Further, servicemembers who serve thirty years or more are entitled to COLA upon retirement. Most servicemembers who are focusing on saving for a house, paying for their children's college tuition, and saving for retirement will consider the ten percent increase as a major incentive to remain in the force while also increasing the percentage of annuity that they will receive upon retirement.

The plan discussed above also aids the services in managing the force. Each of the services can target troops who have been passed over for promotion or are in over-strength areas and separate them at the fifteenth year mark. An extensive severance payment will not be necessary for troops who are involuntarily separated between years ten and twenty due to the defined benefit plan and the government matching contribution. Poor performers can be retrained or involuntarily separated without supervisors feeling that they are ending a career without providing them any retirement benefits.

---

[528] *Id.* at 11 (noting that 76 percent of servicemembers leave the service between their twentieth and twenty-fifth years of service).

F. Criticism

The number one issue that critics might highlight is the fact that the plan proposes having servicemembers contribute to their retirement. Moreover, the plan requires servicemembers to pay far more than what federal civilian workers pay into FERS. Servicemember lobbying groups and veterans groups such as the American Veterans, the Military Officers Association of America, and the American Legion, to name just a few, will likely view it as breaking faith with our servicemembers.[529] However, the goal has always been to protect the immediate annuity and to provide benefits to more servicemembers. Though those organizations may oppose the plan in the beginning, it is very likely that they will come to appreciate the protection that it provides to servicemembers at all stages of their career.

A fair criticism of the alternative plan might be its emphasis on deferred compensation. The 10th QRMC, the Board, and the CAP advocate for current compensation by providing a series of gate pay and separation pay to servicemembers. Adding gate pay and separation pay under the plan above would substantially increase the cost of the retirement system. The plan above does provide some current compensation by providing matching contributions to the TSP, but it is much smaller than under the Board or the CAP's proposal or the series of gate and separation pay. Regardless of the plan, there will always be some winners, losers, and those who find fault with its proposals.

XI. Conclusion

For more than 150 years, the government has provided an immediate retirement annuity to retired servicemembers. Today that system is in jeopardy. While the current retirement system is plagued with problems, a new system should honor the history, meaning, and prestige that embodies the term "retired military." The Hook Commission understood the importance of the shared sacrifice that servicemembers endured during their military careers. Perhaps that is why they sought advice from individual service personnel of all ranks and grades before making their recommendations.[530] Servicemembers should have a voice

[529] *See generally* Gentile & Zoroya, *supra* note 455.
[530] HOOK COMMISSION, *supra* note 13, at iii. The Defense Business Board sought advice from all the Services Chiefs and some prominent members of the Services, but they did

in shaping the new retirement system. They too are patriots and taxpayers who understand the current fiscal dilemma that the United States faces. They understand that the DoD must strike a balance between new weapon systems and personnel cost, and ensure that retirees and survivors are properly cared for and compensated for their sacrifices. The current proposals represent a broad shift to what servicemembers have grown accustomed to over the past 60 years. Any new system should include input from all ranks and grades.

After servicemembers have toiled to preserve and protect the American way of life, the government should take care of them by providing them a sound retirement system worthy of their sacrifice. Too many servicemembers with multiple deployments have left the service with no retirement benefits. Congress and the Department of Defense can no longer wait for additional studies to tell them that the system is broken. Congress must act now and use the model established in Part X of this article as a starting point.

Twenty years of service to the nation is a benchmark that few achieve; it is a testament to the sacrifice of the individual and their family members who endured the sometimes heavy burden of serving their country. To take that away from servicemembers would be a gross injustice. No plan can ever be perfect; there will always be inequity with any plan. But Congress must act to solve the inequality that plagues the current system—failing to act only means that the cost will only grow greater and might eventually use up defense resources for training, maintenance, and new weapon systems. Those who willingly risk their lives to fight and win the nation's wars, regardless of political or ideological differences, deserve a system that fairly compensates them for that sacrifice.

---

not survey the ranks. There is a high likelihood that a majority of servicemembers, given the choice between the Defense Business Board system and a system that maintains a version that ensures some type of recognition for twenty-plus years of service would choose the latter to maintain the history and lore of the military system.

Appendix A[531]

High-3 Computation

Rank	Monthly Annuity	Yearly Retirement Pay	Age 40-57	Age 58-62	Age 63-80	40-year total
E-7	2,069	24,828	422,076.00	124,140.00	446,904.00	993,120.00
E-8	2,263	27,156	461,652.00	135,780.00	488,808.00	1,086,240.00

Officer Member

Rank	Monthly Annuity	Yearly Retirement Pay	Age 45-57	Age 58-62	Age 63-85	40-year total
O-4	3,542	42,504	510,048.00	212,520.00	977,592.00	1,700,160.00
O-5	3,926	47,112	565,344.00	235,560.00	1,083,576.00	1,884,480.00

[531] *2013 Retirement Pay Chart*, THE ARMY TIMES, Jan. 2013, at 23. In the example above, the enlisted member retires at age forty with twenty years in service and the officer retires at age forty-five with twenty years of service. These future calculations do not reflect increases in Cost of Living Adjustments.

Appendix B[532]

Comparative View of FERS and the Military Retirement System

Features	FERS General Employees	Military Retirement System under High-3	Law Enforcement & Firefighters
Retirement Eligibility Age	Must meet a combination of age and years of service (YOS)	After 20 YOS.	Age 50 with 20 YOS or Any age with 25 YOS
Subject to reduction in retirement pay if retiring before age 62; or 60 with 20 years of service	Yes	No	No
Pension Formula	1% (of high-3 yrs) x YOS or If age 62 with 20+ YOS 1.1% (of high-3 yrs) x YOS	2.5% (of high-3 YOS) x YOS	1.7% (of high-3 YOS) x YOS of service + 1% (of high-3) x YOS served beyond 20 YOS
Pension Vest	5 YOS	20 YOS	5 YOS
Employee Pension Contribution	.80%	None	1.3%
TSP Government Match	Up to 5%	None	Up to 5%
TSP Vesting Automatic Contributions	3 YOS	N/A	3 yrs
COLA	Age 62	Upon retirement	Upon retirement
Special Retirement Supplement	Must serve 30 YOS and retire before age 62 or retire at 60 with 20 YOS	N/A	Upon retirement

[532] *See generally* FERS, *supra* note 44.

Appendix C[533]

Comparison Guide

	DACMC	10 TH QRMC	CURRENT SYSTEM	Defense Business Board	New Alternative	The Center for American Progress (CAP)	FERS-for Law Enforcement	Debt Reduction
TSP Enrollment	Automatic	Automatic	Voluntary	Automatic	Voluntary	Automatic	Automatic	Automatic
TSP Rate	Gov't match of up to 5%	2% <2 YOS; 3% at 3 YOS; 4% at 4 YOS; 5% for those with 5+ YOS	NONE	16% (or more depending on additional factors)*	5% match (1-15 YOS); 8% (16-19 YOS); 5% automatic and 8% match at 20+ YOS	16% (more for those who serve in hardship tours, in combat, or in certain specialties)	1% automatic rate, Gov't match of up to 5%	1% automatic rate, Gov't match of up to 5%
TSP Vesting	Vest between 5-10 Years of Service (YOS)	Vests at 10 YOS	N/A	Vest between 4-6 YOS	Vests at 5 YOS	Vest between 3-5 YOS	Fully vested after 3 YOS	Not Specified, will likely adopt FERS.
TSP Withdrawal age	No specified date;	Age 60	Consistent with IRS rules.	Between ages 60-65	Consistent with IRS rules.	Between age 60-65	Consistent with IRS rules.	Not specified, will likely adopt IRS rules.
Offering a defined Benefit Plan (DB)	YES	YES	YES	NO	YES	NO	YES	YES
DB Vesting	Vests at 10 YOS	Vests at 10 YOS	Vests at 20 YOS	N/A	Vests at 10 YOS	N/A	Vests at 5 YOS	Vests at 10 YOS
DB Withdrawal age	Age 60	Age 57 w/20+ YOS; Age 60 with <20 YOS; or Immediate annuity with 5% penalty x year under age 57.	Annuity available upon Retirement	N/A	Age 62 at 10 YOS; Age 57 at 15 YOS; Immediate annuity with 20+ YOS	N/A	Age 50 with 20 YOS; or any age with 25+ YOS	Range between ages 57-62 depending on YOS, although not specified.
DB Annuity Base	High-3	High-3	High-3 or REDUX	N/A	High-3	N/A	High-3	High-5
DB Annuity base calculations	2.5% x YOS x High-3	2.5% x YOS x High-3	2.5% x YOS x High-3	N/A	2% x 20 YOS; 2.5% x YOS thereafter.	N/A	1.7% x 20 YOS; 1% x YOS thereafter.	2.5% x YOS x High-5
DB Annuity based on years of service	Up to 100% at 40 YOS	Up to 100% at 40 YOS	Up to 100% at 40 YOS	N/A	20 % at 10 YOS; 30% at 15 YOS; 40% at 20 YOS; 50% at 25 YOS; 75% at 30 YOS; 100 at 40 YOS;	N/A	Up to 54% at 40 YOS	Up to 100% at 40 YOS

*16% (more depending on the needs of the services, such as larger contributions at certain retention gates, specific Military Occupational Specialty, or other demands to assist in force shaping.)

533 *See* DEF. BUS. BD., *supra* note 5, at 5.

Comparison Guide (Special Provisions)

	DACMC	10 TH QRMC	CURRENT SYSTEM	Defense Business Board	New Alternative	The Center for American Progress (CAP)	FERS-for Law Enforcement	Debt Reduction
Cost of Living Adjustment (COLA)	Not addressed, would likely stay consistent with current system.	Not addressed, would likely stay consistent with current system.	Available upon Retirement	N/A	Immediate COLA with 30+ YOS; Optional COLA for 20-29 YOS All other servicemembers who have vested in the defined benefit plan can receive COLA starting at age 62.	N/A	YES	YES
Gate Pay	10, 15, 20, 25 & 30 YOS (Base Pay x YOS)	Milestones YOS determined by Service (Base Pay x YOS)	NONE	NONE	NONE	Milestones YOS determined by Service-no specific formula	None	Not addressed.
Separation Pay	Payable after 10 YOS (Pay grade x YOS)	Determined by Service (Base Pay x YOS x Multiplier determined by Service)	N/A for regular retirees	May be eligible for certain servicemembers eligible for "retirement"	NONE	Milestones YOS determined by Service-no specific formula	None	YES-no specific formula, however. May adopt the 10th QRMC formula.
Transition	Grandfathered, but with option to convert (may have to agree to additional service obligation)	Grandfathered	N/A	No specific recommendation	3+ YOS are grandfathered with option to convert; less than 3 YOS and new recruits will convert in to new system	10+ YOS are grandfathered with option to convert; <10-option to convert with reduced benefits; New recruits will have new system	N/A	SM with 15+ YOS are grandfathered; everyone else will transition into new system
Special Provision	Once vested in TSP, Servicemember (SM) can opt to receive gov't contribution in cash in lieu of the TSP contribution.		N/A	N/A	SM contribution of 5%-suspended during specific duties.	N/A	Current employees contribute 1.3%; new hires contribute 3.6% toward their pension. Also entitled to special retirement supplement	N/A

Appendix D[534]

10th QRMC Breakdown

Based on the 2013 military basic pay chart, an E-6 with 12 years of service would receive $16,777; an E-7 $18,603; an O-3 $29,235; and an O-4 $32,894 in continuation pay. Similarly, the same group, after being promoted to the next rank, would receive the following in separation pay after twenty years of service: E-7 $151,494; E-8 $169,670; O-4 $254,930; O-5 $291,858. Assuming the servicemember received an annuity under the High-3 system and retired at age forty for the enlisted members and forty-five for officers, the total income they would have received by age fifty-seven would be the following: E-7: $422,076, (a difference of $270,582); E-8 $461,652 (a difference of $291,982); O-4 $510,048 (a difference of $255,118); and O-5 $565,344 (difference of $273,486). Also note that enlisted members tend to lose a greater amount than the officers; that is because they tend to retire, on average, five years earlier.[535]

---

[534] *See generally* 10th QRMC, *supra* note 14; *see supra* Part VIII.B.
[535] *See generally* HENNING 2010, *supra* note 43, at 1 (citing OFFICE OF THE ACTUARY, U.S. DEP'T OF DEF., DEPARTMENT OF DEFENSE FISCAL YEAR 2009 DOD STATISTICAL REPORT ON THE MILITARY RETIREMENT SYSTEM 120 (May 2008)).

Appendix E[536]

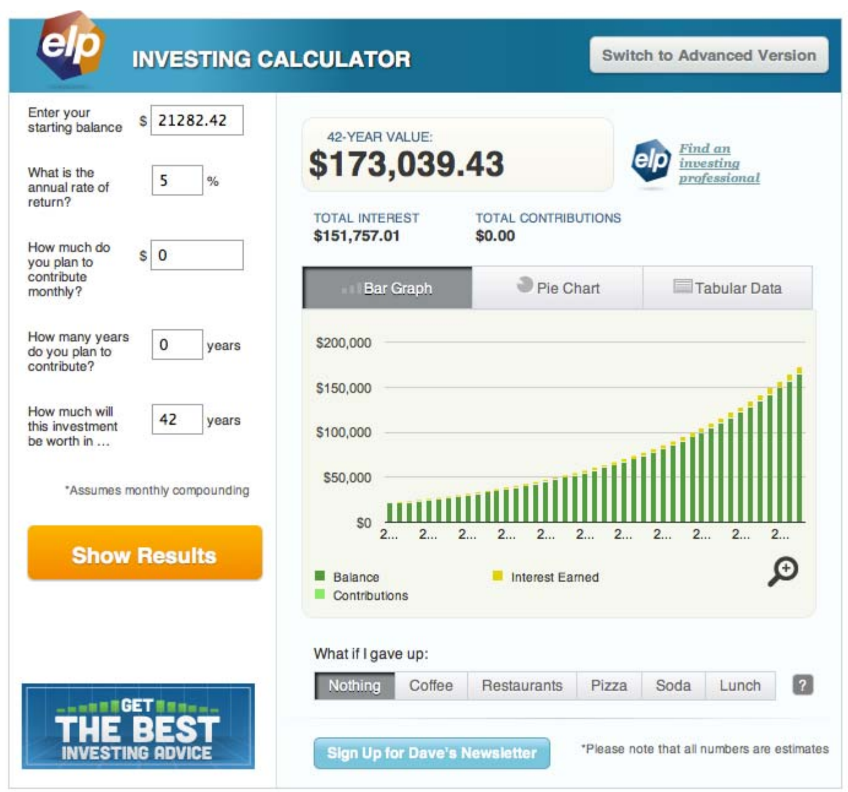
16.5% Contribution to an E-1 to E-5

Yr 1 E2=20,397; @ 16.5%=3,365.60
Yr 2 E2=same 3,365.60
Yr 3 @ E3 over 3= (2,014.80 x12x16.5%)=3,989.30
Yr 4 @ E3 over 4=(2,014.80 x12x16.5%)=3,989.30
Yr 5 @ E3 over 5=(2,014.80 x12x16.5%)=3,989.30 total contributions 18,699.11
Average monthly investment over 5 yrs: 311.65 @ 5% growth
5-YEAR VALUE: **$21,282.42**[537]

[536] *See generally Tilghman, supra* note 475 (noting a similar analysis resulting in $100, 000 in total investment at sixty-five years old).
[537] *Investing Calculator*, DAVERAMSEY.COM, http://www.daveramsey.com/article/investing-calculator/lifeandmoney_investing/#/entry_form.

INVESTING CALCULATOR
Switch to Advanced Version
Enter your starting balance $ 0
What is the annual rate of return? 5 %
How much do you plan to contribute monthly? $ 311.65
How many years do you plan to contribute? 5 years
How much will this investment be worth in … 5 years
*Assumes monthly compounding
Show Results
GET THE BEST INVESTING ADVICE
5-YEAR VALUE:
$21,282.42
Find an investing professional
TOTAL INTEREST
$2,583.42
TOTAL CONTRIBUTIONS
$18,699.00
Bar Graph
Pie Chart
Tabular Data
$24,000
$18,000
$12,000
$6,000
$0
2013
2017
Balance
Contributions
Interest Earned
What if I gave up:
Nothing
Coffee
Restaurants
Pizza
Soda
Lunch
Sign Up for Dave's Newsletter
*Please note that all numbers are estimates

Value at age 65 for an E-1 to E-5



Value at age 65 assuming servicemember is 23 years old at the time he invests the money and invests it for the next 42 years until age 65, and assumes a 5% average return.

VALUE at age 65: **$173,039.43**[538]

---

[538] *Investing Calculator*, DAVERAMSEY.COM, http://www.daveramsey.com/article/investing-calculator/lifeandmoney_investing/#/entry_form.

Appendix F[539]

Retirement Income for O-5 Retiree Under High-3

Calculation for an O-5 officer after twenty years of service using High-3 annuity. These numbers are based on the 2013 retirement pay chart. These calculations assume that the officer retires at age 45 with twenty years of service.

MONTHLY: $3,926
YEARLY: $3,936 X12= $47,112
OVER 20 YRS: $47,112 X 20= $942,240
OVER 40 YRS: $47,112 X 49= $1,884,480

---

539 *See generally Tilghman, supra* note 475 (noting a similar analysis resulting in $100, 000 in total investment at sixty-five years old); *Investing Calculator*, DAVERAMSEY.COM, http://www.daveramsey.com/article/investing-calcula-tor/lifeandmoney_investing/#/entry_form.

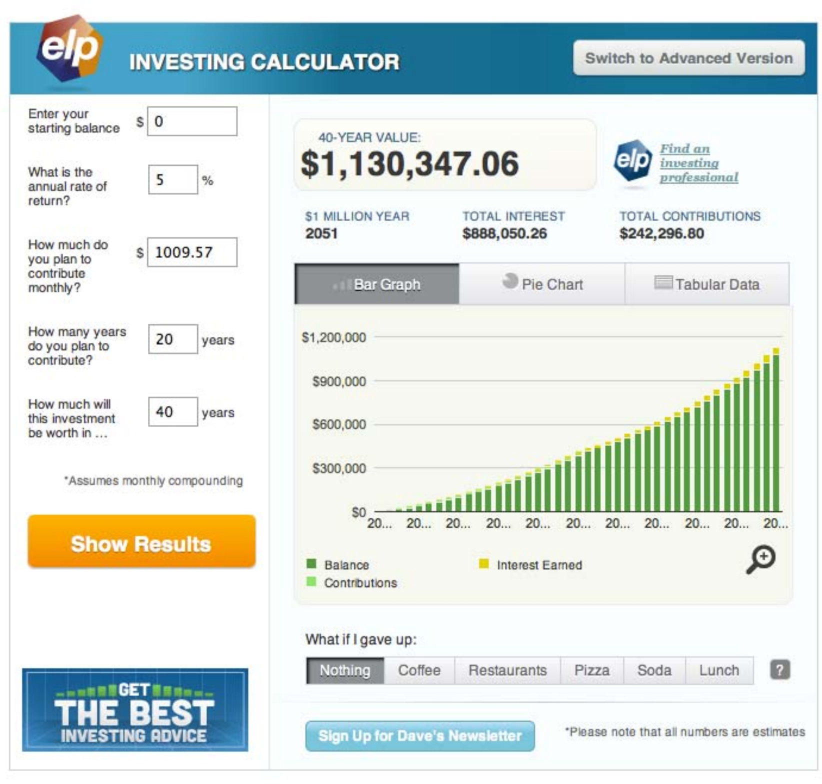
Alternate Contributions Amounts for an O-1 to O-5 for 20 Years

Year in Service	Rank	Monthly	Yearly Salary	2%	3%	5%	8%	10%	16%	16.50%
1	O-1	2876.40	34516.80	690.34	1035.50	1725.84	2761.34	3451.68	5522.69	5695.27
2	O-1	2876.40	17258.40	345.17	517.75	862.92	1380.67	1725.84	2761.34	2847.64
2	O-2	4347.00	26082.00	521.64	782.46	1304.10	2086.56	2608.2	4173.12	4303.53
3	0-2	4347.00	52164.00	1043.28	1564.92	2608.20	4173.12	5216.4	8346.24	8607.06
4	O-2	4493.70	53924.40	1078.49	1617.73	2696.22	4313.95	5392.44	8627.90	8897.53
5	O-3	5116.50	61398.00	1227.96	1841.94	3069.90	4911.84	6139.8	9823.68	10130.67
6	O-3	5361.60	64339.20	1286.78	1930.18	3216.96	5147.14	6433.92	10294.27	10615.97
7	O-3	5361.60	64339.20	1286.78	1930.18	3216.96	5147.14	6433.92	10294.27	10615.97
8	O-3	5630.70	67568.40	1351.37	2027.05	3378.42	5405.47	6756.84	10810.94	11148.79
9	O-3	5630.70	67568.40	1351.37	2027.05	3378.42	5405.47	6756.84	10810.94	11148.79
10	O-3	5804.70	69656.40	1393.13	2089.69	3482.82	5572.51	6965.64	11145.02	11493.31
11	O-4	6527.70	78332.40	1566.65	2349.97	3916.62	6266.59	7833.24	12533.18	12924.85
12	O-4	6852.90	82234.80	1644.70	2467.04	4111.74	6578.78	8223.48	13157.57	13568.74
13	O-4	6852.90	82234.80	1644.70	2467.04	4111.74	6578.78	8223.48	13157.57	13568.74
14	O-4	7078.80	84945.60	1698.91	2548.37	4247.28	6795.65	8494.56	13591.30	14016.02
15	O-5	7078.80	84945.60	1698.91	2548.37	4247.28	6795.65	8494.56	13591.30	14016.02
16	O-5	7895.10	94741.20	1894.82	2842.24	4737.06	7579.30	9474.12	15158.59	15632.30
17	O-5	7895.10	94741.20	1894.82	2842.24	4737.06	7579.30	9474.12	15158.59	15632.30
18	0-5	8118.00	97416.00	1948.32	2922.48	4870.80	7793.28	9741.6	15586.56	16073.64
19	O-5	8118.00	97416.00	1948.32	2922.48	4870.80	7793.28	9741.6	15586.56	16073.64
20	O-5	8338.80	100065.60	2001.31	3001.97	5003.28	8005.25	10006.56	16010.50	16510.82
TOTAL CONTRIBUTION				29,517.77	44,276.65	73,794.42	118,071.07	$147,588.84	236,142.14	243,521.59
AVERAGE				122.99	184.49	307.48	491.96	614.9535	983.93	1014.67

Value of Contributions at 20 Years for O-5

This calculation assumes that the servicemember enters the service at age twenty-five and invests the funds continuously until retirement at age sixty-two.

Value of Contributions at 40 Years for O-5



Appendix G

Retirement Income for E-7 Retiree Under High-3

Calculation for an E-7 enlisted member after twenty years of service using High-3 annuity. These numbers are based on the 2013 retirement pay chart. These calculations assume that the enlisted member retires at age thirty-eight with twenty years of service.

MONTHLY: $2,069

YEARLY: $2,069 X12= $24,828

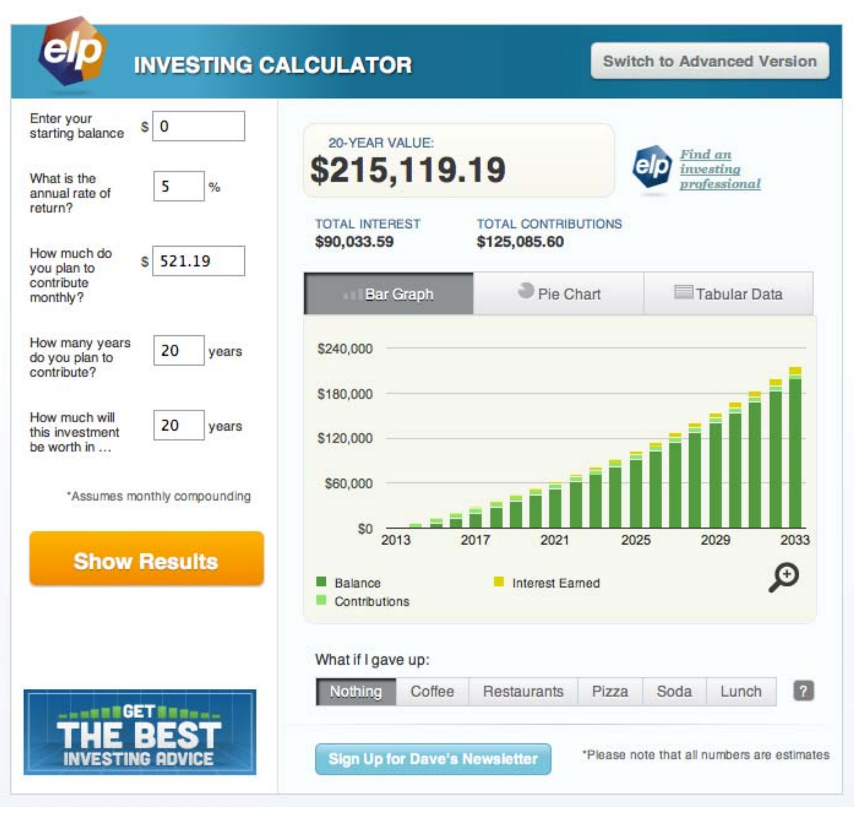
BY AGE 65: 24,828 X 27= $670,356

OVER 40 YRS (an additional 13 years): 24,828 X 40= $993,120

Alternate Contributions Amounts for an E-1 to E-7 for 20 Years

Year in Service	Rank	Monthly	Yearly Salary	2%	3%	5%	8%	10%	16%	16.50%
1	E-1	1516.20	18194.40	363.89	545.83	909.72	1455.55	1819.44	2911.10	3002.08
2	E-2	1699.80	20397.60	407.95	611.93	1019.88	1631.81	2039.76	3263.62	3365.60
3	E-3	2014.80	24177.60	483.55	725.33	1208.88	1934.21	2417.76	3868.42	3989.30
4	E-4	2304.90	27658.80	553.18	829.76	1382.94	2212.70	2765.88	4425.41	4563.70
5	E-5	2529.90	30358.80	607.18	910.76	1517.94	2428.70	3035.88	4857.41	5009.20
6	E-5	2707.50	32490.00	649.80	974.70	1624.50	2599.20	3249	5198.40	5360.85
7	E-5	2707.50	32490.00	649.80	974.70	1624.50	2599.20	3249	5198.40	5360.85
8	E-5	2893.50	34722.00	694.44	1041.66	1736.10	2777.76	3472.2	5555.52	5729.13
9	E-5	2893.50	34722.00	694.44	1041.66	1736.10	2777.76	3472.2	5555.52	5729.13
10	E-6	3298.50	39582.00	791.64	1187.46	1979.10	3166.56	3958.2	6333.12	6531.03
11	E-6	3298.50	39582.00	791.64	1187.46	1979.10	3166.56	3958.2	6333.12	6531.03
12	E-6	3495.30	41943.60	838.87	1258.31	2097.18	3355.49	4194.36	6710.98	6920.69
13	E-6	3495.30	41943.60	838.87	1258.31	2097.18	3355.49	4194.36	6710.98	6920.69
14	E-6	3555.60	42667.20	853.34	1280.02	2133.36	3413.38	4266.72	6826.75	7040.09
15	E-6	3555.60	42667.20	853.34	1280.02	2133.36	3413.38	4266.72	6826.75	7040.09
16	E-7	4158.60	49903.20	998.06	1497.10	2495.16	3992.26	4990.32	7984.51	8234.03
17	E-7	4158.60	49903.20	998.06	1497.10	2495.16	3992.26	4990.32	7984.51	8234.03
18	E-7	4281.00	51372.00	1027.44	1541.16	2568.60	4109.76	5137.2	8219.52	8476.38
19	E-7	4281.00	51372.00	1027.44	1541.16	2568.60	4109.76	5137.2	8219.52	8476.38
20	E-7	4328.40	51940.80	1038.82	1558.22	2597.04	4155.26	5194.08	8310.53	8570.23
TOTAL CONTRIBUTION				15,161.76	22,742.64	37,904.40	60,647.04	75,808.80	121,294.08	125,084.52
AVERAGE				63.17	94.76	157.94	252.70	315.87	505.39	521.19

Value of Contributions at 20 Years for an E-7



Value of Contributions at 40 Years for an E-7

Value of Contributions at Age 62 for an E-7

This calculation assumes that the servicemember enters the service at eighteen years old and invests the funds continuously until retirement at age sixty-two.

Appendix H

Alternate Plan Features

Defined Benefit Plan

- Vest at 10 years of service with a 20% annuity payable at age 62;
- Vest at 15 years of service with a 30% annuity payable at age 57;
- Vest at 20 years of service with a 40% annuity payable upon retirement;
- Payments will be based on the pay scale in existence at the time the member leaves the service.

Defined Contribution Plan

- A government match of five percent from accession to 15 years of service;
- A government match of eight percent from 16–19 years of service;
- An automatic government contribution of five percent and a government match of eight percent starting at 20 years of service.
- Vest after 5 years of service.

COLA Adjustment

- Servicemembers with 30 or more years of service will automatically receive COLA;
- Servicemembers with 20 years of service but less than 30 may apply for COLA if they meet the income requirements;
- All other servicemembers who have vested in the defined benefit plan can receive COLA starting at age 62.

Special Provisions

- Servicemembers will forfeit their defined benefits if they receive a bad-conduct discharge or worse; and forfeit both their defined benefit and government matching contributions if they receive a dismissal or dishonorable discharge. Funds will be forwarded to the Military Retirement Fund.
- Servicemembers will contribute five percent of their base pay toward the Military Retirement Fund. The contribution will be suspended when a servicemember is deployed, on a hardship tour, or performing duty resulting in family separation.

Appendix I

COLA Adjustment

Regular Military Compensation Calculator

Your Results	Monthly	Annual
Basic Pay	$4,189.20	$50,270.40
BAS	$325.04	$3,900.48
BAH	$1,785.00	$21,420.00
Cash Total	$6,299.24	$75,590.88
Tax Advantage	904.30	10,851.63
Regular Military Compensation	7,203.54	86,442.51

Total Annual Family Income: $75,590.88
Total Annual Allowances: $25,320.48
Total Annual Taxable Income: $40,770.40
Total Tax Rate: 0.30

If you wish, you can change your information below and resubmit by clicking the "Calculate" button.

Enter your Information

Grade: E-7
Years of Service: 20
Location: DC - WASHINGTON, DC METRO AREA
If OCONUS, select overseas
OHA will not be included in the results
Family Size: 1
Itemized Deduction Estimate: $ 0
Enter 0 to accept standard deduction
State Marginal Tax Rate: 5%
Spousal or Other Income (monthly): $ 0

Calculate

TICKET TO RIDE:

STANDARDIZING LICENSURE PORTABILITY FOR MILITARY SPOUSES

MAJOR ADAM W. KERSEY*

We're redoubling our efforts to help military spouses pursue their educations and careers . . . . We're going to help spouses get that degree, find that job, or start that new business. We want every company in America to know our military spouses and veterans have the skills and the dedication, and our nation is more competitive when we tap their incredible talents.[1]

I. Introduction

Beginning in early 2012, the First Lady of the United States, Michelle Obama, along with the Second Lady of the United States, Dr. Jill Biden, announced a call to action in support of professionally licensed military spouses.[2] Noting that "more than one of every three

---

* Judge Advocate, U. S. Army. Presently assigned as Instructor, Air Force Judge Advocate General's School, Maxwell Air Force Base, Alabama. LL.M., 2013, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia; J.D., 2008, College of William and Mary, Marshall-Wythe School of Law; B.A., 2001, DePauw University. Previous assignments include Senior Defense Counsel, Fort Benning Field Office, Fort Benning, Georgia, 2011–2012; Senior Trial Counsel, Fort Benning, Georgia, 2010–2011; Trial Counsel, Fort Benning, Georgia, 2009–2010; Battalion Personnel Officer, 53d Transportation Battalion, Fort McPherson, Georgia, 2004–2005; Movement Control Officer, 53d Transportation Battalion, Fort McPherson, Georgia, 2003–2004; Executive Officer, 32d Combat Service Support Company, 3/2 Stryker Brigade Combat Team, Fort Lewis, Washington, 2002–2003; Platoon Leader, 32d Combat Service Support Company, 3/2 Stryker Brigade Combat Team, Fort Lewis, Washington, 2001–2002. Member of the bars of Indiana, Southern District of Indiana, United States Air Force Court of Criminal Appeals, U.S. Court of Appeals for the Armed Forces, and Supreme Court of the United States. This article was submitted in partial completion of the Master of Laws requirements of the 61st Judge Advocate Officer Graduate Course.

[1] U.S. DEP'T OF THE TREASURY & U.S. DEP'T OF DEF., SUPPORTING OUR MILITARY FAMILIES: BEST PRACTICES FOR STREAMLINING OCCUPATIONAL LICENSING ACROSS STATE LINES 1 (2012) [hereinafter BEST PRACTICES] (quoting President Barack Obama, January 24, 2011).

[2] Press Release, First Lady Michelle Obama, Remarks by the First Lady and Dr. Biden on Military Spouse Licensing (Feb. 15, 2012), *available at* http://www.whitehouse.

military spouses in the labor force have [sic] jobs that require some kind of professional license or certification,"[3] Mrs. Obama and Dr. Biden asked state legislatures to pass laws aimed at easing licensure portability for professionally licensed or certified spouses of service members.[4] By mid-2012, nearly half of the states acted on their request, passing some form of protection for professionally licensed military spouse.[5] Despite the advancements toward licensure portability, not all states have considered the issue, including many states with substantial military populations.[6] The states that did pass enactments aimed at licensure portability for professionally licensed military spouse did so as the products of their own state "laboratories."[7] As such, the protections of each state took a number of different, incongruous forms, addressing differing professions,[8] and providing few baseline protections for the professional spouse of a federalized service member. Instead of allowing states to continue the haphazard creation of "protections" for professional military spouses, this article considers the possibility of the federal government taking a direct, proactive role in pursuing standardized licensure portability protections for professionally licensed military spouses through state/federal bargaining, or, alternately, through interstate compact or model act.

---

gov/the-press-office/2012/02/15/remarks-first-lady-and-dr-biden-military-spouse-licensing.

[3] *Id.*

[4] *Id.*

[5] *23 States Have Now Passed Pro-Military Spouse Portability Measures*, THE WHITE HOUSE (June 23, 2012), http://www.whitehouse.gov/blog/2012/06/26/23-states-have-now-passed-pro-military-spouse-license-portability-measures.

[6] *See Issue 2: Facilitate Military Spouse Transition Through Licensure Portability and Eligibility for Unemployment Compensation*, USA 4 MILITARY FAMILIES (Mar. 13, 2012), http://www.usa4militaryfamilies.dod.mil/pls/psgprodf?p=USA4:ISSUE:0::::P2_ISSUE:2 [hereinafter USA 4 MILITARY FAMILIES] (providing a visual reference for states with licensure portability measures for military spouses or unemployment compensation); *see also* U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE U.S.: 2012, tbl.508, at 334 (2012), *available at* http://www.census.gov/compendia/statab/2012/tables/12s0509.pdf (listing military and civilian personnel in installations by state).

[7] Justice Louis Brandeis analogized individual states to "laboratories" in *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932), writing, "[i]t is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *Id.* at 311 (Brandeis, J., dissenting).

[8] *Compare* N.C. GEN. STAT. ANN. § 93B-15.1 (2012) (allowing licensure by endorsement for military spouses yet explicitly excluding those involved in the practice of law), *with* IDAHO BAR COMM'N RULES R. 229 (2012) (specifically providing licensure portability for military spouses engaged in the practice of law).

Part II of this article looks at the military spouse, specifically the evolution of the professionally licensed military spouse, in a historical context. Part III examines the portability measures already enacted that affect professionally licensed military spouses, focusing specifically on the prevalent applicability to state business and occupation codes.[9] Part IV then considers the possibility of standardizing protections for the professional military spouse through one of three methods: first, the article considers standardization by federal enactment under Congress's authority to tax and spend (state/federal bargaining)[10] or through Congress's enumerated War Powers, the legal justification supporting the recently enacted Military Spouses Residency Relief Act;[11] second, the article looks at standardization by interstate compact;[12] and third, the article examines the possibility of standardization by model act. Ultimately, the article concludes that standardization by interstate compact provides the best method to address the significant disadvantages experienced by the professionally licensed military spouse.

II. The Military Spouse

A. Military Spouse in Historical Context

A century ago, the federal government, the War Department, and the Department of the Army had little concern for the military spouse. The military spouse was considered no more than a "camp follower"[13] without right or privilege. In her 1885 memoirs, Elizabeth Bacon Custer, widow of the famous Lieutenant Colonel George Armstrong Custer, lamented the absence of legal and regulatory provisions for the care of the military wife, given the "value" of the spouse to the military member and organization.

---

[9] *See infra* notes 69–76 and accompanying text.
[10] *See* U.S. CONST. art. I, § 8, cls. 1 & 12; *see also* Dameron v. Brodhead, 345 U.S. 322, 325 (1953); South Dakota v. Dole, 483 U.S. 203 (1987).
[11] Military Spouses Residency Relief Act, Pub. L. No. 111-97, 123 Stat. 3007 (2009).
[12] *See* U.S. CONST. art. I, § 10, cl. 3.
[13] Elizabeth Mason Finlayson, A Study of the Wife of the Army Officer: Her Academic and Career Preparation, Her Current Employment and Volunteer Services 18 (May 7, 1969) (unpublished Ed.D. dissertation, George Washington University) (on file with author) (quoting ELIZABETH B. CUSTER, BOOTS AND SADDLES 105 (1961)).

> It seemed very strange to me that with all the value that is set on the presence of women of an officer's family at the frontier posts, the book of army [sic] regulations makes no provision for them, but in fact ignores them entirely! . . . It would be natural to suppose that a paragraph or two might be wasted on an officer's wife! The servants and the company launderesses [sic] are mentioned as being entitled to quarters and rations and the services of the surgeon.[14]

In short, "army women," Mrs. Custer related, had "no . . . acknowledged rights according to military law,"[15] let alone any assistance or encouragement to pursue paid employment. To be sure, the Army wife served any number of important roles—seamstress, nurse, hostess, servant—but paid employment, by and large, was uncommon, and what paid employment existed was almost exclusively reserved for wives of enlisted men who functioned with limited, if any, protections.[16]

By World War II, it was well-established within the military community that a military spouse's first priority was to her family and the home.[17] Nancy Shea, author of the *The Army Wife*, the book commonly considered the unofficial canon for spousal conduct at the time of its publication,[18] espoused that,

> Homemaking is a full-time job, and a wife should not work unless there is a real need for the money she earns . . . [such as] extenuating circumstances . . . but simply

---

[14] *Id.* at 19 (quoting ELIZABETH B. CUSTER, BOOTS AND SADDLES 105 (1961)).

[15] *Id.* Apparently, Mrs. Custer's experiences were common during the late nineteenth and early twentieth century. Martha Summerhayes, a military spouse in the 1870s Wyoming Territory, recounted her dismay at the lack of recognition for a military spouse; arriving on the frontier, her husband quipped, "Why Martha, did you not know that women are not reckoned in at all in the War Department?" MARTHA SUMMERHAYES, VANISHED ARIZONA: RECOLLECTIONS OF MY ARMY LIFE 19, 23 (1908). Aside from the Custer and Summerhayes memoirs, there is a stark absence of data pertaining to military spouses until the post-World War II era. Finlayson, *supra* note 13, at 19.

[16] Finlayson, *supra* note 13, at 19.

[17] *See generally id.* at 19–21 (discussing the military spouse during and post-WWII). This is not to suggest that the military encouraged marriage during this period; in actuality, during WWII the military actively "discouraged" military service members from marriage by refusing reenlistment or family housing. *See* JACQUELYN SCARVILLE, SPOUSE EMPLOYMENT IN THE ARMY: RESEARCH FINDINGS 1 (1990) (citations omitted).

[18] Finlayson, *supra* note 13–76, at 20.

> to improve one's standard of living is not a very worthwhile reason, if such work jeopardizes your home responsibilities.[19]

In the decade following World War II, not all authors were as predisposed to a declaration that a military wife "should not work." By the mid-1950s, the same timeframe as Nancy Shea's publication of the third edition of *The Army Wife*, other authors took the position that "[a]lthough it goes without saying that a woman's first duty is to her home, it is old fashioned to assume that her place is there and nowhere else."[20]

Previously held opinions about working spouses of military servicemen were shifting from the pre-World War II era. For the first time, the military community openly encouraged military wives to seek education. *The Complete Guide for the Serviceman's Wife*, published in 1956, promoted "Other Ways [than employment] of Keeping Busy."[21] Education was becoming, in some opinions, a proper manner to support the husband's military career. "You may never have thought of it this way," the two authors wrote, "but anything you can do to further your own knowledge and education will help Joe's career along too."[22]

In addition to any social mores weighing against employment of the military spouse, the transient military lifestyle created difficulties obtaining meaningful employment for many military spouses.[23] Ironically, education and nursing, professions requiring professional licensure, were viewed as the most "portable" professions. Recognizing

---

[19] *Id.* at 28 (quoting NANCY SHEA, THE ARMY WIFE 146 (3d ed. 1954)).
[20] *Id.* at 28–29 (citing ELIZABETH LAND & CARROLL V. GLINES, JR., THE COMPLETE GUIDE FOR THE SERVICEMAN'S WIFE 370 (1956)).
[21] *Id.* at 23 (quoting ELIZABETH LAND & CARROLL V. GLINES, JR., THE COMPLETE GUIDE FOR THE SERVICEMAN'S WIFE 370 (1956)).
[22] *Id.*
[23] *Id.* at 29 (quoting ELIZABETH LAND & CARROLL V. GLINES, JR., THE COMPLETE GUIDE FOR THE SERVICEMAN'S WIFE 362 (1956)). Land and Glines gave four reasons for limitations on job procurement including that

> [e]mployers shy away from hiring anyone who isn't going to be permanent [and that] [a] job may be hard to get because a wife's particular capabilities may not fit what the market has to offer . . . she may have majored in dietetics and be on a small base or in a small town, where there may be no need for a dietician.

Id.

the large number of spouses trained as educators, *The Complete Guide for the Serviceman's Wife* noted that "many wives are equipped with teachers' certificates, which are the next best things to having built-in jobs; the fact that teachers are almost as much in demand as nurses means that job possibilities are excellent on base or off."[24]

A decade later, by the mid-1960s, the value of education was openly touted to military wives. "Education—for both servicemen and their wives—is becoming just as much a part of adult life as the automobile is of the 20th Century," wrote one commentator in 1966.[25] By the end of the decade, college-educated military wives were numerous, accounting for nearly 40% of wives in one study.[26] Of those wives with degrees, many majored in, or studied, fields requiring a professional license, notably education and nursing.[27] Education and nursing were, by that time, the most common occupational fields of study for spouses seeking post-high school education.[28]

Studies conducted in the 1980s exposed the fallacy of the teaching certificate equating to a "built-in job,"[29] especially given the inherent difficulties of transferring professional licenses. In 1981, one researcher noted the dearth of employment opportunities:

> One of the disadvantages faced by employed military wives is frequent transfers which lead to loss of salary, fringe benefits, and seniority rights on the job. Often these wives may also have difficulties establishing a career because of the lack of uniformity in state licensing and certification requirements necessitating they requalify for employment with each transfer of the

---

[24] *Id.* (quoting ELIZABETH LAND & CARROLL V. GLINES, JR., THE COMPLETE GUIDE FOR THE SERVICEMAN'S WIFE 363 (1956)).

[25] *Id.* at 24 (quoting MARY KAY MURPHY & CAROL BOWLES PARKER, FITTING IN AS A NEW SERVICE WIFE 140 (1966)).

[26] *Id.* at 64. In Finlayson's 1969 study of 753 Army wives, 299 wives had earned a college degree. Of those, 66 had education beyond the undergraduate degree. *Id.*

[27] *Id.* at 68. Finlayson noted that 23.4% of spouses with some amount of post-high school education had studied education and 7.8% had studied nursing. *Id.*

[28] *Id.* at 69. Of the ten most commonly cited occupational fields of study of Army wives in 1969, the highest number of wives cited study of secondary education, closely followed by elementary education and nursing. Also included in the ten most frequent fields of study were three other occupations requiring licensure or certification: medical technicians, social workers, and librarians. *Id.*

[29] *See supra* notes 24–25 and accompanying text.

> husband. . . . Consequently, many highly educated military wives are unable to find positions available in their areas of expertise.[30]

The military spouse in the 1980s was young—three quarters under the age of 32—and "fairly well educated."[31] Nonetheless, the military spouses' unemployment rate was considerably higher than that of civilian spouses, with some estimates indicating that unemployment among military spouses was four times higher than the civilian rate.[32]

The military spouse fared no better gaining employment in the subsequent decades. Young and relatively educated, the "demographics of military spouses suggest[ed] that they should have better employment outcomes and higher wages than civilian spouses."[33] Instead, the military spouse continued to be "employed at much lower rates and earn less than both the average civilian spouse and those who exhibit the same characteristics."[34]

At the end of the first decade of the twenty-first century, the demographics relating to the military spouse showed dynamic shifts in education and the percentage in the labor force. In 2011, there were 711,375 spouses of active duty service members, 66 percent of those in the workforce,[35] earning 42 percent less than civilian counterparts.[36] By-and-large, the military spouse was educated; as of 2008, 84 percent had some college education, 25 percent holding a bachelor's degree, and 10

---

[30] EDNA J. HUNTER ET AL., MILITARY WIFE ADJUSTMENT: AN INDEPENDENT DEPENDENT 16 (1981).

[31] SCARVILLE, *supra* note 17, at 5. Ninety percent of Army wives had completed their high school education with 43% receiving "some training beyond high school." *Id*.

[32] *Id.* at 8 (citations omitted). Studies have suggested that military spousal unemployment during the 1980s was a response to a likelihood that the military spouse was a "discouraged worker" that had fallen from the labor force following failed attempts to secure employment, multiple permanent changes of station with the military spouse, or a desire to stay at home. *Id.* at 7 (citation omitted).

[33] RAND NAT'L DEF. WORKING INST., WORKING AROUND THE MILITARY: CHALLENGES OF MILITARY SPOUSE EMPLOYMENT 2 (2005), *available at* http://www.rand.org/content/dam/rand/pubs/research_briefs/2005/RAND_RB9056.pdf.

[34] *Id.*

[35] WHITE HOUSE, STRENGTHENING OUR MILITARY FAMILIES: MEETING AMERICA'S COMMITMENT 16 (2011) [hereinafter MILITARY FAMILIES], *available at* http://www.defense.gov/home/features/2011/0111_initiative/Strengthening_our_Military_January_2011.pdf.

[36] *Id.* (citing MARY K. KNISKERN & DAVID R. SEGAL, MEAN WAGE DIFFERENCES BETWEEN CIVILIAN AND MILITARY WIVES (2010)).

percent holding post-graduate degrees.[37] Most working military spouses worked to supplement the household income, 77 percent reporting that they "want or need to work."[38] Many of the educated, working spouses were becoming licensed, certified professionals.[39]

B. Professionally Licensed Military Spouse

Contrary to some lingering misconceptions, military spouses today are, in large percentage, licensed professionals. Professionally licensed military spouses now constitute close to 35 percent of the total number of working military spouses.[40] Pervasive professional licensing laws and regulations encompassing "some 1000 occupations and professions"[41] now apply to 100,000 military spouses or more[42]—spouses that are "ten times more likely to have moved across state lines" in the previous twelve months than a comparable civilian.[43] Due to the large number of spouses affected by professional licensing, in 2011, President Barack Obama committed the Department of the Treasury, in collaboration with the Department of Defense, to examine the effects of state occupational licensing on military spouses.[44]

The resulting data from the joint Treasury and Defense study uncovered the specifics of the now commonplace professionally licensed military spouse. For those spouses in the work force, five of the twenty most common spousal occupations, including the top three most common occupations—teachers, child care workers, and registered nurses—were

---

[37] *Id.* (citing DEF. MANPOWER DATA CTR., 2008 DMDC SURVEY OF ACTIVE DUTY SPOUSES 28 (2011)), *available at* https://pki.dmdc.osd.mil/appj/hrsap/streamDocuments?contentItemId=73155&fileName=ADSS0801_Briefing_MilOne_Ed- Employ_Finance.pdf. Interestingly, the cited 25 percent of military spouses with bachelor's degrees is a reduction in percentage from a 1969 survey. *See supra* note 26 and accompanying text.
[38] MILITARY FAMILIES, *supra* note 35, at 16.
[39] *See infra* Part II.B and accompanying text.
[40] BEST PRACTICES, *supra* note 1, at 3.
[41] Pam Brinegar, *Professional Licensing*, *in* THE BOOK OF STATES 495, 497 (Council of State Government ed., 2005).
[42] *23 States Have Now Passed Pro-Military Spouse Portability Measures*, THE WHITE HOUSE (June 23, 2012), http://www.whitehouse.gov/blog/2012/06/26/23-states-have-now-passed-pro-military-spouse-license-portability-measures. *See also* Jim Malewitz, *Continuing U.S. Trend, North Carolina Helps Military Spouses with Licensing*, PEW CTR. ON STATES (July 25, 2012), http://www.pewstates.org/projects/stateline/headlines/continuing-us-trend-north-carolina-helps-military-spouses-with-licensing-85899407152.
[43] BEST PRACTICES, *supra* note 1, at 3.
[44] MILITARY FAMILIES, *supra* note 35, at 19.

those requiring either state licensure or certifications.[45] Teachers (pre-kindergarten through 12th grade) accounted for 5.2% of the total number of military spouses in the labor force, with child care workers and registered nurses accounting for 3.9% and 3.7%, respectively.[46] Accountants (including auditors) and dental assistants, two more occupations requiring state licensure or certification, also appeared in the most common occupations for military spouses at 1.6% and 1.2%, respectively.[47]

The joint study also confirmed that the concerns of the professional military spouse did not significantly change since they were first identified in the early 1980s.[48] Focused solely on professionally licensed military spouses, the joint study provided greater detail than previously conducted studies on military spouse employment. In summary, the joint study found that,

> State licensing and certification requirements are intended to ensure that practitioners meet a minimum level of competency. Because each state sets its own licensing requirements, these requirements often vary across state lines. Consequently, the lack of license portability—the ability to transfer an existing license to a new state with minimal application requirements—can impose significant administrative and financial burdens on licensed professionals when they move across state lines. Because military spouses hold occupational licenses and often move across state lines, the patchwork set of variable and frequently time-consuming licensing requirements across states disproportionately affects these families. The result is that too many military

---

45 BEST PRACTICES, *supra* note 1, at 10.
46 *Id.*
47 *Id*. To grant some perspective, retail salespersons (3.6%), administrative assistants (3.5%), and waiters/waitresses (3.0%), are the three most common unlicensed or uncertified occupations held by military spouses. *Id.* Based on the White House figure of 711,375 active duty spouses, there are approximately 60,000 military spouse teachers, child care workers, and registered nurses requiring a license or state certification. Comparatively, there are only approximately 47,000 military spouse salespersons, secretaries/administrative assistants, and waiters/waitresses. *See also supra* note 35 and accompanying text.
48 *See supra* notes 30–32 and accompanying text.

> spouses looking for jobs that require licenses are stymied in their efforts.[49]

Furthermore, the ability of the professional military spouse to find meaningful and satisfying employment mattered, not only to the service member, but to the service. The military professional spouse's career "plays a key role in the financial and personal well-being of military families, and their job satisfaction is an important component of the retention of service members. Without adequate support for military spouses and their career objectives the military could have trouble retaining service members."[50] In order to facilitate the "best practices" as determined by the study, the Departments of the Treasury and Defense called on "state governments, licensing boards, and professional associations to join . . . in finding more efficient ways for military spouses . . . to fulfill these state and professional licensing and certification requirements."[51] The "best practices," as determined by the joint study, included three recommendations to the states: easing endorsement of already-held licenses obtained in other states; allowing for temporary or provisional licenses; and speeding up the application process[52]—though it has yet to be determined if these three methods of providing portability do, in fact, present the "best practices" for the states. Part III will closely examine several legislative enactments already signed into law at the state level, each of which purports to fulfill

---

[49] BEST PRACTICES *supra* note 1, at 3.

[50] *Id.*

[51] *Id.* at 2. The Department of Defense (DoD) has launched the USA 4 Military Families initiative, "seeking to engage and educate state policymakers, not-for-profit associations, concerned business interests, and other state leaders about the needs of military members and their families." One of the ten focus areas of the initiative is the facilitation of "military spouse transition through licensure portability and eligibility for unemployment compensation." The initiative tracks actions by individual states to achieve the goal of portability. *See* USA 4 MILITARY FAMILIES, *supra* note 6.

[52] BEST PRACTICES, *supra* note 1, at 4–5. These practices differed from previous congressional and DoD attempts to assist in the employment of either professional military spouses or military spouses generally. Previously implemented "Employment Assistance Programs" (EAPs), designed to aid military spouses address employment difficulties due to frequent transfers, were largely unknown and unused by military members or spouses. JEANNE T. SCHARCH, MILITARY SPOUSE EMPLOYMENT WITHIN THE DEPARTMENT OF DEFENSE 3 (2005). Historically, as few as seven percent of positions held by military spouses were obtained using EAPs. The military spousal preference program, a program developed in the late 1980s to "reduce the interruption of the military spouse's career when they have to move due to the service member relocating," has been similarly unsuccessful. *Id.* at 4. Appointments of military spouses to positions within the DoD recently accounted for little more than half a percent (0.7%) of the total DoD civilian employee population. *Id.* at 5.

one of the "best practices" and for which the Department of Defense gives credit for supporting the licensure portability initiative.[53]

III. Licensure Portability Enactments

As of February 2014, a majority of states have passed legislation addressing licensure portability for military spouses.[54] The method by

[53] *See also* USA 4 MILITARY FAMILIES, *supra* note 6. The USA 4 Military Families website provides all 50 states with a numerical grade out of 100 points: 30 points for providing licensure by endorsement, 30 points for providing expedited professional licenses or temporary licenses, and 40 points for providing unemployment compensation. *Id.*

[54] Alabama, Alaska, Arizona, California, Colorado, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Mississippi, Missouri, Nebraska, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Virginia, Washington, Wisconsin, and Wyoming have all passed some form of licensure portability for military spouses. ALA. CODE § 31-1-6 (2012); ALASKA STAT. § 08.01.063 (2011); ARIZ. REV. STAT. ANN. § 32-4302 (2011); CAL. BUS. & PROF. CODE § 115.5 (West 2012); COLO. REV. STAT. § 12-71-102 (2012) (applying only to professions regulated by the Colorado Professions and Occupations Code but specifically excluding engineers, medical doctors, optometrists, realtors, and those working with fireworks); COLO. REV. STAT. § 22-60.5-111 (2012) (applying only to educators); DEL. CODE ANN. tit. 29, § 29-8735(g) (2012); FLA. STAT. ANN. § 455.02 (West 2010) (applying only to licensure by boards listed under FLA. STAT. ANN. § 20.165); FLA. STAT. ANN. § 456.024 (West 2011) (applying to health professions); GA. CODE ANN. § 43-14-16 (West 2013) (applying to electrical contractors, plumbers, conditioned air contractors and utility contractors); GA. CODE ANN. § 43-41-19 (West 2013) (applying to residential and commercial contractors); HAW. REV. STAT. §§ 436B-14.6 to -14.7 (2012); 20 ILL. COMP. STAT. ANN. 5/5-715 (West 2012); IND. CODE ANN. § 25-1-17 (West 2012); KAN. STAT. ANN. § 48-3406 (West 2012); KY. REV. STAT. ANN. § 12.357 (West 2011); LA. REV. STAT. ANN. § 37:3650 (2012); ME. REV. STAT. ANN. tit 10, § 8011 (2013); MD. CODE. ANN., BUS. REG. § 2.5-1.06 (West 2013) (endorsement and temporary licensure for business occupations); MD. CODE. ANN., EDUC. § 6-101.1 06 (West 2013) (expedited educator certification); MD. CODE. ANN., FIN. INST. § 11-612.2 06 (West 2013) (expedited mortgage originator certification); MASS. GEN. LAWS ANN. ch. 112, § 1B (West 2012) (applying only to public health professions); MASS. GEN. LAWS. ANN. ch. 147, § 62 (West 2012) (applying only to professions regulated by the Massachusetts Department of Public Safety); MISS. CODE. ANN. § 73-50-1 (West 2013); MO. ANN. STAT. § 324.008 (West 2011); N.M. STAT. ANN. § 61-1-34 (West 2013); N.C. GEN. STAT. ANN. § 93B-15.1 (West 2012); N.D. CENT. CODE § 43-51-11.1 (West 2013) (discretionary, case-by-case licenses by endorsement); OKLA. STAT. tit. 59, § 4100.5 (2012); OR. REV. STAT. ANN. § 351.1 (West 2013); R.I. GEN. LAWS ANN. § 5-88-1 (West 2013) (relating to the business professions); R.I. GEN. LAWS ANN. § 23-92-1 (West 2013) (relating to health professions); S.C. CODE ANN. § 40-1-77 (2012); S.D. CODIFIED LAW § 13-42-68 (2013) (temporary certificate for educators); S.D. CODIFIED LAW § 36-1-B-1 (2013) (applying to occupations governed by the professions and occupations code); TENN. CODE ANN. § 4-3-1304 (West 2012); TEX. OCC. CODE ANN. §

which each state chooses to address portability varies from state to state, usually following one of the "best practices" identified by the Departments of Treasury and Defense,[55] e.g., endorsement,[56] temporary licensure,[57] expedited licensure,[58] or most commonly, a hybrid of those

---

55.004 (West 2011); VA. CODE ANN. § 54.1-3005 (West 2012) (applying to the Virginia Board of Nursing); VA. CODE ANN. § 54.1-118 (West 2012) (applying only to professions regulated by the Virginia Department of Professional and Occupational Regulation or the Virginia Department of Health Professionals; provisions to become effective in July 2014); WASH. REV. CODE ANN. § 18.340.020 (West 2011); WIS. STAT. ANN. § 440.09 (2012); WYO. STAT. ANN. § 33-1-117 (West 2013). Nevada enacted licensure portability by executive order. Executive Order No. 2012-11, Nev. Governor, Providing Reciprocity for Military Spouses Seeking Licensure (May 7, 2012), *available at* http://gov.nv.gov/news/item/4294973520/.

[55] *See supra* note 52 and accompanying text.

[56] States enacting legislation to allow endorsement of licenses from other states include Alabama, Arizona, Colorado, Delaware, Georgia, Hawaii, Indiana, Kansas, Louisiana, Maine, Massachusetts, Mississippi, New Mexico, North Carolina, Oklahoma, Oregon, Rhode Island, Tennessee, Texas, Virginia, Washington, and Wyoming. ALA. CODE § 31-1-6 (2012); ARIZ. REV. STAT. ANN. § 32-4302 (2011); COLO. REV. STAT. § 12-71-102 (2012) (applying only to professions regulated by the Colorado Professions and Occupations Code but specifically excluding engineers, medical doctors, optometrists, realtors, and those working with fireworks); COLO. REV. STAT. § 22-60.5-111 (2012) (applying only to educators); DEL. CODE ANN. tit. 29, § 29-8735(g) (2012); GA. CODE ANN. § 43-14-16 (West 2013) (applying to electrical contractors, plumbers, conditioned air contractors and utility contractors); GA. CODE ANN. § 43-41-19 (West 2013) (applying to residential and commercial contractors); HAW. REV. STAT. §§ 436B-14.6 to -14.7 (2012); IND. CODE ANN. § 25-1-17 (West 2012); KAN. STAT. ANN. § 48-3406 (West 2012); LA. REV. STAT. ANN. § 37:3650 (2012); ME. REV. STAT. ANN. tit 10, § 8011 (2013); MASS. GEN. LAWS ANN. ch. 112, § 1B (2012) (applying only to public health professions); MASS. GEN. LAWS. ANN. ch. 147, § 62 (2012) (applying only to professions regulated by the Massachusetts Department of Public Safety); MISS. CODE. ANN. § 73-50-1 (West 2013); MO. ANN. STAT. § 324.008 (West 2011); N.M. STAT. ANN. § 61-1-34 (West 2013); MO. ANN. STAT. § 324.008 (West 2011); N.C. GEN. STAT. ANN. § 93B-15.1 (West 2012); OKLA. STAT. tit. 59, § 4100.5 (2012); OR. REV. STAT. ANN. § 351.1 (West 2013); R.I. GEN. LAWS ANN. § 5-88-1 (West 2013) (relating to the business professions); R.I. GEN. LAWS ANN. § 23-92-1 (West 2013) (relating to health professions); TENN. CODE ANN. § 4-3-1304 (West 2012); TEX. OCC. CODE ANN. § 55.004 (West 2011); VA. CODE ANN. § 54.1-3005 (West 2012) (applying to the Virginia Board of Nursing); VA. CODE ANN. § 54.1-118 (West 2012) (applying only to professions regulated by the Virginia Department of Professional and Occupational Regulation or the Virginia Department of Health Professionals; provisions to become effective in July 2014); WASH. REV. CODE ANN. § 18.340.020 (West 2011); WYO. STAT. ANN. § 33-1-117 (West 2013). Nevada enacted licensure portability by executive order. Executive Order #2012-11, Nev. Governor, Providing Reciprocity for Military Spouses Seeking Licensure (May 7, 2012), *available at* http://gov.nv.gov/news/item/4294973520/.

[57] States enacting legislation to provide for temporary licensure of professionally licensed military spouses include Alabama, Alaska, Colorado, Delaware, Florida, Hawaii, Illinois, Indiana, Kentucky, Louisiana, Maine, Massachusetts, Missouri, North Carolina, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Virginia, Washington, and

Wisconsin. ALA. CODE § 31-1-6 (2012); ALASKA STAT. § 08.01.063 (2011); COLO. REV. STAT. § 12-71-102 (2012) (applying only to professions regulated by the Colorado Professions and Occupations Code but specifically excluding engineers, medical doctors, optometrists, realtors, and those working with fireworks); COLO. REV. STAT. § 22-60.5-111 (2012) (applying only to educators); DEL. CODE ANN. tit. 29, § 29-8735(g) (2012); FLA. STAT. ANN. § 455.02 (West 2010) (only applicable to licensure by boards listed under FLA. STAT. ANN. § 20.165); FLA. STAT. ANN. § 456.024 (West 2011) (applying to health professions); HAW. REV. STAT. §§ 436B-14.6 to -14.7 (2012); 20 ILL. COMP. STAT. ANN. 5/5-715 (West 2012); IND. CODE ANN. § 25-1-17 (West 2012); KY. REV. STAT. ANN. § 12.357 (West 2011); LA. REV. STAT. ANN. § 37:3650 (2012); ME. REV. STAT. ANN. tit 10, § 8011 (2013); MASS. GEN. LAWS ANN. ch. 112, § 1B (2012) (only applicable to public health professions); MASS. GEN. LAWS. ANN. ch. 147, § 62 (2012) (only applicable to professions regulated by the Massachusetts Department of Public Safety); MO. ANN. STAT. § 324.008 (West 2011); N.C. GEN. STAT. ANN. § 93B-15.1 (West 2012); OKLA. STAT. tit. 59, § 4100.5 (West 2012); OKLA. STAT. tit. 59, § 4100.5 (2012); OR. REV. STAT. ANN. § 351.1 (West 2013); S.C. CODE ANN. § 40-1-77 (2012); S.D. CODIFIED LAW § 13-42-68 (2013) (temporary certificate for educators); S.D. CODIFIED LAW § 36-1-B-1 (2013) (applying to occupations governed by the professions and occupations code); TENN. CODE ANN. § 4-3-1304 (West 2012); VA. CODE ANN. § 54.1-3005 (West 2012) (applying to the Virginia Board of Nursing); VA. CODE ANN. § 54.1-118 (West 2012) (applying only to professions regulated by the Virginia Department of Professional and Occupational Regulation or the Virginia Department of Health Professionals; provisions to become effective in July 2014); WASH. REV. CODE ANN. § 18.340.020 (West 2011); WIS. STAT. ANN. § 440.09 (2012).

[58] States enacting legislation to provide for expedited licensure of professionally licensed military spouses include Alabama, Alaska, California, Hawaii, Illinois, Kentucky, Louisiana, Maryland, Massachusetts, New Mexico, Oklahoma, Rhode Island, South Dakota, Tennessee, Virginia, and Washington. ALA. CODE § 31-1-6 (2012); CAL. BUS. & PROF. CODE § 115.5 (West 2012); HAW. REV. STAT. §§ 436B-14.6 to -14.7 (2012); 20 ILL. COMP. STAT. ANN. 5/5-715 (West 2012); KY. REV. STAT. ANN. § 12.357 (West 2011); LA. REV. STAT. ANN. § 37:3650 (2012); MD. CODE. ANN., BUS. REG. § 2.5-1.06 (West 2013) (endorsement and temporary licensure for business occupations); MD. CODE. ANN., EDUC. § 6-101.1 06 (West 2013) (expedited educator certification); MD. CODE. ANN., FIN. INST. § 11-612.2 06 (West 2013) (expedited mortgage originator certification); MASS. GEN. LAWS ANN. ch. 112, § 1B (2012) (only applicable to public health professions); MASS. GEN. LAWS. ANN. ch. 147, § 62 (2012) (only applicable to professions regulated by the Massachusetts Department of Public Safety); N.M. STAT. ANN. § 61-1-34 (West 2013); OKLA. STAT. tit. 59, § 4100.5 (2012); R.I. GEN. LAWS ANN. § 5-88-1 (West 2013) (relating to the business professions); R.I. GEN. LAWS ANN. § 23-92-1 (West 2013) (relating to health professions); S.D. CODIFIED LAW § 13-42-68 (2013) (temporary certificate for educators); S.D. CODIFIED LAW § 36-1-B-1 (2013) (applying to occupations governed by the professions and occupations code); TENN. CODE ANN. § 4-3-1304 (West 2012); VA. CODE ANN. § 54.1-3005 (West 2012) (applying to the Virginia Board of Nursing); VA. CODE ANN. § 54.1-118 (West 2012) (applying only to professions regulated by the Virginia Department of Professional and Occupational Regulation or the Virginia Department of Health Professionals; provisions to become effective in July 2014); WASH. REV. CODE ANN. § 18.340.020 (West 2011).

practices.[59] Regardless of whether the state decided to effectuate portability through endorsement, expedited licensure, or a hybrid of methods, many enactments emulate a roughly similar structure. Each state's enactment retains at least one indispensible provision common to every other state—marriage to a service member—and many contain similar provisions regulating licensure issue.[60]

A. Portability Enactments Generally

All licensure portability measures currently enacted require that the military spouse be married to a member of the Armed Forces and that the service member relocate to the license-issuing state due to official military orders.[61] Additionally, nearly all the legislative provisions require that the professional military spouse possess a current, and not lapsed, license prior to taking advantage of the licensure portability statute.[62]

Although no other provisions are standard to the portability enactments, there are several commonly enacted provisions found in the licensure portability measures. First, many of the states have drafted portability measures in a manner intended to limit discretion by the issuing agencies upon fulfillment of identified requirements.[63] Second,

---

[59] *See supra* notes 56–58 and accompanying text.

[60] *See infra* notes 61–66 and accompanying text.

[61] *E.g.*, ALA. CODE § 31-1-6(b)(1) (2012) (stating that the provision applies to persons who "[a]re married to and living with an active duty member of the United States Armed Forces who is relocated to and stationed in the State of Alabama under official military orders"). Not all states share Alabama's requirement that the service member's spouse be co-located in the state to which the service member is assigned or that the two cohabitate. *See, e.g.*, CAL. BUS. & PROF. CODE § 115.5(a)(1) (West 2012) ("[A]pplicant is married to, or in a domestic partnership or other legal union with, an active duty member of the Armed Forces . . . who is assigned to a duty station in this state under official active duty orders.").

[62] *E.g.*, ARIZ. REV. STAT. ANN. § 32-4302 (2011) ("The person is currently licensed or certified by another state . . . ."). *Accord* COLO. REV. STAT. §§ 12-71-101 (2012) (requiring "the holding of a currently valid license" in order to obtain reciprocity), *and* S.C. CODE ANN. § 40-1-77(B)(1)(b) (2012) ("[A]pplicant holds a valid license by another state . . . for the profession for which temporary licensure is sought."). The requirement of a current or valid license presumably may have a negative impact on professionally licensed military spouses who have been unable to find work in their field prior to relocation or enactment of the portability measures considered in this article.

[63] At least ten states with portability measures are "shall issue" states, directly mandating that state licensing agencies issue licenses, temporary or otherwise, upon fulfillment of requirements by a professionally licensed military spouse accompanying a service

states with licensure portability enactments often inquire into the military spouse applicant's character and fitness to practice.[64] Third, many states and their associated licensing agencies explicitly require the payment of licensing fees prior to issuance of a license.[65] Fourth, states often choose to conduct background checks through either local or federal law enforcement agencies before issuing licenses to professional military spouses.[66]

Providing evidence of marriage to a service member, relocation pursuant to official orders, possession of a current license, and demonstration of character and fitness to practice should be a relatively simple factual assertion for many professionally licensed military spouses. Similarly, the payment of applicable licensing fees and law enforcement background checks—both state and federal—are straightforward procedural hurdles prior to licensure, though licensing fees could be cost prohibitive to some relocating professionally licensed military spouses. Despite those minor requirements, the professionally licensed military spouse is far more likely to have greater difficulties determining which professions are covered by the licensure portability measures.[67] If the military spouse's profession is covered by the

---

member to the state. "Shall issue" states include Arizona, Hawaii, Illinois, Indiana, Kansas, Kentucky, Louisiana, Massachusetts, Missouri, and North Carolina. ARIZ. REV. STAT. ANN. § 32-4302 (2011); HAW. REV. STAT. §§ 436B-14.6 to -14.7 (2012);20 ILL. COMP. STAT. ANN. 5/5-715 (West 2012); IND. CODE ANN. § 25-1-17 (West 2012); KAN. STAT. ANN. § 48-3406 (West 2012); KY. REV. STAT. ANN. § 12.357 (West 2011); LA. REV. STAT. ANN. § 37:3650 (2012); MASS. GEN. LAWS ANN. ch. 112, § 1B (2012) (applying only to public health professions); MASS. GEN. LAWS. ANN. ch. 147 § 62 (2012) (applying only to professions regulated by the Massachusetts Department of Public Safety); MO. ANN. STAT. § 324.008 (West 2011); N.C. GEN. STAT. ANN. § 93B-15.1 (West 2012). California, a state providing only expedited licensure, has enacted a "shall expedite" requirement for its state agencies issues licenses to professionally licensed military spouses. CAL. BUS. & PROF. CODE § 115.5(a)(1) (West 2012). Alabama, Alaska, Florida, and South Carolina are "may issue" jurisdictions. ALA. CODE § 31-1-6 (2012); ALASKA STAT. § 08.01.063 (2011); FLA. STAT. ANN. § 455.02 (West 2010) (applying only to licensure by boards listed under FLA. STAT. ANN. § 20.165); FLA. STAT. ANN. § 456.024 (West 2011) (applying to health professions); S.C. CODE ANN. § 40-1-77 (2012).

[64] *E.g.*, IND. CODE ANN. § 25-1-17-5(3) to -5(4) (West 2012) ("Has not committed any act in any jurisdiction that would have constituted grounds for refusal, suspension, or revocation of a license . . . to practice . . . . Is in good standing and has not been disciplined by the agency.").

[65] *E.g.*, *id.* § 25-1-17-5(5) ("Pays any fees required by the occupational licensing board for which the applicant is seeking licensure, certification, registration, or a permit.").

[66] *E.g.*, ILL. COMP. STAT. ANN. 5/5-715(b)(4) (West 2012) (requiring fingerprinting by the Illinois State Police for both state and national criminal history checks).

[67] *See infra* notes 69–76 and accompanying text.

measure, the spouse will then likely have to compare the surrogate state's qualifications to practice to the practice qualifications imposed by the military spouse' original licensing state.[68]

State portability measures are frequently applicable to multiple professions, often by application to consolidated professional licensing or occupation codes.[69] In a similar vein, the majority of states have consolidated their professional and occupational licensing agencies, with several creating separate agencies for regulation of health professions and non-health professions.[70] Tennessee's licensure portability measure provides an illustration of application to a central occupational licensing code. Tennessee's licensure portability measure applies directly to its "division of regulatory boards."[71] That division is responsible for regulation of auctioneers, general contractors, accountants, barbers, cosmetologists, architects and engineers, land surveyors, funeral directors and embalmers, firefighting personnel, private investigators, and realtors.[72] A professionally licensed military spouse relocating to Tennessee could utilize the provision if the spouse's license and occupation was regulated by the division of regulatory boards. However, Tennessee's statute has several explicit exceptions, removing some professions from the licensure portability measure's purview. In Tennessee, the "healing arts," hospitals, pollution control, pest control, sanitation, miners, and law are excluded from the portability enactment.[73] Such exclusions are commonplace, even when state enactments encompass more occupations and professions than the Tennessee enactment. Comparatively, Colorado's licensure portability measure, also regulating a consolidated business and professional code, applies to

---

[68] *See infra* notes 77–78 and accompanying text.

[69] Examples of states applying licensure portability to specific codes include Arizona, California, Colorado, Tennessee, and Virginia, among others. *See generally* ARIZ. REV. STAT. ANN. § 32-4302 (2011) (applying to Arizona Revised Statutes, Title 32, Professions and Occupations); CAL. BUS. & PROF. CODE § 115.5 (West 2012) (applying to California's Business and Professional Code); COLO. REV. STAT. §§ 12-71-101 (2012) (applying to Colorado Revised Statutes, Title 12, Professions and Occupations); TENN. CODE ANN. § 4-3-1304(d)(1) (West 2012) (applying portability statute to boards attached to Tennessee's division of regulatory boards); and VA. CODE ANN. § 54.1-118 (West 2012) (applying only to professions regulated by the Virginia Department of Professional and Occupational Regulation or the Virginia Department of Health Professionals).

[70] Brinegar, *supra* note 41, at 495.

[71] TENN. CODE ANN. § 4-3-1304 (West 2012).

[72] *Id.*

[73] *Id.* § 4-3-1304(a). Teacher certification is also absent from the Tennessee division of regulatory boards. *Id.* Tennessee's military spouse licensure portability measure applies only to boards attached to the division of regulatory boards. *Id.* § 4-3-1304(d).

over seventy-seven professions,[74] but it specifically excludes engineers, surveyors, architects, firework workers, medical practitioners, optometrists, and realtors,[75] some of which are included in Tennessee's measure.[76]

Once it is determined that a portability measure applies to a given profession, the state makes a determination as to whether the original license is sufficient to allow the military spouse to practice. State portability measures mandate that the requirements to obtain the professionally licensed military spouse's original license be, at a minimum, substantially similar to the license to be issued by the surrogate state. For example, Illinois provides expedited, temporary licenses with proof that the "requirements for licensure in the other jurisdiction are determined by the department to be *substantially equivalent* to the standards for licensure in this state."[77] At the most stringent, the surrogate state may require that the professionally licensed military spouse's out-of-state license be based on either equivalent or more rigorous standards than the surrogate state would require for initial licensure.[78] States requiring equivalent or more stringent standards, by eliminating any allowance for substantial equivalence, effectively remove discretion from the surrogate state's licensing bodies. Those states, in effect, impose a strict elements test pertaining to licensure requirements of professional military spouses. Arguably, the states requiring equivalent or more stringent standards for licensure portability have simply re-cast their own, already existing licensure requirements, begging the question whether much protection is afforded the professionally licensed military spouse at all.

Although, as discussed, there is a general formulation to the licensure portability enactments implanted by the states, the method of

---

[74] BEST PRACTICES, *supra* note 1, at 16.
[75] COLO. REV. STAT. § 12-71-102(3) (2012).
[76] *See supra* notes 71–73 and accompanying text.
[77] 20 ILL. COMP. STAT. ANN. 5/5-715(b)(2) (West 2012) (emphasis added). Alternately, Alaska increases the showing necessary by a military spouse, requiring that the military spouse's "hold[ ] a current license or certificate in another state . . . with requirements that the department or appropriate board determines are *equivalent* to those established under [Alaska's] title for that occupation." ALASKA STAT. § 08.01.063(a)(2) (2011) (emphasis added).
[78] *See* HAW. REV. STAT. § 436B-14.7 (2012) ("If a nonresident military spouse holds a current license in another state . . . with licensure requirements that the licensing authority determines are equivalent to or exceed those established by the licensing authority of this state, that nonresident military spouse shall receive a license . . . .").

providing portability varies. The next three subsections will discuss the three methods: licensure by endorsement, temporary licensure, and expedited licensure or application process.

B. Licensure by Endorsement

The DoD report on licensure portability "consistently found that 'licensure by endorsement' significantly eases the process of transferring a license from one state to another."[79] In theory, licensure by endorsement should provide the quickest method for professionally licensed military spouses to return to work following relocation to a surrogate state.[80] Assuming the previous state's licensure requirements are similar, equal, or more stringent, licensure by endorsement allows the professional military spouse to provide a license from the previous state, show absence of a disciplinary record, and obtain a license from the surrogate state.[81] Colorado's licensure portability measure does not even require that certain professionally licensed military spouses obtain a license to practice for the first year of Colorado residence.[82] Following the first year of practice, the Colorado statute simply requires notice to the appropriate agency of continued practice.[83]

The most onerous licensure by endorsement legislation requires applicants to demonstrate recent work experience in the profession.[84]

---

[79] BEST PRACTICES, *supra* note 1, at 16.
[80] *See id.*
[81] *Id.*
[82] The Colorado statute, titled "Authority to practice—reciprocity," provides,

> (1) Notwithstanding any other article in this title, a person need not obtain authority to practice an occupation or profession under this title during the person's first year of residence in Colorado if:
> (a) The person is a military spouse who is authorized to practice that profession in another state;
> (b) Other than the person's lack of licensure, registration, or certification in Colorado, there is no basis to disqualify the person under this title, and
> (c) The person consents, as a condition of practicing in Colorado, to be subject to the jurisdiction and disciplinary authority of the appropriate agency.

COLO. REV. STAT. § 12-71-102 (2012).
[83] *Id.* § 12-71-103.
[84] BEST PRACTICES, *supra* note 1, at 16.

Arizona's licensure by endorsement statute contains two temporal provisions: first, that the professionally licensed military spouse "has been licensed or certified by another state for at least a year,"[85] and second, that "[i]f the person has been licensed or certified for fewer than five years, the regulating entity may require the person to practice under the direct supervision of a licensee . . . ."[86] The DoD recognized the potential difficulties inherent with temporal practice limitations in licensure by endorsement enactments: "[t]his . . . requirement can pose a problem for military spouses who have been unable to practice due to assignment overseas or in other locations."[87] Additionally, the temporal practice limits pose hurdles for recently licensed spouses or those out of work for extended periods for myriad other reasons such as childbirth, illness, temporary relocation during a spouse's deployment, or a series of assignments in jurisdictions without licensure portability.

C. Temporary and Provisional Licensure

Temporary and provisional licensure rules are designed, in large part, to constitute "stop-gap" measures for professionally licensed military spouses relocated to temporary license jurisdictions. As the DoD found, "[t]hese licenses allow applicants to be employed while they fulfill all of the requirements for permanent license, including examinations or endorsement, applications, and additional fees."[88]

States with temporary or provisional licensure provisions frequently do not intend to allow military spouses continual practice under their original license; instead they are often drafted to be nonrenewable and strictly time-limited. These nonrenewable, strictly time-limited provisions only provide a means to practice en route to full licensure by the surrogate state; they do not provide temporary practice authorization for the duration of the service member spouse's assignment in the state. Alaska,[89] Florida,[90] Illinois,[91] Kentucky,[92] Missouri,[93] and South

---

85 ARIZ. REV. STAT. ANN. § 32-4302.A.2 (2011).
86 *Id.*
87 BEST PRACTICES, *supra* note 1, at 16.
88 *Id.* at 17.
89 Temporary licenses issued by Alaska are valid for 180 days, renewable for one more 180-day period upon the discretion of the issuing agency. ALASKA STAT. § 08.01.063 (2011).
90 Temporary licenses issued by Florida for business and professional occupations are valid for six months and are not renewable. FLA. STAT. ANN. § 455.02 (West 2010)

Carolina[94] are temporary licensure jurisdictions with strict limitations on renewal of the temporary licenses.

Other states are more lenient with the duration of the temporary and provisional licensure, allowing the military spouse applicant to continue practice until such time as the grant of licensure by endorsement or full license by the surrogate state. Louisiana, as an example, allows continued practice under its temporary licensure provision until "a license, certification, or registration is granted or until a notice to deny a license . . . is issued."[95]

Perhaps one of the most unique portability measures comes from the Idaho Supreme Court, the first state to provide licensure portability for attorney spouses of active duty service members assigned to that state.[96] As previously noted, states do not use temporary licensure as short-duration licensure by endorsement.[97] Idaho has altered that common practice by allowing military spouse attorneys to practice in one-year increments as long as (1) the military service member remains assigned to an installation in Idaho, (2) the military spouse attorney continues to meet the requirements for practice, (3) the military spouse attorney retains local supervision, (4) the military spouse attorney remains in Idaho, and (5) the military spouse attorney remains a dependent of the

(applying only to licensure by boards listed under FLA. STAT. ANN. § 20.165). Temporary licenses by Florida for health professions and occupations are valid for twelve months and are not renewable. FLA. STAT. ANN. § 456.024(3)(f) (West 2011).

[91] Temporary licenses issued by Illinois to professionally licensed military spouses are good for six months from issuance and are not renewable. 20 ILL. COMP. STAT. ANN. 5/5-715(c) (West 2012).

[92] Temporary licenses issued by Kentucky to professionally licensed military spouses are good for six months from issuance and are not renewable. KY. REV. STAT. ANN. § 12.357(3) (West 2011).

[93] Temporary licenses issued by Missouri to professionally licensed military spouses are good for 180 days, renewable for another 180 days at the discretion of the issuing agency. MO. ANN. STAT. § 324.008 (West 2011). Missouri also imposes a requirement that applying military spouses have practiced two of the five years immediately preceding application for the temporary license. *Id.*

[94] Temporary licenses issued by South Carolina to professionally licensed military spouses are good for one year and may not be renewed. S.C. CODE ANN. § 40-1-77 (2012).

[95] LA. REV. STAT. ANN. § 37:3650D (2012). Indiana has similar provisions but adds expiration of the temporary license and failure to "comply with the terms of the temporary license" as other conditions preceding temporary license termination. IND. CODE ANN. § 25-1-17-8(b) (West 2012).

[96] IDAHO BAR COMM'N RULES R. 229 (2012).

[97] *See supra* notes 88–94 and accompanying text.

service member.[98] By doing this, Idaho has effectively created "temporary licensure by endorsement," which has advantages for both the military spouse attorney and the state of Idaho. For the military spouse attorney, it ensures the continued opportunity to work in the field of law and to earn a living. For the state, it potentially increases revenue through income taxes,[99] de-centralizes oversight through the local supervision requirement, and ensures limited increase in the number of permanent members of the Idaho bar[100] while still receiving annual dues from the military spouse attorney.

At least one state also requires that the professionally licensed military spouse apply for full licensure before taking advantage of portability. Illinois requires that, to apply for a temporary license, the professionally licensed military spouse have "submitted an application for full licensure."[101] The pitfalls of the "submitted application" requirement before issuance of a temporary license are readily apparent: it countermands the purpose of the temporary license as a stop-gap measure[102] as the military spouse applies for full licensure. In short, the professionally licensed military spouse relocated to Illinois must make sure all requirements for full Illinois licensure are met before presenting a "substantially equivalent"[103] out-of-state license to support the issuance of a temporary license.

D. Expedited Application Processes

Expedited application processes reflect the implementing state's "overall willingness to address the core concern that military spouses only have a short time in a location to establish their households, obtain

---

[98] IDAHO BAR COMM'N RULES R. 229(j) (2012).
[99] This presumes the military spouse does not take advantage of the Military Spouses Residency Relief Act. The Military Spouses Residency Relief Act allows military spouses transferred into a new state as a result of the military service member's official orders to retain their state of residency for state income tax purposes. *See* Military Spouses Residency Relief Act, Pub. L. No. 111-97, § 2(a), 123 Stat. 3007 (2009). The Military Spouses Residency Relief Act is an example of congressional willingness to legislate military spouse issues under Congress's War Powers. *See* U.S. CONST. art. I, § 8, cls. 12–14. *See also infra* notes 200–09 and accompanying text.
[100] Of course, the military spouse attorney could choose to follow the requirements for full licensure as an Idaho attorney.
[101] 20 ILL. COMP. STAT. ANN. 5/5-715(c)(5) (West 2012).
[102] *See supra* note 88 and accompanying text.
[103] 20 ILL. COMP. STAT. ANN. 5/5-715(c)(2) (West 2012).

new licenses, find employment within their professions, and progress in their skills and abilities."[104] The method in which the state will expedite licensure is ill-defined in the legislation, requiring agencies to "expedite" the professionally licensed military spouse's license but leaving the discretion to the agency to accomplish the task.[105]

The Department of Defense recommends that an expedited application process proceed by one of two methods. First, it recommends that states vest their licensure approval in its agency directors.[106] By doing this, the agency director presumably could approve military spouses' applications without the application having to go to a licensing board, decreasing the amount of time needed for licensure issuance. Second, it suggests that a state's licensing board have "authority to approve a license based simply on an affidavit from the applicant that the information provided on the application is true and that verifying documentation has been requested."[107] The second Department of Defense recommendation, when coupled with licensure by endorsement or temporary licensure, could be extremely advantageous to the professionally licensed military spouse seeking employment in a new jurisdiction. In short, the approval by affidavit would, potentially, provide the quickest method for an otherwise qualified professionally licensed military spouses to begin work while preparing an application for licensure by endorsement or temporary licensure, reducing the total period of time the spouse was out of the workforce.

E. Other Provisions

The currently enacted licensure portability measures governing professionally licensed military spouses are as varied as the states implementing them. As such, a review of their individual provisions provides numerous opportunities to examine distinct measures—and the shortfalls or advantages found in each—that may shape future enactments. Several of these provisions, namely the supervision

---

[104] BEST PRACTICES, *supra* note 1, at 18.

[105] *See* ALA. CODE § 31-1-6(c) (2012) ("[U]pon completion of an application that documents compliance with the receiving agency's requirements for a certificate or license, an authorized board, commission, or agency *shall expedite* the application according to statute, promulgated rules, or if applicable, at the next scheduled licensing proceeding . . . ." (emphasis added)).

[106] BEST PRACTICES, *supra* note 1, at 19.

[107] *Id.*

requirement, previous practice requirements, and reduced fee clauses, are each treated in depth.

First, the supervision requirement is a distinct provision found only in a small number of states, such as Arizona and Idaho.[108] Such a requirement allows those two states to provide a significant advantage to the professionally licensed military spouses: it theoretically opens, the ability to practice occupations with significant variability from jurisdiction to jurisdiction, such as the practice of law or education. The licensing and certification of educators is typically excluded from military spouse licensure portability measures, especially those measures applicable to business and occupations codes.[109] Teachers constitute the largest single percentage of professionally licensed military spouses,[110] and yet they are frequently unable to take advantage of the licensure portability provisions. The Department of Defense has identified this problem, chalking up the difficulty to the complexities of teacher certification.[111]

> Licensure portability in teaching is very complicated. There are several tiers of licensing in teaching, and course requirements vary widely based on the state and the subject being taught. Even the relatively standardized portions of teaching license requirements . . . have very different state standards. . . . In addition to the variability in . . . cutoff scores, many states with large military populations have their own individual examinations. Re-taking examinations due to inconsistent cutoff scores or additional state tests pose-time consuming and expensive barriers to licensure portability [for military spouses].[112]

Developing and applying a supervision requirement for professions such as teaching and law could eliminate jurisdiction-specific concerns

---

[108] ARIZ. REV. STAT. ANN. § 32-4302.A.2 (2011); IDAHO BAR COMM'N RULES R. 229(f) (2012). *See also* ARIZ. SUP. CT. R. 38(i) (2012), *available at* http://www.azcourts.gov/Portals/20/2012Rules/120512/R120020C.pdf (requiring local counsel for attorneys with fewer than five years of practice prior to endorsement).

[109] *See supra* notes 69–76 and accompanying text.

[110] BEST PRACTICES, *supra* note 1, at 10. Teachers constitute 5.2% of the total population of military spouses in the labor force. *Id.*

[111] *See id.* at 14.

[112] *Id.*

by placing the supervisory burden on a local licensee as opposed to the state regulatory or licensing agency. Although it could potentially seem onerous to the professionally licensed military spouse to find local supervision at the outset, it would work to ensure that the professionally licensed spouse had gainful employment prior to beginning practice in the surrogate state. The supervisory requirement in an educational setting would truly be minimally burdensome as educators presumably look to teach within established institutions. Similarly, the requirement would provide a framework for attorneys to begin work in a law firm or state agency for the duration of the service member's assignment without hazarding malpractice for inexperience in solo practice.

Other states have implemented length of practice requirements greater than the one-year practice requirement in Arizona.[113] Missouri mandates that the professionally licensed military spouse have been "engaged in the active practice of the occupation or profession for which the nonresident military spouse seeks a temporary license or certificate in a state, district, or territory of the United States for at least two of the five years immediately preceding the date of application . . . ."[114] Such a requirement overlooks, or at least adds to, the statute's own internal requirement that the license be "current,"[115] and ignores the fact that professionally licensed military spouses often have difficulty finding consistent employment in the given field.[116] As written, the provision denies applicability of Missouri's expedited licensure provision to a professionally licensed military spouse who, hypothetically, still maintains a current professional license from another state, complete with adequate continuing education credits, if that military spouse has practiced fewer than two years in the previous five. Such a provision dramatically impacts the seasoned practitioner over the neophyte.

Consider a situation in which that military spouse, with a current license and adequate continuing education hours, has been out of work for three-and-a-half years due to constant re-assignment. Now consider that the spouse had fifteen years of continual practice before the five-year window and one-and-a-half years of practice within the five-year

---

[113] *See supra* notes 85–87 and accompanying text.

[114] MO. ANN. STAT. § 324.008 (West 2011).

[115] *Id.* (requiring that the nonresident military spouse "hold[ ] a *current* license or certificate in another state . . . with licensure requirements that the appropriate regulatory board or agency determines are equivalent to those established under Missouri law for that occupation or profession").

[116] *See generally* BEST PRACTICES, *supra* note 1, at 7.

window immediately preceding application—for a total of sixteen-and-a-half years of practice. That seasoned practitioner would still be denied expedited licensure under Missouri law, perhaps in an occupation that could readily benefit from the practitioner's expertise. Viewed in this light, a practice requirement such as Missouri's appears to be a strict exclusionary rule against some experienced professionally licensed military spouses.

Second, though the supervisory requirement in Arizona and Idaho could be viewed as either a limiting or enhancing provision—limiting to the recently admitted to practice but enhancing if prospectively applied to allow practice in jurisdiction-specific professions that might be otherwise excluded from the provisions—many states have enacted provisions that strictly limit the use and function of licensure portability measures. Three states—Oklahoma, Tennessee, and Washington—explicitly require that the professionally licensed military spouse have "left employment" in the previous state before obtaining the benefit of the licensure portability measures in the surrogate state.[117] This means that the spouse must have actively held employment in the previous state or else the licensure portability measure would not apply. Those provisions do not specify that the previously held out-of-state employment be in the profession to which the military spouse applies to practice in the surrogate state. Yet they do not account for professionally licensed military spouses out of work for any number of reasons, leaving those previously unemployed to work through the full, non-expedited licensure requirements.

Third, few states address the financial concerns of professionally licensed military spouses faced with transfer every few years. As one military spouse real estate broker noted,

> I was a real estate broker in North Carolina when I met my husband. When we [moved] to Texas, my license was no longer valid . . . . In order to reinstate my license, I would have had to attend Texas real estate school and

[117] OKLA. STAT. tit. 59, § 4100.5B.4 (West 2012) (applying Oklahoma's expedited licensure measure to professionally licensed military spouses "[w]ho left employment in another state to accompany the person's spouse to this state"); TENN. CODE ANN. § 4-3-1304(d)(1)(D) (West 2012) (applying Tennessee's expedited licensure enactment to professionally licensed military spouses "[w]ho left employment to accompany the person's spouse to this state"); WASH. REV. CODE ANN. § 18.340.020(2)(a)(iii) (West 2011).

> pay Texas licensure fees. The cost to get my license and restart my business would have been more than I could have earned in the 18 months we lived there before [moving] to Kentucky. In Kentucky, I would have had to do it all over again.[118]

A reduced fee structure, or alternate fee structure, is a largely unexplored area in licensure portability enactments that would have a direct, tangible, positive effect on the well-being of the military family moving into a new state. Failure to address licensure fees, as noted by the military spouse above, results in the transplanted military family having to make a determination if it is financially viable for the professionally licensed military spouse to seek continued employment in the occupational field. If not, the failure to seek employment may detrimentally affect the professionally licensed military spouse. This is especially true if subsequent assignments take the military family to a state requiring that the military spouse either have immediately left employment[119] or have worked a requisite number of years in the profession prior to using the portability enactment.[120]

IV. Standardizing Portability

Erin Worth's story typifies the experience of the professionally licensed military spouse. The wife of a Coast Guard sailor, Worth had "moved seven times since graduating from law school in 1995, and . . . never held the same job for more than three years."[121] As a practicing attorney, she sat for three bar examinations and was admitted to practice in four jurisdictions.[122] In order to continue her practice, she lived apart from her spouse and often commuted over three hours daily.[123] Worth, now a Federal Maritime Commission administrative law judge, worked extensively with the Military Spouse JD Network to lobby the American Bar Association [ABA] to "effect rule changes to allow licensed

---

[118] BEST PRACTICES, *supra* note 1, at 7 (citations omitted).
[119] *See supra* note 117 and accompanying text.
[120] *See supra* notes 113–15 and accompanying text.
[121] Hollee Swartz Temple, *Mission Accomplished: Military Spouse Network Gets ABA, White House Attention*, ABA J. (May 1, 2012, 12:40 AM), http://www.abajournal.com/magazine/article/mission_accomplished_military_spouse_network_gets_aba_white_house_attention/.
[122] *Id.*
[123] *Id.*

attorneys to obtain admission in new jurisdictions."[124] In 2012, Worth's efforts were rewarded when the ABA "unanimously passed a resolution urging state and local bar authorities to accommodate [military spouse] lawyers in various ways, including 'licensure by endorsement . . . .'"[125]

Despite Judge Worth's successes lobbying the ABA, and even with the advent of licensure portability measures over the past few years, the professionally licensed military spouse transferred with a service member across state lines faces challenges, notably between continued state variability among covered professions and the types of protections afforded, highlighted in Part III of this article.[126] Considering the drastic differences in licensure portability measures enacted, and the absence of licensure portability in a number of states, the question remains whether the federal government could, or should, take additional actions to standardize portability enactments for professionally licensed military spouses. Alternately, if the federal government either chose not to take further action or was precluded from taking any action, is there a methodology by which the states could standardize protections?

This section will explore possible options for both federal and state governments to standardize licensure portability measures for the professionally licensed military spouse. Beginning with the federal government, the section will examine the interplay between enumerated federal powers and state "police powers," looking at the potential for enticing state action through "bargained for" federalism under the Constitution's Spending Power.[127] Turning to state enactments, the article discusses the states' constitutional ability to engage in interstate compacts,[128] frequently utilized in other areas yet rarely used in the context of military or veterans' affairs.[129] Absent congressional action or adoption of interstate compact, the section discusses a model act

---

[124] *Id.*
[125] *Id.*
[126] *See supra* notes 54–120 and accompanying text.
[127] U.S. CONST. art. I, § 8, cls. 1 & 12. For more information on federal-state "bargains," including spending power bargains, see Erin Ryan, *Negotiating Federalism*, 52 B.C. L. REV. 1 (2011). Professor Ryan notes that "Congress frequently uses its spending power to bargain with state policymakers in areas of law traditionally associated with state prerogative, such as education, family law, and health policy." *Id.* at 25 (citation omitted). Occupational licensing is also an area of "state prerogative." *Id.*
[128] U.S. CONST. art. I, § 10, cl. 3.
[129] *See* Matthew Pincus, Note, *When Should Interstate Compacts Require Congressional Consent*?, 42 COLUM. J.L. & SOC. PROBS. 511, 519 (2009).

pertaining to licensure portability for professionally licensed military spouses in the context of current legislative enactments.[130]

A. "Bargained-For" Federalism

The Obama Administration, through the efforts of First Lady Michelle Obama, has made licensure portability for professionally licensed military spouses a priority.[131] In this complex field, the question remains whether Congress possesses any avenue to address the issue directly or indirectly. Licensing is, generally speaking, a function of the state and not of the federal government.[132] With professional licensing, it is the state government that is viewed as a bulwark and "instrument of social control to protect the public against unfit or unscrupulous practitioners."[133] As such, is Congress impotent from taking action to address the professionally licensed military spouse?

Congress, with its enumerated constitutional powers to tax and to spend, possesses the power to entice state action where it could not normally act on its own.[134] The power to tax and spend derives from the General Welfare Clause of the Constitution, which provides that "Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States."[135] From this clause's grant of substantive power, Congress could presumably act to ensure uniform or standardized portability for professionally licensed military spouses by conditioning expenditure of federal funds on enactment of licensure portability measures for the professionally licensed military spouse, eliminating state-by-state variation that could still prove troublesome for spouses.

---

[130] *See supra* Part III and accompanying text.
[131] *See generally* MILITARY FAMILIES, *supra* note 35, at 16.
[132] *See* Brinegar, *supra* note 41, at 497.
[133] Walter Gellhorn, *The Abuse of Occupational Licensing*, 44 U. CHI. L. REV. 6, 10 (1976).
[134] *See generally* 3 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 5.7 (3d ed. 1999).
[135] U.S. CONST. art. I, § 8, cl. 1.

1. Standardization Under the General Welfare Clause

In 1936, for the first time, the Supreme Court provided limited guidance for congressional action under the power to tax and spend. In the landmark case of *United States v. Butler*,[136] Justice Roberts effectively summarized earlier General Welfare Clause jurisprudence:

> Since the foundation of the Nation, sharp differences of opinion have persisted as to the true interpretation of the phrase. Madison asserted that it amounted to no more than a reference to the other powers enumerated in the subsequent clauses of the same section . . . . In this view the phrase is a mere tautology, for taxation and appropriation are or may be necessary incidents of the exercise of any of the enumerated legislative powers. Hamilton, on the other hand, maintained the clause confers a power separate and distinct from those later enumerated, it is not restricted in meaning by the grant of them, and Congress consequently has a *substantive power to tax and to appropriate*, limited only by the requirement that it *shall be exercised to provide for the general welfare of the United States*. . . . Mr. Justice Story, in his Commentaries, espouses the Hamiltonian position. [We] conclude that the reading by Mr. Justice Story is the correct one. While therefore, the power to tax is not unlimited, its confines are set in the clause which confers it, and not in those of section 8 which bestow and define the legislative powers of the Congress. It results that the power of Congress to authorize the expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution.[137]

As Justice Roberts noted in *Butler*, power to tax and appropriate was not unlimited, but bounded by the "requirement" that the exercise be for the "general welfare of the United States."[138] Since Congress could tax for

[136] United States v. Butler, 297 U.S. 1 (1936).
[137] *Id.* at 65–66 (citations omitted).
[138] *Id.* The Supreme Court would ultimately determine that the Agricultural Adjustment Act of 1933 was unconstitutional in *Butler*, violating the powers reserved to the states under the Tenth Amendment. *Id*. at 74 ("Congress has no power to enforce its commands on the farmer to the ends sought by the Agricultural Adjustment Act. It must follow that

the general welfare, the issue remained whether Congress could condition spending based on state action in response to federal policy priorities. It would take the Supreme Court another fifty years to provide an answer and the constitutional test on spending restrictions.

In 1987, *South Dakota v. Dole*[139] considered the constitutionality of withholding federal highway funds from states that allowed the purchase and consumption of alcoholic beverages by persons under the age of twenty-one.[140] The Court determined that, incident to Congress's power to "provide for the common Defence and general Welfare,"[141] "Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power 'to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.'"[142]

The Court laid out a four-part test to determine the limits of the federal spending power used to entice a state into action. First, the "exercise of the spending power must be in pursuit of the 'general welfare.'"[143] Second, "if Congress desires to condition the States' receipt of federal funds, it 'must do so unambiguously . . . , enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation.'"[144] Third, the Court found that precedent indicated that "conditions on federal grants might be illegitimate if they are unrelated 'to the federal interest in particular national projects or programs.'"[145] Fourth, the condition must not run afoul of another constitutional provision that could provide an independent bar against the exercise of the spending power.[146]

At first glance, the spending power appears to be an inappropriate tool for Congress to standardize licensure portability for professionally licensed military spouses. As then-Justice Rehnquist noted in *Dole*, the "spending power is of course not unlimited,"[147] and the enumerated four-

---

it may not indirectly accomplish those ends by taxing and spending to purchase compliance.").

139 483 U.S. 203 (1987).

140 *Id.* at 205.

141 U.S. CONST. art. I, § 8, cl.1.

142 *Dole*, 483 U.S. at 206 (quoting Fullilove v. Klutznick, 448 U.S. 448, 474 (1980)).

143 *Id.* at 207 (citations omitted).

144 *Id.* (citations omitted).

145 *Id.* (citations omitted).

146 *Id.* at 208 (citations omitted).

147 *Id.* at 207 (citation omitted).

part test would seemingly only apply in cases similar to those presented in *Dole*, pertaining to public safety. As shown below, however, applying *Dole*'s standard to professionally licensed military spouses yields surprising results: in fact, Congress could potentially condition spending on state enactment of licensure portability measures.

a. "General Welfare" and the Professionally Licensed Military Spouse

Any congressional action premised on the General Welfare Clause would require a determination that licensure portability for the professionally licensed military spouse be a matter of "general welfare." Congressional determination of what constitutes a matter of "general welfare" is rarely contested in spending power jurisprudence. The Supreme Court has explicitly recognized that "the concept of welfare or the opposite is shaped by Congress . . . ."[148] Though the Supreme Court gives deference to Congress on what constitutes spending for the "general welfare," as Professor John C. Eastman theorized, Congress could not, therefore, spend "for the special welfare of particular regions or states, even if the spending was undertaken in all regions or all states and therefore might be said to enhance the 'general' welfare in the aggregate."[149]

Despite Professor Eastman's assertion that Congress would be precluded from conditional spending focused on the "particular" in a geographic sense, professionally licensed military spouses are geographically dispersed throughout the Union.[150] Regardless of the geographical dispersion of professionally licensed military spouses, would those spouses nonetheless encompass a "particular" group for which spending would be precluded? In *Helvering v. Davis*, Justice Cardozo looked at the General Welfare Clause in a non-geographic sense and surmised that,

> The line must still be drawn between one welfare and another, between particular and general. Where this shall

[148] *Id*. at 208 (quoting Helvering v. Davis, 301 U.S. 619, 645 (1937)).
[149] John C. Eastman, *Restoring the "General" to the General Welfare Clause*, 4 CHAP. L. REV. 63, 65 (2001).
[150] *See generally* MILITARY FAMILIES, *supra* note 35, at 24 (listing the twenty states with the highest concentration of military spouses).

> be placed cannot be known through a formula in advance of the event. There is a middle ground or certainly a penumbra in which discretion is at large. The discretion, however, is not confided to the courts. The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment. This is now familiar law.[151]

In effect, the Court insufficiently provided guidance on defining what comprises the term "general" and what compromises the term "particular" in the exercise of the spending power absent a "clearly wrong" or "display of arbitrary power" by Congress.[152] With such wide latitude for congressional action, the lower courts have gone so far as to treat the "general welfare" element of the *Dole* test as a "complete throw away."[153]

Pragmatically, standardization of licensure portability enactments could not rest on the hope that federal courts would ignore what constitutes "general welfare." In recent years, some legal academics have derided the Supreme Court's spending power jurisprudence in large part because of the amorphous tests.[154] Others have re-cast the discussion in terms of social welfare, implying that the variation among different state policies increases the aggregate social welfare, more akin to a true general welfare. A consistent, national policy directed by Congress under the spending power, therefore, would decrease the aggregate social welfare.[155]

> [I]n the absence of a nationwide consensus, permitting state-by-state variation will almost always satisfy more people than would the imposition of a uniform national policy, and will almost always therefore increase aggregate social welfare. . . . [S]tate-by-state diversity

[151] Helvering v. Davis, 301 U.S. 619, 640 (1937).
[152] *Id.*
[153] Lynn A. Baker & Mitchell N. Berman, *Getting Off the Dole: Why the Court Should Abandon Its Spending Doctrine, and How a Too-Clever Congress Could Provoke It to Do So*, 78 IND. L.J. 459, 464 (2003).
[154] *See* Eastman, *supra* note 149, at 87 ("For the first eighty-five years of our nation's history, under both the Articles of Confederation and the Constitution, the language of 'general welfare' was viewed as a limitation on the powers of Congress, not as a grant of plenary power."). *See also* Baker & Berman, *supra* note 153, at 470–85 (discussing why *Dole* should be abandoned).
[155] *See* Baker & Berman, *supra* note 153, at 470–77.

> will generally allow the government to accommodate the preferences of a greater portion of the electorate, as long as those preferences are unequally distributed geographically. . . . [T]his is likely to mean that the imposition of national uniformity in the absence of consensus will reduce aggregate social welfare relative to the existence of state-by-state diversity . . . . Because *Dole*'s interpretation of the spending power is so generous, it enhances Congress's authority to drive states toward a single nationwide policy, notwithstanding the preferences of citizens of some states to have a different policy. To the extent that Congress need respond only to the preference of a majority of states in exercising the spending power, its action may well be at odds with the preferences of a dissenting minority of states.[156]

Arguably, the professionally licensed military spouse presents a different scenario, one that directly counters the idea of a reduced aggregate social welfare, or general welfare, by standardizing state enactments. Unlike other segments of society, military families cannot choose the jurisdiction to which they relocate.[157] The ability to choose relocation in order to take advantage of jurisdictional variation is therefore lost on the military spouse and the military family. Instead, relying on standardized licensure portability measures to ensure the financial well-being of a military family would add to the aggregate

---

[156] *Id.* at 471.
[157] Professors Baker and Berman provide an example of aggregate social welfare as increased by jurisdictional variation:

> Mormons moved from Illinois to Utah, while African Americans migrated from the Jim Crow South. Rail travel and, later, automobiles enabled residents of conservative states to escape constraints on divorce and remarriage. In the years before *Roe v. Wade*, women from states with restrictive abortion laws sought reproductive autonomy in more sympathetic jurisdictions. Today, the lesbian who finds herself in Utah like the gun lover who lives in Washington, D.C., and the gambler in Pennsylvania, need only cross a state border to be free of constraining rules. These are liberties that come only with the variations in local norms made possible by federalism.

Id. at 471–72 (quoting Seth Kreimer, *Federalism and Freedom*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 66, 72 (2001)).

social, or general, welfare: professionally licensed military spouses desiring to work would gain employment, quickly inserting themselves into the professional workforce, decreasing unemployment rolls, increasing disposable family income all while increasing state and federal tax revenues and, potentially, the quality of life and career satisfaction for the service member and family. As President Obama and his administration have made clear, "stronger military families will strengthen the fabric of America."[158] This is especially true in light of the dramatic disparities in wage and labor force participation between military spouses and civilian counterparts, enhanced by the "lack of broad-based reciprocity among states to recognize professional licenses . . . creat[ing] a significant barrier to employment."[159] Identifying these disparities and posing the issue of licensure portability as a nationwide problem "attributes sufficient incidence or impact to it to implicate the general welfare as opposed to the welfare of a few."[160]

Licensure portability for the professionally licensed military spouse has broader implications than rectifying disparities in pay between military and civilian spouses or overcoming reduced employment opportunities. It is well-documented that military spouses are indispensible in the support of the military service members.[161] Former Army Chief of Staff General John A. Wickham, Jr. recognized the impact of family issues on service members in 1983, arguing that "family issues [are] central to retention, readiness, and mission success and as such, deserve[ ] greater support . . . ."[162] Military spouses "endure

---

[158] Letter from President Barack Obama, (Jan. 14, 2011), *in* MILITARY FAMILIES, *supra* note 35.
[159] MILITARY FAMILIES, *supra* note 35, at 16.
[160] David E. Engdahl, *The Spending Power*, 44 DUKE L.J. 1, 45 (1994).
[161] *See* BEST PRACTICES, *supra* note 1, at 6.
[162] LAURA L. MILLER ET AL., A NEW APPROACH FOR ASSESSING THE NEEDS OF SERVICE MEMBERS AND THEIR FAMILIES 5 (2011). Spouses may even play a role in how an organization, such as the Army, effectuates organizational change; one commentator noted, "*there is a high correlation between spouse involvement in and support of organizational change and the success of that change*." Major Dominic L. Edwards, Spouse Influence in Army Organizational Change 29 (April 23, 2009) (unpublished monograph, U.S. Army Command and General Staff College) (on file with the School of Advanced Military Studies (SAMS)) (emphasis original). Additionally, either positive or negative spousal interactions can, in limited circumstances, provide a basis for an officer's or noncommissioned officer's evaluation. *See* U.S. DEP'T OF ARMY, REG. 623-3, EVALUATION REPORTING SYSTEM para. 3-21 (5 June 2012). In "circumstances involving actual and/or impacts on the rated Soldier's performance or conduct . . . comments containing reference to a spouse may be made." *Id.* The Army regulation provides two examples: (1) "CPT Doe continued his outstanding, selfless service, despite his wife's

recurring absences of their service member spouse, frequent relocations, and extended periods of single-parenting . . . ."[163] Studies indicate that those challenges can be alleviated by employment that provides "financial and personal well-being . . . [that are] important compenent[s] of the retention of service members."[164] Couched in these terms, as supporting the military mission, standardization would directly benefit the general welfare as opposed to a specific, and thereby constitutionally prohibited, welfare.[165]

b. Unambiguous Conditions

By necessity, any congressional action based on the General Welfare Clause would have to clearly and unambiguously present the basis for conditional spending to the states.[166] In *South Dakota v. Dole*, the conditional spending was premised on federal highway funding to be withheld unless the state imposed an age restriction on consumption of alcoholic beverages.[167] Regarding any standardization of licensure for professionally licensed military spouses, Congress could condition expenditure of federal funds for higher education on implementation of licensure portability measures, and the limits of the licensure portability measure would have to be explicitly dictated to the states before the conditioning of federal funds.

---

severe illness," and (2) "COL Doe's intemperate public confrontations with his wife were detrimental to his status as an officer." *Id*.

[163] BEST PRACTICES, *supra* note 1, at 6.

[164] *Id.* The joint Department of the Treasury and DoD study also determined that spousal satisfaction—or dissatisfaction—with their careers affects re-enlistment. *Id.* Generally, the "most satisfied military families are those with an employed spouse. . . . [T]he influence of the military spouse on service member retention decision has increased with the proportion of military spouses working outside the home." SCHARCH, *supra* note 52, at 1 (citation omitted). In short, the importance of the military spouse's happiness is paramount to career satisfaction for the service member; the spouse "may be the most important factor in determining an employee's happiness or frustration and overall quality of life." Edwards, *supra* note 162, at 18.

[165] At least one commentator has decried such expansive and abstractive use of the spending power. "Even if we could agree on the correct substantive theory of fairness, determining whether a spending program is unfair under that theory will often depend on the level of abstraction at which the program is described." Samuel R. Bagenstos, *Spending Clause Litigation in the Roberts Court*, 58 DUKE L.J. 345, 360 (2008) (citations omitted).

[166] South Dakota v. Dole, 483 U.S. 203, 207 (1987) (citing Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981)).

[167] *Id.* at 205.

By clearly explaining and presenting unambiguous conditions on which related federal spending would be conditioned, the federal government and the state are creating, and bargaining for, a contract. Simply described, spending power legislation "is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress's power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'"[168] Congress must also have provided adequate notice prior to holding any state in violation of conditional spending. That notice necessitates "(a) notice of the remedy for violation of the spending condition, (b) notice of how the substantive rule imposed by that condition applies to the particular facts, and (c) notice of the facts in a given case that violate that condition."[169]

The Supreme Court in *Pennhurst State School and Hospital v. Halderman* addressed adequate notice to the states under the Developmentally Disabled Assistance and Bill of Rights Act of 1975, which stated that "[p]ersons with developmental disabilities have a 'right to appropriate treatment, services, and habilitation,'" and "[t]reatment should be designed to maximize an individual's potential and should be provided 'in the setting that is least restrictive of the person's personal liberty.'"[170] The Court reasoned, "[i]t is difficult to know what is meant by providing 'appropriate treatment' in the 'least restrictive' setting, and it is unlikely that a State would have accepted federal funds had it known it would be bound to provide such treatment."[171] These terms, the Court held, were more indicative of a federal and state "cooperative program" and "not as a device for the Federal Government to compel a State to provide services that Congress itself is unwilling to fund."[172] The Court further noted that any "condition" for the receipt of federal funds was conspicuously absent from the terms at issue.[173]

Any congressional enactment to standardize licensure for professionally licensed military spouses would have to clearly indicate the requested outcome—licensure portability—in more definitive terms than the aspirational language found in *Pennhurst*. Additionally, the

---

[168] Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981).
[169] Bagenstos, *supra* note 165, at 394.
[170] *Pennhurst*, 451 U.S. at 13.
[171] *Id.* at 24–25.
[172] *Id.* at 22.
[173] *Id.* at 13.

legislation would have to specify: (1) the federal funds, and amounts, which could potentially be withheld from the state absent enactment, (2) the factual link between those funds and the desired outcome of licensure portability for professionally licensed military spouses, and (3) the conditions for when the state would be viewed as in violation of the conditional spending agreement.[174]

Providing more definitive terms than the legislation considered in *Pennhurst* should not pose difficulty for Congress. As a matter of example, Congress could tailor the condition of federal spending on state enactment of licensure portability measures by drafting legislation that authorizes the appropriate executive department[175] to withhold a certain percentage of funds, conditioned on a state's failure to enact expedited licensure by endorsement or temporary licensure for professionally licensed military spouses, and prior to disbursement of current fiscal year appropriations. In diligence, Congress should also clarify what necessitates a professionally licensed military spouse, perhaps by tying the professions to those regulated and licensed by all state executive agencies—the broadest applicability—or under the state's occupations and licensure code—a much narrower applicability.[176]

c. Relation to the Federal Interest

In addition to the presentation of unambiguous conditions to the state, Congress would have to find a relationship between the conditional spending and the federal interest.[177] In the factual findings used to support the legislation, Congress would designate and specify the link between spending and condition. Congressional enactment on licensure portability for professionally licensed military spouses would best be linked to expenditure of federal money for educational programs for

---

[174] *See* Bagenstos, *supra* note 165, at 394.
[175] *See infra* notes 182–84 and accompanying text.
[176] By allowing the individual states to enact their own portability measures as opposed to attempting to implement a federally structured program, Congress eliminates concerns that the federal government has unconstitutionally regulated the activity of state officials, in this case officials responsible for licensure. *See* Prinz v. United States, 521 U.S. 898, 935 (1997) ("Congress cannot . . . conscript[ ] the State's officers directly. The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program."). *See also supra* notes 69–76 and accompanying text.
[177] South Dakota v. Dole, 483 U.S. 203, 207 (1987).

post-secondary school and professional vocations. The U.S. Department of Education has budgeted approximately $69 billion in discretionary educational expenditures for 2013.[178] Additionally, the federal government has budgeted approximately $140.6 billion in expenditures directly tied to higher education, including programs aimed at producing licensed professionals.[179]

As discussed in Part II of this article, the military spouse has undergone a dramatic transformation from the early days of the frontier Army.[180] The professionally licensed military spouse, now comprising more than a full third of military spouses in total,[181] may rely on these federal programs before finding themselves transferred with a military spouse to a jurisdiction that does not recognize the license. Conditioning federal education spending in the states on state enactment of licensure portability measures for professionally licensed military spouses amounts to little more than a federal condition mandating a return on its educational investment.

Congress would have to be thoughtful as to the amount of money conditioned on state licensure portability enactments. The amount of money withheld under the spending power could not be too large as to coerce the state into action.[182] "Spending Clause programs do not pose this danger [of impermissible coercion] when a State has a legitimate choice whether to accept the federal conditions in exchange for federal funds. In such a situation, state officials can fairly be held politically accountable for choosing to accept or refuse the federal offer."[183] Withholding a small proportion of federal education dollars, no more than five percent, would likely constitute enough of a boon for states to

---

[178] *See* U.S. DEP'T OF EDUC., FISCAL YEAR 2013 BUDGET SUMMARY AND BACKGROUND INFORMATION 2, http://www2.ed.gov/about/overview/budget/budget13/summary/13summary.pdf (last visited Mar. 16, 2014).
[179] Included in this estimate are $1.1 billion for career and technical educational grants, $1.1 billion in federal work-study programs, $3.1 billion in vocational rehabilitation grants, $120.8 billion for federal direct student loan programs, and $14.5 billion for college and career-ready student grants. *Id.* at 18, 36, 41, 49, 71.
[180] *See generally supra* Parts II.A and II.B and accompanying text.
[181] BEST PRACTICES, *supra* note 1, at 3.
[182] Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2602–03 (2012).
[183] *Id.* The *Sebelius* decision, focused on the Affordable Care Act, was the first Supreme Court case to find any constitutional violation of the spending power test enumerated in *South Dakota v. Dole* since that case was decided in 1987. Erin Ryan, Spending Power Bargaining After Sebelius 2 (July 12, 2012) (unpublished paper), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2119241.

enact licensure portability measures for professionally licensed military spouses. At the same time, a potential five percent withholding of federal education dollars would likely not be impermissibly coercive to the legislating state.[184]

d. Independent Constitutional Bar

Lastly, any congressional action under the spending power must not be precluded by an independent constitutional bar.[185] Despite the pervasive state "police powers" responsible for state professional licensing legislation,[186] the "police powers" and the Tenth Amendment do not amount to an independent constitutional bar against spending power legislation.[187]

> Today the Supreme Court will not attempt to reserve areas of activity for the sole control of state governments. Thus federal spending programs will not be invalidated merely because they invade the "police power" of the states and influence local activities. The spending program will be upheld so long as its substantive provisions did not violate a specific check on federal power.[188]

The Tenth Amendment does not provide a "specific check" on congressional action pursuant to the spending clause.[189] The state's "police powers" are subsumed by the state's decision to participate in the federal program, because "[t]he State [chooses] to participate in the . . . program and, as a condition of receiving the grant, freely [gives] its assurances that it [will] abide by the conditions of [federal program]."[190]

---

184 The amount of federal highway dollars at issue in *South Dakota v. Dole*, potentially withheld from states failing to implement the age restriction on drinking alcoholic beverages, was five percent. South Dakota v. Dole, 483 U.S. 203, 211 (1987).
185 *Id.* at 208.
186 *See* James W. Hillard & Marjorie E. Johnson, *State Practice Acts of Licensed Health Professionals: Scope of Practice*, 8 DEPAUL J. HEALTH CARE L.237, 239–41 (2004) (describing "police powers" broadly as residual powers left to the states not given to the federal government by the Constitution, including power to promote the general welfare through licensing).
187 ROTUNDA & NOWAK, *supra* note 134, § 5.7, at 526.
188 *Id.*
189 *Id.*
190 Bell v. New Jersey, 461 U.S. 773, 790 (1983).

In a dramatic representation of congressional ability to circumvent a state's powers under the spending clause, the Supreme Court's decision in *Oklahoma v. U.S. Civil Service Commission* even affirmed withholding federal funds for a state's failure to remove a state official who had violated the Hatch Act.[191] "While the United States is not concerned with and has no power to regulate local political activities as such of state officials," Justice Reed wrote, "it does have power to fix the terms upon which its money allotments to states shall be disbursed."[192]

2. Congressional Regulation Pursuant to Enumerated Powers

Although this section has focused intently on the potential for congressional action pursuant to the General Welfare Clause, it has not considered the prospect of conditional spending under the constitutional grant of power to "provide for the common Defence"[193] or any enumerated power to regulate the Armed Forces.[194] Could these constitutional grants of enumerated power provide an avenue for standardization of licensure portability for professionally licensed military spouses?

First, the Supreme Court has never considered the efficacy of conditional spending based on Congress's ability to spend to provide for the common defense.[195] Any conditional spending based on the common defense as opposed to the general welfare would require a new legal framework, though such a framework would likely be far less controversial than general welfare spending conditions due to Congress's enumerated powers under Article I, section 8 of the Constitution to "raise and support Armies," "provide and maintain a Navy," and "make rules for the Government and Regulation of the land and naval Forces."[196]

Theoretically though, any mimicry of the already-established General Welfare Clause spending power jurisprudence would almost result in absurdity. Consider again the *Dole* factors: (1) that the

---

191 *See* Oklahoma v. U.S. Civil Serv. Comm'n, 330 U.S. 127 (1947).
192 *Id.* at 143.
193 U.S. CONST. art. I, § 8, cl. 1.
194 *Id.* art. I, § 8, cls. 12–14 ("To raise and support Armies. . . ."; "To provide and maintain a Navy"; "To make Rules for the Government and Regulation of the land and naval Forces.").
195 ROTUNDA & NOWAK, *supra* note 134, § 5.7, at 523.
196 U.S. CONST. art. I, § 8, cls. 12–14.

spending be for the general welfare, (2) that the terms be unambiguous, (3) that the spending be related to a federal interest, and (4) that there be no independent constitutional bar to preclude the action.[197] Spending based on the common defense would, by necessity, eliminate the third and fourth *Dole* factors; spending for the common defense would, impliedly, be for the federal interest and would be constitutionally permissible under Congress's enumerated Article I powers. The resulting test would consist of two elements: first, that the conditional spending implicate the common defense as opposed to the general welfare, and, second, that the terms be unambiguous. When broken down to these minimal elements, the question arises if conditional spending for defense is even plausible. One critic of the spending power noted,

> The clause commonly mischaracterized as the General Welfare Clause has never been called the Common Defence Clause, although its relevant language, to "provide for the common Defence and general Welfare of the United States", makes parallel reference to both. Surely this is because, while the Taxing Clause alludes to spending for defense, the power to spend for defense obviously derives from other language, drafted in suitable power-granting form, located elsewhere in the Constitution. [T]he reference to "common Defence" spending simply alludes to power conferred elsewhere.[198]

Regardless of the textual location of the congressional spending power—in the General Welfare Clause or the remainder of Congress's enumerated powers—conditional congressional spending is well-established.[199] Given the long-established precedent of conditional spending, it may be that conditional spending for the common defense with unambiguous terms would suffice to support congressional action. Assuming that conditional spending for the common defense is plausible under the established spending power precedent or enumerated congressional powers, the application to military spouses would, facially, seem problematic. Interestingly, Congress has already passed, and the

---

[197] *See* South Dakota v. Dole, 483 U.S. 203, 207–08 (1987).

[198] David E. Engdahl, *The Basis of the Spending Power*, 18 SEATTLE U. L. REV. 215, 221–22 (1995).

[199] *See* Helvering v. Davis, 301 U.S. 619 (1937).

President has signed, legislation based on Congress's enumerated powers over the Armed Forces as applied to military spouses.

3. The Military Spouses Residency Relief Act

In 2009, Congress considered amendments to the Servicemembers Civil Relief Act (SCRA), extending SCRA protections to military spouses to retain residency in a state from which they were absent (1) for voting purposes and (2) for income and personal property tax purposes.[200] Prior to passing the legislation, the Chairman of the Senate Veteran's Affairs Committee, Senator Daniel Akaka, was concerned about the constitutionality of the extension of the SCRA to military spouses.[201] Senator Akaka noted that provisions of the SCRA had been found constitutional by the Supreme Court under Congress's authority to "declare War" and "raise and support Armies,"[202] but application to "individuals who are not members of the Armed Forces" was unclear.[203]

The constitutionality of expanding SCRA protections to military spouses is a question of first impression, never before considered by courts,[204] namely "whether the proposed amendment could precipitate a conflict between congressional power to regulate the military pursuant to its constitutional War Powers and the reserved right of the states to tax."[205] Previously, in *Dameron v. Brodhead*, the Supreme Court only held that the "statute [the SCRA] merely states that the taxable domicile of *servicemen* shall not be changed by military assignments," which the Court thought was "within the Federal power."[206] Spouses were absent from the Court's analysis.

The Congressional Research Service determined that the extension of the SCRA to military spouses was constitutionally firm.[207] The Service concluded,

---

[200] SENATE COMM. ON VETERANS' AFFAIRS, MILITARY SPOUSES RESIDENCY RELIEF ACT, S. REP. NO. 111-46, at 2 (1st Sess. 2009).
[201] *Id.* at 9.
[202] *See* Dameron v. Brodhead, 345 U.S. 322, 325 (1953).
[203] S. REP. NO. 111-46, at 9.
[204] *Id.* at 13 (constitutional analysis by R. Chuck Mason, Legislative Attorney for the Congressional Research Service).
[205] *Id.* at 15.
[206] *Dameron*, 345 U.S. at 325 (emphasis added).
[207] S. REP. NO., 111-46, at 17 (constitutional analysis by R. Chuck Mason, Legislative Attorney for the Congressional Research Service).

> Federal regulation of state residency requirements may in itself be unusual, but there does not appear to be a significant question as to whether Congress' War Powers are sufficient to support such a regulation. The interest of the Armed Forces in family cohesion and troop morale may be sufficient justification for a legal requirement allowing service members and their dependents to maintain the same domicile regardless of where they are stationed. It could be argued that this requirement would serve the broader interests of the Federal Government in raising and maintaining its troops and therefore within Congress' constitutional authority.[208]

With that guidance, Congress passed and the President signed the Military Spouses' Residency Relief Act.[209]

The Military Spouses Residency Relief Act (MSRRA) clearly indicates congressional sympathy for the difficulties encountered by military spouses. The rationale used to justify the enactment of the MSRRA approves of Congress's use of enumerated War Powers to abrogate historically assessed state taxation of military spouses. Although the pertinent facts to the adoption of the MSRRA are distinguishable from those applicable to licensure portability, Congress's action provides some guidance as to whether Congress could use its enumerated powers to alter state action through conditional spending: the War Powers are broad, and if they can eliminate—or at least circumvent—state taxation, they could support conditional spending initiatives.

B. Interstate Compact

Given the unknowns inherent in congressional spending power action used to entice state enactment of licensure portability measures, the states could act jointly to address the issue of standardization. The Constitution explicitly provides a mechanism by which states can enter

[208] *Id.* at 17–18.
[209] Military Spouses Residency Relief Act, Pub. L. No. 111-97, § 2(a), 123 Stat. 3007 (2009).

into cooperative compacts to address interstate issues.[210] The Constitution's Compact Clause allows states to enter into agreements, provided they have the consent of Congress,[211] and once Congress approves an interstate compact, the "compact itself [becomes] a law of the United States."[212]

Historically, interstate compacts have been used sparingly[213] and typically in three situations: the result of "political accident," "state or private ploys to avoid federal regulation," and "the desperate last resort of states."[214] Beyond the usual use of interstate compacts, compacts have been used to address law enforcement, education, and the welfare of children.[215] Interstate compacts allow states to assert and negotiate state priorities prior to, and without substantial, federal intrusion,[216] and have "been recognized as a valuable intermediate level of regulation between intrusive federal control and ineffective state control."[217] By utilizing interstate compacts, states can "develop a dynamic, self-regulatory system that remains flexible enough to address changing needs."[218]

To facilitate the policy-driven development of interstate compacts, the Council of State Governments formed the National Center for Interstate Compacts (NCIC) to aid states to develop and implement interstate compacts.[219] Assistance in the formulation of interstate compacts is useful in creating and drafting administrative compacts, such as one to address licensure portability, due to their complexities.[220] These administrative compacts often necessitate the creation of

---

[210] U.S. CONST. art. I, § 10, cl. 3.
[211] *Id.* ("No State shall, without the consent of Congress . . . enter into any Agreement or Compact with another State.").
[212] ROTUNDA & NOWAK, *supra* note 134, § 12.5, at 237. Upon congressional consent, the interstate compact becomes reviewable by federal courts and, potentially, the Supreme Court. *Id.*
[213] Jill Elaine Hasday, *Interstate Compacts in a Democratic Society: The Problem of Permanency*, 49 FLA. L. REV. 1, 4 (1997) (noting congressional approval of 175 compacts at the time of publication).
[214] *Id.* at 34.
[215] Pincus, *supra* note 129, at 519.
[216] *See* Crady Degolian, *The Evolution of Interstate Compacts*, *in* THE BOOK OF STATES 61, 62 (Council of State Government ed., 2012).
[217] Marlissa S. Briggett, *State Supremacy in the Federal Realm*, 18 B.C. ENVTL. AFF. L. REV. 751, 753 (1991) (citation omitted).
[218] Degolian, *supra* note 216, at 62.
[219] NAT'L CTR. FOR INTERSTATE COMPACTS, http://www.csg.org/NCIC/about.aspx (last visited Mar. 17, 2013).
[220] *See* Degolian, *supra* note 216, at 63.

administrative bodies, called "commissions."[221] The commissions, which function as semi-governmental agencies, typically have the power to "pass rules, form committees, establish organizational policy, seek grants and ensure compliance with the compact."[222]

The NCIC has started work on three interstate compacts that are closely related to the issue of licensure portability for military spouses. First, the NCIC has drafted a model Interstate Compact on Educational Opportunity for Military Children.[223] Second, the NCIC is considering the proposal of a State Authorization Reciprocity Agreement pertaining to "[s]tate regulatory requirements and [educational] evaluative measures [that] vary considerably, making interstate reciprocity difficult."[224] Third, the NCIC will begin a working group on licensure reciprocity for emergency medical services personnel.[225]

The NCIC's rationale supporting the drafting of these compacts could support an interstate compact for standardized licensure portability for professionally licensed military spouses. For example, the NCIC believes the Interstate Compact on Education Opportunity for Military Children is necessary because "[m]ilitary families move between postings on a regular basis, and while reassignments can often be a boon for career personnel, they can be difficult for the children of military families. The Compact seeks to make transition easier for the children of military families."[226] Similarly, the State Authorization Reciprocity Agreement on educational reciprocity is aimed to improve access to higher education while reducing the associated costs with differences in educational requirements acquired through on-line education.[227] Lastly, the EMS Licensure Compact would "allow member states to self-regulate the existing system for licensing emergency personnel" through

---

[221] *Id.*
[222] *Id.*
[223] MI3: MILITARY INTERSTATE CHILDREN'S COMPACT COMM'N, http://mic3.net/documents/InterstateCompactonEducationalOpportunityforMilitaryChildren-Model Language.pdf (last visited Mar. 16, 2014).
[224] Crady Degolian, *Top 5 Issues for 2013: Interstate Compacts*, COUNCIL OF STATE GOV'TS (Jan. 7, 2013, 10:32 AM), http://knowledgecenter.csg.org/drupal/content/top-5-issues-2013-interstate-compacts [hereinafter *Top 5*].
[225] *Id.*
[226] MI3: MILITARY INTERSTATE CHILDREN'S COMPACT COMM'N, http://mic3.net/pages/re-sources/documents/MIC3_Newsletter_May2011.pdf (last visited Mar. 16, 2014).
[227] Degolian, *supra* note 224.

interstate compact allowing EMS technicians to cross state lines between member states.[228]

These proposals and working groups are considering the same issues affecting professionally licensed military spouses: the difficulties inherent in cross-state licensure and education encountered by military dependents and licensed professionals. Recognizing the shortcomings in some of the licensure portability measures already enacted,[229] the NCIC should consider a policy and compact for professionally licensed military spouses. This compact would identify the common areas among signatory states' treatment of professionally licensed military spouses and allow for constructive dialogue on differences, allowing states to continue individual regulation where the interstate compact did not apply.

Thus, the use of interstate compact for licensure portability best represents cooperative federalism, driven by the individual states, to address a national policy consideration upon which the federal government could potentially act.[230] Allowing the states to make the determination together as to how to standardize licensure portability for professionally licensed military spouses increases application of the portability measure between member states while keeping those member states actively engaged in the process following adoption through establishment of a commission.

C. Model Act

Absent standardized licensure portability for professionally licensed military spouses through interstate compact or federal action, currently enacted licensure portability measures could serve as a basis for the drafting of a model act. This model act could serve as a temporary measure enacted by individual states prior to standardization by interstate compact or federal action. As states continue to address licensure portability for professionally licensed military spouses, notions of how best to effectuate that portability will change. However, the current state of the law allows for adequate visualization of the best practices for a model act.

---

[228] *Id.*
[229] *See supra* Part III.
[230] *See supra* Part IV.A (discussing methods of potential federal action).

The concept of a model act for professional licensure has been debated for almost half a century. In 1968, the *Harvard Journal on Legislation* drafted a Model Professional and Occupational Licensing Act,[231] a model which preceded the implementation of centralized licensure agencies and codes now common throughout the country.[232] The Model Professional and Occupational Licensing Act was an "attempt to provide an integrated licensing structure that will afford the state desirable economies and at the same time provide for procedural uniformity."[233] A model act regulating professionally licensed military spouses would serve a similar purpose with the added rationale of providing economic and procedural uniformity directly to the relocated military spouse.

In determining applicability, a model act would specifically address already-enacted state licensure and occupational codes and the professions associated to each.[234] However, the model act should not be limited to professions under the consolidated code. There is a well-established argument that interstate variability among licensure requirements is often less a function of the state exercise of its "police power" to protect citizenry than a method to "protect against competition from newcomers."[235] The anti-competition purpose behind licensure

---

[231] *A Model Professional and Occupational Licensing Act*, 5 HARV. J. ON LEGIS. 67 (1967–1968) [hereinafter *Model Act*].
[232] Brinegar, *supra* note 41, at 495.
[233] *Model Act*, *supra* note 231, at 68.
[234] *See supra* notes 69–76 and accompanying text.
[235] Walter Gellhorn, *The Abuse of Occupational Licensing*, 44 U. CHI. L. REV. 6, 11 (1976). Professor Gellhorn, an avid critic of professional licensure, noted that,

> Licensing has only infrequently been imposed upon an occupation against its wishes. Unwelcomed licensure has indeed occurred, as when stockbrokers were brought under federal regulation in response to the financial scandals of 1929. In many more instances, however, licensing has been eagerly sought—always on the purported ground that licensure protects the uninformed public against incompetence or dishonesty, but invariably with the consequence that members of the licensed group become protected against competition from newcomers. *That restricting access is the real purpose, and not merely a side effect, of many if not most successful campaigns to institute licensing schemes can scarcely be doubted*. . . . the restrictive consequence of licensure is achieved in large part by making entry into the regulated occupation expensive in time or money or both.

requirements pervades professions where potential interstate variability appears, though it might not necessarily be significant, such as the practice of law. Therefore, any model act should eliminate any distinction between professions regulated by centralized professional and occupational codes and professions such as teaching or law.

The American Bar Association's position on licensure portability for military spouse attorneys provides a tool to reevaluate the necessity of portability restrictions applicable to jurisdictionally varied professions. In 2012, the ABA formally adopted a resolution to "urge state and territorial bar admission authorities to adopt rules, regulations, and procedures that accommodate the unique needs of military spouse attorneys who move frequently in support of the nation's defense."[236] The resolution recommended the states alter admission rules to accommodate military spouse attorneys' licensure by endorsement through simplified application procedures on a reduced fee structure.[237] The ABA also suggested that the states establish mentoring programs for new military spouse attorneys relocated to the jurisdictions.[238] Current reciprocity rules, the ABA found, are inadequate for the military spouse attorney.

> Although many jurisdictions have rules allowing attorneys to be admitted on motion or through reciprocity, those provisions are too limited for military spouse attorneys. Military spouse attorneys have trouble meeting the "previous practice" requirements when: they are recently admitted; their military spouse has been assigned overseas; they have breaks in employment between duty stations; they have held non-attorney or part-time positions; or they have been unable to find legal work at a duty station.[239]

Id. at 11–12 (emphasis added) (citing Alex Maurizi, *Occupational Licensing and the Public Interest*, 82 J. POL. ECON. 399, 400 (1974)).

[236] AM. BAR ASS'N, REVISED RESOLUTION 108 (2012), *available at* http://www.abanow.org/wordpress/wp-content/files_flutter/13285629012012mm108.pdf.

[237] *Id.*

[238] *Id.*

[239] AM. BAR ASS'N, REPORT ON RESOLUTION 108, at 7 (2012) [hereinafter REPORT ON RESOLUTION 108], *available at* http://www.abanow.org/wordpress/wp-content/files_flutter/1326399839_31_1_1_9_resolution_summary.doc.

The ABA concluded that military spouse attorneys admitted by endorsement would still be responsible for continuing legal education, subject themselves to jurisdictional discipline, and comport with the jurisdictions ethical obligations.[240] With these checks, the military spouse would be fully admitted to practice, in similar fashion as law school faculty, clinical law professors, in-house counsel, and non-profit legal service providers.[241] Currently only seven states have implemented licensure by endorsement for military spouse attorneys: Arizona,[242] Idaho, [243] Illinois,[244] North Carolina,[245] South Dakota,[246] and Texas.[247] The ABA resolution and accompanying report also provide policy guidance on the detrimental effect of "previous practice" requirements in licensure portability measures. Simply stated, military spouses often cannot meet them, in large part due to the failure to enact portability measures earlier.[248] To fully support the professionally licensed military spouse and the transition from jurisdiction to jurisdiction, any model act should eliminate or carefully modify any previous practice requirement.

The ABA resolution, along with the examination of licensure portability enactments in effect,[249] tempers any consideration of what a model act should address. A model act must address: (1) the type of licensure portability, with preference for temporary licensure by endorsement for the duration of the orders to the surrogate state but discounting any hardship tours away from the state by the military service member; (2) the occupations covered by the portability measure, ostensibly by providing coverage to all regulated occupations including professions with jurisdictional variation, such as law or education; (3) fitness to practice, including lack of professional discipline, and necessary background checks equivalent to those required for newly

---

240 *Id.* at 9–10.
241 *Id.* at 10.
242 ARIZ. SUP. CT. R. 38(i) (2012), *available at* http://www.azcourts.gov/Portals/20/2012Rules/120512/R120020C.pdf.
243 IDAHO BAR COMM'N RULES R. 229 (2012).
244 ILL. RULES ON ADMISSION & DISCIPLINE OF ATTORNEYS R. 719 (2013), *available at* http://www.state.il.us/court/supremecourt/rules/Art_VII/artVII.htm#Rule719.
245 N.C. RULES GOVERNING THE ADMISSION TO PRACTICE LAW IN N.C.R. sec. 0503 (2013), *available at* http://www.ncble.org/RULES.htm#REQUIREMENTS.
246 S.D. SUP. CT. R. 13-10 (2013), *available at* http://ujs.sd.gov/media/sc/rules/SCRule13-10.pdf.
247 TEX. BD. OF LAW EXAMINERS, LICENSE PORTABILITY FOR MILITARY SPOUSES 1 (2013), *available at* http://www.ble.state.tx.us/applications/apps_other/Military_Spouse_info.pdf.
248 REPORT ON RESOLUTION ON 108, *supra* note 239, at 7.
249 *See supra* Part III.

admitted licensees in the surrogate state; (4) continuing education in the field as determined by the surrogate state; (5) local supervisory requirement for newly admitted licensees if the surrogate state's licensing standards are more stringent than the original licensing state's; (6) strict timelines for issuance of a provisional license to practice during pendency of request for licensure by endorsement; and (7) reduced licensure fees. A licensure portability enactment addressing these issues would provide the broadest possible protections for a professionally licensed military spouse and would very nearly standardize licensure portability in all states adopting the model act. A model military spouse professional licensing act for licensure by endorsement adhering to these principles is provided in the Appendix.[250]

V. Conclusion

The professionally licensed military spouse is the product of a lengthy historical development ranging from a time when "women [were] not reckoned"[251] to a culmination in the change of societal mores where spouses are indispensible to the support of military service members. Now, military spouses are, generally speaking, very well educated and, in large percentage, licensed professionals. Despite the proliferation of licensure portability measures, professionally licensed military spouses continue to face difficulties obtaining employment in their chosen professions.

Current licensure portability enactments pertaining to professionally licensed military spouses are inadequate to truly effectuate broad-based changes. Although undeniably well-intentioned, the acts still contain provisions that are significantly exclusionary; many are exclusionary as to the professions to which the enactment applies, many contain staunch previous practice requirements, some contain mandatory prior-employment provisions, and still others provide vague and broad discretion to the licensing authority without guidance to the military spouse.

With the variability, this article considered three methods in which the states could present standardized licensure portability measures for military spouses: federal action through conditional spending, interstate

---

[250] *See* Appendix A.
[251] *See* SUMMERHAYES, *supra* note 15, at 23.

compact, and a model act. Standardizing portability through Congress's power to tax and spend under either the General Welfare Clause or its enumerated powers pushes the boundaries of established spending power jurisprudence. The problem with enactment of licensure portability through conditional spending, either through the General Welfare Clause or the War Powers, comes with the commensurate level of intrusion into the state's licensing scheme. If the federal conditional spending were premised on the condition of the state's move to enact licensure portability in some fashion, there would still be limited standardization among states. In that case, all the military spouse could be assured of would be that a given state had a portability measure. If the federal conditional spending were premised on ensuring true standardization, with the same legislation in all states, the possibility of federal enactment becomes considerably lower because, pragmatically, the "heavy hand" of the federal government could be viewed as impermissibly commandeering state government to effectuate a federal program.

Enactment of an interstate compact would provide the independent states a forum in which they could address licensure portability for professionally licensed military spouses. Together the states could forward a cogent plan to remove inconsistencies among member states and determine the boundaries of licensure portability: what professions would be covered, what prerequisite requirements would be necessary for licensure issuance, and when the license would terminate, if at all. Similarly, a model act, if enacted by multiple states, could provide broad-based standardized protections to professionally licensed military spouses. Enactment of a model act does not preclude entry into an interstate compact or standardization under Congress's power to tax and spend or the War Powers. The model act could, in effect, serve as the basis upon which an interstate compact could be formulated or provide the enumerated conditions for federal/state "bargained for" federalism. Providing the model act as the condition for federal conditional spending may, however, lead to unavoidable violations against the federal government commandeering the state government. With such a significant limitation looming on federal action, either the interstate compact based on a model act or broad enactment of the model act would present the best-case scenario for the military spouse.

Appendix A

Model Professional Licensing Act

Model Military Spouse Professional Licensing Act for Licensure by Endorsement[252]

(a) Licensure by Endorsement: Notwithstanding any other provision of law, any occupational or professional licensing board established under this code shall issue a license, certification, or registration to a military spouse to allow the military spouse to lawfully practice the military spouse's occupation in this state if, upon application to an occupational or professional licensing board, the military spouse satisfies the following conditions:

(1) Holds a current license, certification, or registration from another jurisdiction, and that jurisdiction's requirements for licensure, certification, or registration are substantially equivalent to the requirements for licensure, certification, or registration of the occupational or professional licensing board for which the applicant is seeking licensure, certification, or registration in this state;

(2) Can demonstrate competency in the occupation through alternate methods as determined by the individual licensing boards in absence of a current license and/or having achieved substantially equivalent requirements, certification, or registration from another jurisdiction as enumerated in subsection (a)(1). Completion of continuing education units or having recent practice experience in the professional field for at least two of the five years preceding the date of the application under this section may constitute alternate methods of demonstrated competency;

(3) Has not committed any act in any jurisdiction that would have constituted grounds for refusal, suspension, or revocation of a license to practice that occupation in this state at the time the act was committed;

(4) Is in good standing and has not been disciplined by the agency that had jurisdiction to issue the license, certification, or permit; and,

---

[252] The Model Military Spouse Professional Licensing Act for Licensure by Endorsement presented here draws from the currently enacted licensure portability measures in North Carolina and Idaho. For comparison, see N.C. GEN. STAT. ANN. § 93B-15.1 (West 2012) and IDAHO BAR COMM'N RULES R. 229 (2012).

(5) Has submitted to a state or federal background check as required by the occupational or professional licensing board. Submission to a background check will only be required if the occupational or professional licensing board mandates the equivalent background check for new, non-military spouse applicants.

(b) Alternate Methods to Demonstrate Competency: All relevant experience, including full-time and part-time experience, regardless of whether in a paid or volunteer capacity, shall be credited in the calculation of years of practice in an occupation as required under subsection (a) of this enactment.

(c) Rights, Privileges, and Obligations: A nonresident licensed, certified, or registered under this enactment shall be entitled to the same rights and subject to the same continuing education and reporting obligations as required of a resident licensed, certified, or registered by an occupational or professional licensing board in this state.

(d) Provisional Licenses: All occupational or professional licensing boards shall issue a provisional license, certification, or registration to a military spouse applying under subsection (a) of this enactment within 30 days of the application, barring a finding by the occupational or professional licensing board that a requirement under subsection (a)(1) through (5) has not been met by the applicant. Additionally,

(1) The provisional license shall be valid until the professional or occupational licensing board issues an endorsed license, certification, or registration, or

(2) The provisional license shall be valid until the military spouse no longer qualifies for an endorsed license due to termination of status under subsection (h) of this enactment, or

(3) The professional or occupational licensing board terminates the provisional license through the board's established procedures to terminate licenses for cause.

(e) Scope: For the purposes of this enactment, professional and occupational licensing boards shall not be limited to boards constituted under the professions and occupations code but shall be broadly construed to apply to all executive agency licensing boards, including the State Board of Education, as well as licensing boards governed by the judiciary, such as the Board of Law Examiners.

(f) Non-Exclusive Applicability: Nothing in this section shall be construed to prohibit a military spouse from proceeding under the existing licensure, certification, or registration requirements established by an occupational licensing board in this state.

(g) Temporary License Necessitating Supervision: In absence of a current license or ability to demonstrate competency under subsection (a)(2) of this enactment, the professional or occupational licensing board shall issue a provisional license to an otherwise qualified military spouse if the military spouse has local supervision.

(1) Local supervision means a currently licensed, certified, or registered practitioner of the same profession as the military spouse applicant with whom the board may readily communicate.

(2) Local supervision will be responsible to the board for all services provided by the provisionally licensed military spouse.

(h) Termination of Status: A license, certification, or registration issued under this enactment shall be valid until termination of status by,

(1) The spouse's separation or retirement from the United States Uniformed Services;

(2) Failure to meet the annual licensing requirements of an active member of the profession as regulated by the professional or occupational licensing board;

(3) The absence of supervision by local supervision under subsection (g), if applicable;

(4) Permanent relocation outside the state;

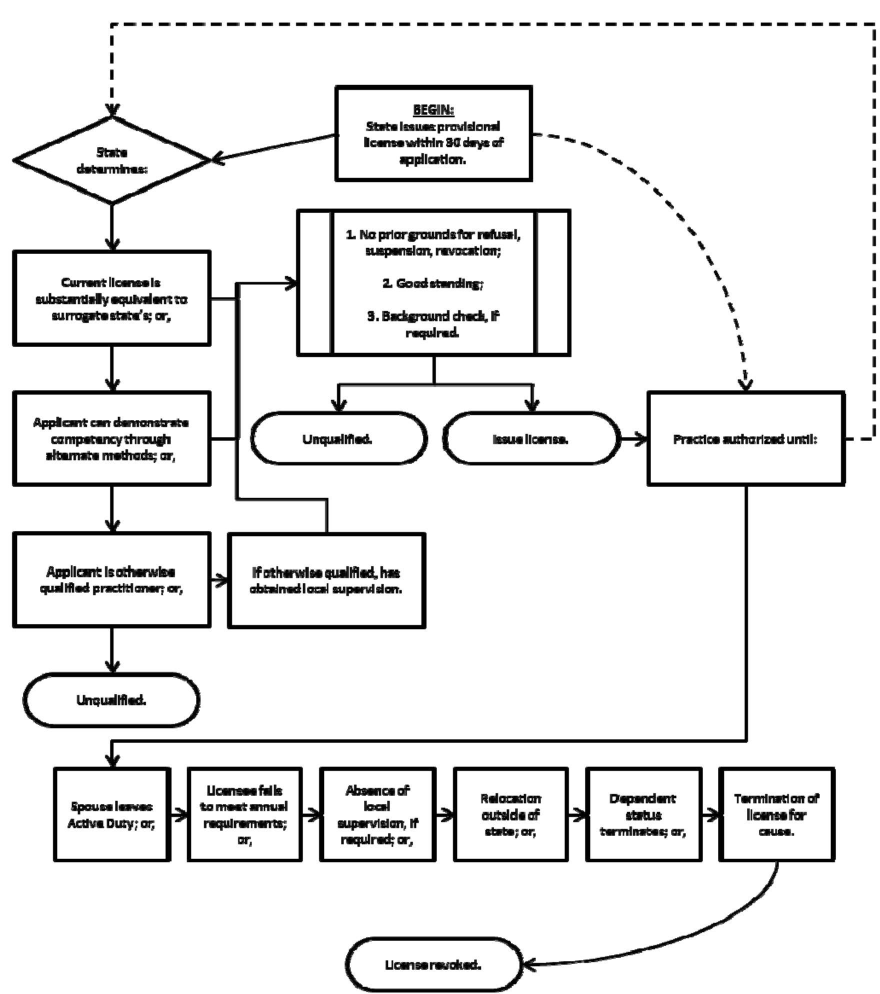
(5) Ceasing to be a dependent as defined by the Department of Defense (or, for the Coast Guard when it is not operating as a service in the Navy, by the Department of Homeland Security) on the spouse's official military orders; or

(6) The professional or occupational licensing board terminates the endorsed license through the board's established procedures to terminate licenses for cause.

(i) Fees: Professional and occupational licensing boards may assess licensing and annual fees provided that licensing fees do not exceed the cost to the board for issuance of either the endorsed or provisional license. Annual fees may equal, but may not exceed, annual fees imposed on non-military spouse professionals.

Appendix B

Model Act in Application



AUTONOMOUS WEAPONS AND THE LAW OF ARMED CONFLICT

CADET ALLYSON HAUPTMAN[*]

I. Introduction

Control. Human beings have an innate, insatiable desire to control the world around them. Much of this desire comes from a sense of self-preservation embedded in the human subconscious. Thus, it is counter-intuitive that humans are also obsessed with automation. We want our gadgets to cook, clean, read, dictate, count, and solve problems for us. Now, we must decide if we want them to fight for us as well. While most international prohibitions on weapons specifically prohibit what weapons *do*, the issue of automation raises a fundamentally different concern. The issue is not what effect a weapon can achieve but, rather, how it achieves effects in a way that does not transgress the fundamental principles of the Law of War (LoW).

The discussion about how LoW should address autonomous weapons is overdue. These weapons already exist, at least to the point of being mostly autonomous. The Department of Defense (DoD) defines an autonomous weapon system as one that, "once active, can select and engage a target without further intervention by a human operator."[1] This article uses the terminology "in-the-loop," "on-the-loop," and "out-of-the-loop" to describe the human role in a system's ability to acquire and attack a target. Under this terminology, in-the-loop systems require a human to actively engage a target; on-the-loop systems can engage a target autonomously but can be stopped by a hman operator; and out-of-the-loop systems act completely without human input.

Recent media stories have highlighted the viewpoints of anti-automation activists who maintain banning autonomous weapons entirely

---

[*] Cadet, U.S. Military Academy at West Point; Rhodes Scholarship finalist (2013); Rotary Scholar; Battalion Commander, U.S. Corps of Cadets; Policy & Doctrine, Fort Meade, Maryland; Judge Assistant, Northampton District Court, New York.

[1] U.S. DEP'T OF DEF., DIR., AUTONOMY IN WEAPON SYSTEMS 13 n.3000.09 (21 Nov. 2012). This definition also includes human-supervised systems that allow operators to override the system. This article refers to the "law of war" (LoW) and "law of armed conflict" (LOAC) interchangeably.

would solve any possible problems.[2] Yet, it is difficult to convince innovators to abandon new and exciting technologies. Autonomous technology and the issues associated with them already exist, and the international community must decide how to govern their development and the way they are used as the technology progresses. This article will begin by outlining the principles of the law of armed conflict (LOAC). It will then examine the laws governing weapons. Next, it will review existing and developing autonomous weapons technology, and finally, the article will explore the moral principles important to determining the answer to this question. Ultimately, it concludes that until technology is advanced enough to mirror human decision making processes, humans must remain a part of the "kill chain" for the foreseeable future, but that possibility of autonomous weapons that can follow LOAC are possible.

II. Legal Foundation

A. The Four Principles

The LOAC revolves around four core principles: distinction, proportionality, military necessity, and unnecessary suffering. Because distinction and proportionality are the most germane to reviewing the capabilities of robotic systems, they will be discussed at length below. At this point in time, a human's decision to employ robotic systems would presumably account for the principles of military necessity and unnecessary suffering, although there may come a time when these higher-level decisions could be automated. Robots developed in the foreseeable future would account for the military necessity principle through the human decision on how to program and when to deploy a robot, and the unnecessary suffering principle would be incorporated into the human decision of how to arm the robot. Still, it is useful to introduce these terms.

---

[2] Brid-Aine Parnell, *Killer Robots Could Be Banned by the UN Before 2016*, (18 Nov. 2013), *available at* http://www.forbes.com/sites/bridaineparnell/2013/11/18/killer-robots-could-be-banned-by-the-un-before-2016/. Multiple lobby groups, such as Article 36, have lobbied the United Nations (UN) to add autonomous weapons to next year's Convention on Certain Conventional Weapons agenda. Article 36 is one of forty organizations involved in the Campaign to Stop Killer Robots, aimed at banning fully autonomous weapons.

Military necessity "consists in the necessity of those measures which are indispensable for securing the ends of war."[3] Yet, military necessity "does not justify a violation of positive rules."[4] That is to say, the need to achieve victory cannot be overshadowed by the proscriptive laws of war. The prohibition of weapons or tactics that cause unnecessary suffering is derived from the concept that all a state should seek to accomplish in war is to weaken the enemy force sufficiently enough to win. To harm a combatant in a way that would permanently maim or purposely cause lasting pain is seen as an affront to the laws of humanity.[5] This principle would primarily affect the way a robot is weaponized. In order to assess the robots themselves as instruments of war, it is more important to understand how they would comply with distinction and proportionality.

B. Distinction

The concept of distinction on the battlefield was shaped by seventeenth century perspectives on gender.[6] The Italian philosopher Vitoria argued that "innocence" should be protected from war, and this virtue was most personified by virgin women and children.[7] In his own work on the laws of war, the Dutch jurist Hugo Grotius took a similar stance.[8] Laws concerning distinction, he advised, should reflect a need to protect society. Violence against the innocent harms not only the victim but the offender as well. He expanded the category of illegitimate

---

[3] UCMJ art. 18, § 6 (1950). Originally stated in General Order 100, as written by Francis Lieber. *See also* U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE art. 3, at 17 (18 July 1956).

[4] United States v. List et al., Case No. VII, at 1256 (July 8, 1947–1948), *in* TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, VOL. XI/2, *available at* http://werle.rewi.hu-berlin.de/Hostage%20Case090901mit%20deckblatt.pdf (last visited Dec. 16, 2013) (referring to bracketed page numbers in the U.S. Military Tribunal Nuremberg, Judgment on February 19, 1948).

[5] St. Petersburg Declaration to the Effect of Prohibiting the Use of Certain Projectiles in Wartime (Nov. 29–Dec. 11, 1868). In the past these ideas have been applied to the prohibition of expanding bullets and blinding lasers.

[6] *See, e.g.*, HELEN M. KINSELLA, THE IMAGE BEFORE THE WEAPON 68–69 (2011).

[7] *See id.* Vitoria did not classify non-virgin women as protected, since they were no longer a haven of innocence. His concept of discrimination was based on collective interest in preserving the virtue of the warring communities. *Id.*

[8] *See* HUGO GROTIUS, THE LAW OF WAR AND PEACE (1625) (Legal Classics Library 1925).

targets to include non-virgin women since they have no active part in either initiating or waging war.[9]

Disenchanted by battlefield violence in 1648, the parties that composed the Peace of Westphalia utilized these perspectives of distinction in their anti-Just War rhetoric. They adopted the concept of an international system of sovereign states whose definition of "civilized" included binding one's self to law.[10] This was a significant departure from the basic assumption that warring entities determine their targets based upon strategy rather than pre-set criteria. Yet, this idea was not codified until the promulgation of United States' General Order 100, commonly known as the Lieber Code.[11] With their brothers' faces in their iron sights, Americans waged a vicious civil war that departed from the image of civilized conflict as envisioned by the authors of the Peace of Westphalia. Sherman's "March to the Sea," for example, was for many an affront to the ideals of distinction. However, Francis Lieber's own interpretation of General Order 100 deemed Sherman's brutal campaign legitimate because Lieber expanded the concept of distinction to those who actively participated in the war. Although most Americans saw distinction as a separation between soldiers and private citizens, Lieber argued that direct support could be offered to the enemy in various ways and codified a broader view of legitimate targets, thus complicating the determination of lawful targets.[12]

Even during the crafting of the Geneva Conventions following World War II, the concept of battlefield distinction took a thorough beating. Most states felt it was an illusory concept that would be abandoned once the first shot was fired in the next conflict. The controlling nations at the conference held a more utopian view—the ideal should be codified regardless of what states actually expect it will accomplish. The purpose of the laws set forth in the Geneva Conventions, after all, was to "humanize" war, and recognizing the

---

[9] KINSELLA, *supra* note 7, at 74–78. Grotius's idea of distinction incorporated the offender as well as the soldier. It would harm a soldier's soul to take an innocent life. His view expanded the classification of protected persons to those who could not by law and nature take part in the hostilities. *Id.*

[10] *Id.* at 53.

[11] *Id.* at 85. In 1863 Abraham Lincoln signed the Lieber Code.

[12] JOHN F. WITT, LINCOLN'S CODE 237 (2012). Lieber emphasized military necessity as the qualifying variable for his utopian code. When the Civil War became egregiously costly to the United States he began to advocate a broader definition of a legitimate target than his code originally contemplated.

different types of human actors on a battlefield was inherent to accomplishing that mission. The parties to the Conventions argued that codifying a concept they hoped nations would observe would aid in its universal adoption.

And for the most part, they succeeded. The International Court of Justice described the principle of distinction as a concretely "intransgressible principle of international customary law."[13] Similarly, the UN General Assembly has declared distinction applicable in all armed conflicts, regardless of their specific natures.[14] The customary and codified exception to the prohibition against targeting civilians is when they cross the line into directly participating in the conflict.[15] Civilians who directly participate in hostilities lose their protected status when they commit acts that meet the following three criteria:

> (1) the act will likely have an adverse effect on military operations or harm civilians;
> (2) there is an obvious causal link between the act and the harm it will result in; and
> (3) the act is purposefully designed to cause such harm.[16]

Despite this guidance, most states consider any acts that "are intended to cause actual harm to enemy personnel and materiel" as constituting

---

[13] JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 26 (2005). This implies that there is no instance where distinction ceases to be a primary factor in determining whether or not the use of force is lawful. This principle has also been used to extend absolute responsibility over the individual pulling the trigger rather than his commander alone.

[14] G.A. Res. 2444, U.N. GAOR, 23d Sess., Supp. No. 1748, U.N. Doc. A/7433, at 50 (19 Dec. 1968). This includes international armed conflicts, domestic civil conflicts, and most pertinent to today, conflicts between state and non-state actors. It makes the definition of a non-state group extremely important in deciding whether a group is a lawful target.

[15] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 13, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I]. Article 13 states that "[c]ivilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities." Thus, as soon as a civilian ceases to take a direct part in the conflict, he is again immune from targeting.

[16] NILS MELZER, INT'L COMM. OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 46 (2009). The ICRC conducted a five-year advisory study on the notion of direct participation. It recommended ten guidelines, including this three-step test on the constitutive elements of direct participation in hostilities.

direct participation in hostilities.[17] The modern era of warfare, which seldom provides solid front lines and often includes chameleon-like combatants, is rife with doubt about whether a person is either a disguised combatant or taking a direct part in hostilities. In these cases the Geneva Conventions mandate that would-be attackers err on the side of caution and treat questionable persons discovered on the battlefield as protected civilians until their status can be determined.[18]

International law has a lot to say about the extent to which weapons must distinguish between legal and illegal targets during hostilities. The Draft Hague Rules of Air Warfare, commonly cited as a starting point for modern day Law of War documents, specifically outlaws weapons that "employ a method or means of combat which cannot be directed at a specific military objective."[19] That is to say, it bans weapons that are indiscriminate by their nature. But what about weapons designed to be discriminate but with less-than-perfect accuracy? The International Criminal Court evaluates breaches of distinction by the act's intent and specifically leaves room for malfunctions and human error.[20] For the purposes of this article, the rules of distinction that apply specifically to the employment, as opposed to nature, of the utilized weapon are extremely important. The prohibitions include firing a weapon blindly; firing a weapon at random; firing in conditions that hinder visibility; and firing near civilians with an imprecise devise.[21]

---

[17] Third Report on the Human Rights Situation in Colombia, OEA/Ser.L/V/II.102. doc., 9 rev. 126 (26 Feb. 1999). This vague definition encompasses a broad variety of activities. In a time when many acquisitions and activities relating to the military are contracted to civilians, there is an ongoing effort to tighten the definition.

[18] AP I, *supra* note 16, art. 51. Notably, the United States submitted a reservation to this article, stating that battlefield commanders retain their right to act to protect their troops, thus permitting commander to err on the side of a combatant if in their professional judgment the situation warrants it.

[19] 1996 Amended Protocol II on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, arts. 3, 8, June 3, 1997, 35 I.L.M. 1206. The protocol is the second protocol to the Convention on Certain Conventional Weapons. The concept of indiscriminate weapons will be discussed more thoroughly in the section concerning weapons law, *infra*. Although never adopted, these rules are often used as a foundation for subsequent Law of War conventions and treaties.

[20] Rome Statute of the International Criminal Court, July 1, 2002, 2187 U.N.T.S. 90 [hereinafter Rome Statute]. The International Criminal Court (ICC) created a balance system between acceptable and unacceptable margins of error predicated upon military advantage and foreseen chances of collateral damage. It emphasizes an intent-based analysis of the act.

[21] YOREM DINSTEIN, CONDUCT OF HOSTILITIES UNDER THE INTERNATIONAL LAW OF ARMED CONFLICT (2004). These four provisions on weapons usage hint at the mandate to

The latter two prohibitions are the most pertinent to autonomous weapons, because they make the technical capabilities of the autonomous system's weapons germane to the system's legality.

This is the law, but what about reality? Has the codified principle of distinction led to actual distinction on the battlefield, and can new prohibitions achieve the same end? Many legal scholars argue that mandates against innovation will result in the opposite effect. States will pursue the technology regardless, and the wide gap between reality and international law could lead to a mass disregard for the LOAC.[22] When too many states violate such laws, the principle of reciprocity is rendered null, and even the states that first drafted the prohibitions may feel compelled to build illegal systems in response. What follows would be an arms race of reprisals involving illegal systems that knowingly breach the principle of distinction in order to punish a state that already has breached it.[23]

C. Proportionality

Inspirational posters, catchy radio jingles, and a powerful wave of righteousness carried Americans through the second half of World War II. It was not until afterwards, when the horrors of war arrived home in the form of photographs and film clips, that they began to question how much more humane they had been than the ruthless Axis Powers they had been fighting. Although the United States had entered the war with a policy commitment to "precision bombing," its military and political leaders considered the advantages of massive bomb raids to outweigh the collateral damage inherent in such an offense.[24]

---

restrain a weapon system and its operator if the conditions and methodology of firing render distinction impossible. *Id.*

22 Mica Nishimura Hayashi, *The Principle of Civilian Protection and Contemporary Armed Conflict*, *in* THE LAW OF ARMED CONFLICT (Howard M. Hansel ed., 2007). Hayashi's approach to international law is to test its utopian goals with the consequences of its practical application. He determines that technology prohibitions that stifle innovation will be dismissed by scientists and inventors, and that once the technology exists, it will almost immediately find its way onto the battlefield. *Id.*

23 HENCKAERTS & DOSWALD-BECK, *supra* note 14. A reprisal is a sanctioned breach of the LOAC in order to stop another's breach.

24 SAHR LANZ-CONWAY, COLLATERAL DAMAGE 3–8 (2006). Throughout the war the United States maintained that it had not abandoned its "precision bombing" policy, ardent that every bomb dropped was intended for a specific target and was not employed to

During hostilities the need to wage a "total war" with Germany and Japan was nationally accepted, but afterwards Americans began to question whether the speed with which the atomic bomb had ended the war was worth the devastation. Still, they did not blame the technology. The desire to decrease war carnage has actually resulted in an increased affinity for more powerful weapons, as the American population largely associates technology with increased precision and thus fewer civilian casualties. U.S. commanders have consistently considered the precision capabilities of a weapon system in their calculations of proportionality.[25]

It is the responsibility of these commanders and their subordinates to ensure that the collateral damage that results from their actions is not "excessive in relation to the concrete and direct military advantage anticipated."[26] The use of the term "excessive" is commonly used in discussions of proportionality, not to be confused with "extensive." Extensive collateral damage would be acceptable if the expected military advantage outweighs the loss of life. It is only a violation of the principle of proportionality if the "incidental loss of life or injury to civilians . . . [is] clearly excessive in relation to the . . . military advantage anticipated."[27] The term "anticipated" is of the utmost importance. The *ex post facto* rubric for whether an act did or did not violate the principle of proportionality is what the actor reasonably expected the outcome to be.[28]

---

incite fear. There has been significant debate since the end of the war on how much validity there was to those proclamations.

[25] *Id.* at 130. International law assesses acts based upon reasonable expectations, and the United States considers the technical capabilities of a weapons system a primary factor in determining if an act would or would not violate the principle of proportionality. The increased precision capabilities of weapons has elevated. Americans' bar for an acceptable military advantage.

[26] AP I, *supra* note 16, art. 51(5)(b). The degree to which collateral damage is acceptable is related not only to the expected gain if the attack succeeds but also to the probability of it succeeding.

[27] Rome Statute, *supra* note 21, art. 8(2)(b)(iv). Although the United States does not submit to the jurisdiction of the ICC, the Rome Statute references accepted customary international law, including customary rules regarding what is considered proportional in relation to injury to civilians.

[28] DINSTEIN, *supra* note 22, at 121. The *ex post facto* analysis of an attack adopts a lens of reasonability and weighs, given the information available to the actor at the time of the attack, what the actor should have expected the collateral damage to be and what he expected to gain militarily from the attack. *Id.* Precautions are also considered, as discussed later on in this section.

The calculus of proportionality is not always confined to a single soldier's determination. Although the onus to prevent excessive damage to civilians does fall on every combatant, international law does not require decisions concerning proportionality be made within a vacuum. The scope for review when considering if an act is proportional to the anticipated collateral damage has been customarily expanded to be an "overall" assessment of the battle.[29] However, this analysis does not encompass an entire war. Most states consider the term "overall" to include a defined portion of the hostilities because states must be able to consider strategic military advantages in addition to tactical advantages when making their calculations.[30]

The determination of whether a military advantage is large enough to justify the incidental collateral damage caused "necessarily contains a large subjective element."[31] States' military and defense components attempt to make the subject more objective through Rules of Engagement.[32] International law dictates that calculations of anticipated collateral damage include three key components: civilians inside of the target; civilians possibly within range of a weapon's damage radius; and the possibility and effects of a weapons malfunction or error.[33]
Accordingly, an entity wielding an autonomous system would have to consider how likely the weapons system is to malfunction or to make an error before employing it.

These three components also raise the question of whether an autonomous system is more likely to decrease the probability of human error or just perpetuate them through errors in software coding. The

---

[29] Rome Statute, *supra* note 21, art. 8(2)(b)(iv).

[30] DINSTEIN, *supra* note 22, at 217. A strategic advantage should still be limited to a definable portion of the hostilities in order to ensure the military advantage foreseen is, in fact, concrete. If "overall" encompassed an entire war, there would be too many factors to prove a direct causal relationship between the action and the foreseeable military advantage gained.

[31] HANS BLIX, MEANS AND METHODS OF COMBAT IN INTERNATIONAL DIMENSIONS OF HUMANITARIAN LAW 135 (1988). This complicates how an engineer could automate a system to make the calculation itself. While this author considers only that international law is too vague to make the calculation objective, the ability to program a system with updated Rules of Engagement (ROE) is a possible solution.

[32] It is important to note that the ROE are not synonymous with LOAC. While ROE must comply with LOAC, they also incorporate domestic strategic, tactical, and political concerns not part of international law and subject to frequent change.

[33] Yoram Dinstein, *Collateral Damage and the Principle of Proportionality*, *in* NEW WARS, NEW LAWS 211 (David Wippman & Matthew Evangelista eds., 2005). The third component includes both technical and human error.

Additional Protocols to the Geneva Conventions require that an attack be canceled if the principle of proportionality is no longer met.[34] This implies that an ability to override a malfunctioning machine would be necessary to ensure a system meets international expectations for assessing proportionality and would also solve issues of coding errors.

D. Laws Governing Weapons Development and Adoption

"The right of belligerents to adopt means of injuring the enemy is not unlimited."[35] At some point the conscious decision of an individual or a group to initiate an attack against another must become kinetic if it is to have any effect, and in the transition the attacker must choose its instrument of attack, that is, the weapon. Some forms of weapons are expressly forbidden or highly regulated by international law, such as chemical, biological, nuclear, and, most recently, blinding lasers. However, if no specific provision exists, states are instructed to assess a weapon under the general rules regulating armed conflict.[36]

International law, for the most part, adopts a *laissez faire* approach to the vast array of weapons not specifically mentioned by international law. Instead, international law specifies what a state must do domestically to ensure the laws of war are considered in the weaponization process. In particular, it emphasizes that the review must take place during "study, development, acquisition or adoption of a new

---

[34] AP I, *supra* note 16, art. 57(2)(b). This provision provides express measures for taking precautions in an attack and states that "an attack shall be canceled or suspended if it becomes apparent that the objective is not a military one . . . [or] may be expected to cause incidental loss of civilian life . . . which would be excessive." *Id.*

[35] Regulations Concerning the Laws and Customs of War on Land, annexed to Hague Convention (IV) Respecting the Laws and Customs of War on Land, art. 22, Oct. 18, 1907, T.S. 539. Section II of this annex discusses regulations governing hostilities. This is the first article of the section, implying that all additional regulations on hostilities stem from this core principle. Means to injure the enemy is certainly largely composed of weapon choice.

[36] INT'L COMM. RED CROSS, A GUIDE TO THE LEGAL REVIEW OF NEW WEAPONS, MEANS, AND METHODS OF WARFARE 2 (2006) [hereinafter ICCR GUIDE]. The International Committee of the Red Cross conducted a thorough study of what the "general rules" say about the process and provided a concise advisory opinion on the subject in this report. The study will be used heavily in this section of this article.

weapon."[37] The substantive analysis should examine three different considerations:[38]

> (1) the design intent (conducted prior to development),
> (2) the technological capabilities (conducted post development); and
> (3) the types of injuries to people and the environment it would inflict (prior to fielding).

The third level of this review is intended to have a wide scope. That is, a weapon cannot be assessed in isolation from how it *may* be used. Although states are not required to include every possible way the weapon could be misused—as those realizations often occur *ex post facto*—states are required to consider all reasonably likely uses of the weapon in their analysis.[39]

How these three substantive levels are met is left to a state's domestic laws and policies. In the United States, the DoD requires that all new weapons be reviewed upon completion of the design phase in regards to the intent of the design and upon completion of the development phase (in regards to the capabilities and likely injurious effects of the weapon). If acquiring a new weapon from another state, the DoD is required to conduct the second review before fielding the new weapon.[40]

---

[37] AP I, *supra* note 16, art. 36. This article also specifically obligates a buyer state to conduct an analysis before employing a new weapon even if the building state has already conducted a study or fielded the weapon.

[38] ICCR GUIDE, *supra* note 37, at 18–19. This three-tiered review obligates the weapon building state to assess what it is building prior to initiating any development, after development, and before fielding. The second and third tier assessments can be conducted simultaneously if the weapon-building state is the state fielding the weapon. If another state is adopting the weapon, the adopting state must conduct an analysis at the third level for itself. *Id.*

[39] *Id.* at 10. The intent of this wide scope is to prevent a state from claiming that a weapon's intended purpose makes it lawful even though other states may acquire and use the weapon for different purposes and in different ways. If, for instance, a weapon may be proven to be indiscriminate when a minor modification is made to it, the weapon would be unlawful, and the state would be expected to redesign it to prevent the ease of that modification.

[40] U.S. DEP'T OF ARMY, REG. 27-53, REVIEW OF LEGALITY OF WEAPONS UNDER INTERNATIONAL LAW § 4 (16 Oct. 1979). In addition to this general directive, each branch of the military *has been delegated* the task of creating specific review processes for weapons its organization plans to research, develop, and/or adopt, such as Air Force Instruction 51-402.

In the adoption of a weapon for use in the field, international law requires that the weapon system be used in a manner that allows for discrimination and the implementation of reasonable precautions. Weapons are indiscriminate by their nature, and may never be fielded, regardless of the context, if they meet one or both of the following criteria: they cannot be directed at a specific military objective, or their effects cannot be limited.[41]

It would stand to reason that if the system fielding a weapon causes the weapon to meet either of the above criteria, then it would be prohibited, even if the weapon itself makes it through the review process. This caveat is further supported by the ability of a review board to give conditional approval of a weapon.[42]

Many states have argued that their ability to field a weapon in hostilities should also depend on the conduct of their enemy. This is an issue of reciprocity. However, this argument is clearly refuted by international law, which provides that states are required to obey the LOAC "in all circumstances."[43] In addition to the Geneva Conventions, the United States has also affirmed its commitment to this principle at the Nuremberg Trials. The U.S. Military Tribunal at Nuremberg refuted the claim that non-reciprocity relieves states and their soldiers from their obligations under LOAC.[44]

III. Autonomous Systems

A. Land—Field Robots

There are multiple scenarios in which land-based robotic systems can be deployed. Because those that involve the use of multiple robots in a

---

[41] AP I, *supra* note 16, art. 51(4). These regulations come from the provision that prohibits weapons that "strike . . . without distinction." This should include systems that could not utilize a weapon in a manner that does not violate both criteria. *Id.*

[42] ICCR GUIDE, *supra* note 37, at 21–22. A reasonable interpretation of this would be that a review board could approve a new type of firearm, for example, provided that it never would be mounted on a system incapable of meeting certain accuracy and precision standards that would render it indiscriminate.

[43] All of the Geneva Conventions and Additional Protocols contain language to this effect, such as in AP I, article 1(1).

[44] The United States of America v. Wilhelm von Leeb, et. al., Case No. XII (Nuremberg 1948). The court rejected the defendants' argument that if an adversary violated international law, then they are released from their obligation to comply with that law.

crowded environment are the most chaotic and problematic scenarios, much of this section discusses the robots currently being tested by Special Weapons and Tactics (SWAT) teams. The reason that these robots pose a unique set of problems is that they operate in close proximity to human actors in violent situations. Stanford's Aerospace Robotics Laboratory (ARL)[45] is a leading research facility in autonomous robotics, and its record of experimentation with California law enforcement is useful to examine. From 1998 through 2002, California SWAT teams tested and fielded ARL's autonomous field robots for use in high-pressure scenarios, mostly hostage situations. The purpose of the autonomous robots, as designed by Stanford, is to substantially decrease the risk to police officers in the conduct of dangerous missions.[46]

The set-up of a SWAT mission is very similar to that of a military operation. The operation is led by the incident commander and the tactical commander, which is analogous to a platoon leader and a platoon sergeant in military terms. During the tests, both of these jobs were deemed irreplaceable by an autonomous system because of the extensive uncertainty both commanders have to manage.[47] Within these tests, it was observed that despite the technical capabilities of the robots, they could not adapt very well to unfamiliar objects. As a possible solution to this, Stanford is testing Object Oriented Electronic Dialogues that allow a robot to assess each object it faces and use models to decide if and how it should handle the object.[48]

The robots were, however, useful in allowing for quick collection and consolidation of information, to include real-time situation reports.

---

[45] *Aerospace Robotics Lab*, STANFORD UNIVERSITY (2014), http://www.stanford.edu/group/arl/.

[46] Henry L. Jones et al., *Autonomous Robots in SWAT Applications: Research, Design, and Operations Challenges*, ASS'N FOR UNMANNED VEHICLE SYS. INT'L (July 2002) (conference paper presented in Orlando, Florida). Stanford University's Aerospace Robotics Laboratory (ARL) conducted a four-year research study with the Palo Alto police department fielding a handful of autonomous systems.

[47] *Id*. This is the equivalent of an on-the-loop system. The robots move, communicate, and act autonomously but may be overridden or redirected at any time by the incident and tactical commanders. The robots lacked the necessary cognitive ability to plan and adjust to new situations.

[48] Hank Jones & Pamela Hinds, *Extreme Work Teams: Using SWAT Teams as a Model for Coordinating Distributed Robots*, ASS'N FOR COMPUTING MACHINERY (Nov. 2002) (conference paper on Computer Supported Cooperative Work presented in New Orleans, Louisiana). This solution would allow robots to deal with most new objects as long as they have a schema with which to associate the objects. Such a solution would still leave gaps when objects do not fit into any of the robot's models.

An issue that law enforcement—and even more so, soldiers—face today is vast engagement areas. Separate teams must communicate to the incident commanders and tactical commanders what is occurring in different areas simultaneously and then inform their subordinates of the ongoing situation.[49] Human beings are limited in their ability to process multiple perspectives at once and to communicate quickly, but a team of robots can use an internet network to pass visual and auditory data back and forth in less than a second. Stanford equipped its systems to use Distributed Local Models that continuously merge information between the systems and send the updates to the remote commander.[50]

Beyond research, many departments have already adopted the use of autonomous systems in the field. Smart Trakk is an autonomous vehicle whose main purpose is to transmit situation data. It is not "weaponized," but its intelligent targeting capabilities make it a prime contender to become so if the military adopted it or a similar system. The system is equipped with a 40x zoom with a fixed laser for targeting purposes, as well as an advanced Global Positioning System (GPS) program named GeoLocation. Its Bumblebee II camera is capable of creating maps from digital photographs which can then be transferred over any Internet Protocol (IP) radio system. The robot is also equipped with a stereo-based obstacle avoidance system that allows it to maneuver without human control.[51]

Use of these land-based systems would likely decrease breaches of proportionality on the battlefield. The ability to merge information and account for a multitude of factors without time delays would enable informed decisions concerning the likely collateral damage and military advantage gained from any attack. Additionally, using Object Oriented Electronic Dialogues and other software that analyzes the system's capabilities in reference to a specific target would help calculate the

---

[49] *Id*. The need to consider multiple perspectives outside of their view causes significant time delays between incident and tactical commander updates and information dissemination. In high-pressure situations, this can lead to hasty decision-making that does not consider all of the facts and the entire situation.

[50] *Id.* Currently, the software includes a user control that would allow a commander to choose what a robot does with an object once the robot has identified feasible options.

[51] *SmartTrakk*, MOBILINTEL. CORP., http://www.mobil-intelligence.com/smarttrakk.php (last visited Jan. 7, 2014). The system can communicate using user datagram protocol (UDP) or transmission control protocol (TCP), allowing for the choice between real-time transmission and reliable transmissions that do not require buffer time. This system demonstrates the recognized targeting capabilities of autonomous robots.

possibility and effects of a malfunction or error in the execution of an attack.

On the other hand, these systems are not capable of matching a human's ability to properly distinguish between a combatant and a non-combatant. Although the systems are equipped with software that prevents them from being labeled as "indiscriminate by nature," they are limited in their ability to assess new objects without a prior frame of reference. The armed conflicts being fought today are laden with combatants who are determined to blend in with the population and who use new forms of weapons and protection. Nevertheless, the developments in Object Oriented Dialogues appear promising. There may well be a day when a system can consider enough factors about how to deal with an object that uncertainty will not be any more of an issue than it is with a human soldier encountering a new object. Currently, a human needs to be on-the-loop to ensure that a field robot does not target a non-combatant.

The principles of LOAC that govern weapons would permit the use of these systems, provided a human is on-the-loop.[52] However, these weapons could be used by those who do not care how discriminating the weapon is, and thus in weaponizing these systems it would be necessary to program an oversight requirement for the system to function. Once this is in place, the weapon's mapping and information collection capabilities would enable it to meet the principle of proportionality and military necessity.

B. Sea

The newest development in naval warfare is the U.S. Navy's use of a system known as Counter Rocket Artillery and Mortar (C-RAM). These systems are designed primarily as defense systems capable of operating multiple weapons simultaneously. Originally intended to protect naval vessels, C-RAM systems have since been developed and deployed by the Army as well.[53]

---

[52] On-the-loop, as opposed to in-the-loop, means the robot operates without human commands but with a human operator witnessing and able to override any of its actions.

[53] John Pike, *Counter Rocket, Artillery, and Mortar (C-RAM)*, GLOBALSECURITY.ORG, http://www.globalsecurity.org/military/systems/ground/cram.htm (last visited Jan. 7, 2014). In 2005 the Army contracted the latest Phalanx C-RAM models. Current Army

The Navy is currently testing but has yet to field the SeaRam Anti-Ship Missile Defense System. The system is equipped with eleven missile launchers and the high resolution search-and-track sensor system from the Phalanx 1B C-RAM system on which the SeaRam is based. This sensor system includes a Forward-Looking Infrared Imager (FLIR) which is designed for excellent accuracy in all light conditions.[54] What makes this weapon autonomous is its automatic target acquisition mode. The SeaRam was designed to be more precise than the Phalanx that caused a friendly fire incident in 1991, when the USS *Jarrett* intended to hit an incoming Iraqi missile and instead fired at the nearby USS *Missouri*.[55]

Not yet installed on an existing naval C-RAM, the Naval Research Laboratory is testing another type of C-RAM, the Cognitive Robot Abstract Machine.[56] This mechanism is designed to be pre-programmed with various algorithms that allow the system to infer and make decisions. The system is able to do this by using "designators" to classify and identify objects. The designators activate process modules that run algorithms which test action-based scenarios. The best scenario drives the decision the system adopts.[57]

Even while in automatic targeting mode, these systems must have a human operator. The DoD Directive requires that all robotic systems

---

models incorporate lightweight counter mortar radar to detect and track fired rounds. The Centurion system has added strong armor to the system for its protection in the field. *Id.*

54 M.S. Frick, *RAM and Phalanx: System of Systems Testing*, NAVY LEAGUE, *available at* http://www.highbeam.com/doc/1P3-68057630.html.

55 *TAB H—Friendly-fire Incidents*, ENVTL. EXPOSURE REPORT (2000), *available at* http://www.gulflink.osd.mil/du_ii/du_ii_tabh.htm. In May 1991, three U.S. Navy warships were attacking Iraqi-occupied Faylakah Island. The USS *Missouri* fired to protect itself from an Iraqi missile, and the burst caused the USS *Jarret*'s Phalanx system to malfunction and mistake the USS *Missouri* as a threat. Luckily, no casualties were incurred. *Id.*

56 Greg Trafton & Alan C. Schultz, *Human Robot Interaction and Cognitive Robotics*, NAVAL RES. LAB (2013), http://www.nrl.navy.mil/aic/iss/aas/CognitiveRobots.php. The Naval Research Laboratory hopes to perfect the cognitive processes such that the modeling of information is not only quicker but much more effective than human decision-making.

57 *CRAM: Cognitive Robot Abstract Machine*, TECHNICHE UNIVERSITAT MÜNCHEN (Aug. 18, 2011), http://ias.cs.tum.edu/research/cram. The processes run by the C-RAM are referred to as reasoning processes. They are designed to fill the knowledge gaps that usually impair a robot's ability to make a decision. By using a number of algorithms designed to test situations against multiple schemas and scenarios, it enables the robot to mimic human inference processes.

maintain a human on-the-loop in case of malfunction or an error in programming if an autonomous system has the capability of being lethal.[58] The directive is not definitive on what that means. Instead, it simply requires that the systems be designed "to allow commanders and operators to exercise appropriate levels of human judgment over the use of force."[59] The directive specifically cites the needs to minimize collateral damage and prevent weapons from firing on incorrect targets, such as occurred in the misfire incident involving the USS *Jarett*.

New C-RAM systems such as the SeaRam may make it difficult for the Navy to comply with the DoD Directive because of its eleven guns and quick reaction time. Human operators would be required to take corrective measures in less time than they would be able to react.[60] Furthermore, studies show that when an operator is tasked with monitoring more than one weapon, his attention significantly decreases. Subconsciously, he realizes that he is physically incapable of effectively manning the system in the event of an error.[61] This is concerning due to conflicting advantages. On one hand, if a system is expected to be programmed with near-perfect accuracy and precision, with complex algorithms to assess distinction and proportionality, it would make the norm for a permissible attack stricter.[62] On the other hand, if

---

[58] AR 27-53, , *supra* note 40.

[59] Aaron Mehta, *U.S. DoD's Autonomous Weapons Directive Keeps Man in the Loop*, DEF. NEWS (Nov., 27 2012), http://www.defensenews.com/article/20121127/DEFREG02/311270005/U-S-DoD-8217-s-Autonomous-Weapons-Directive-Keeps-Man-Loop. This directive has the stated intent of avoiding unintended engagements. The policy makers behind the directive commented that its necessity comes from the need to confront the worst-case scenarios.

[60] Major Erin A. McDaniel, Robot Wars: Legal and Ethical Dilemmas of Using Unmanned Robotic Systems in 21st Century Warfare and Beyond (Dec. 12, 2008) (unpublished M.A. thesis, U.S. Army Command and General Staff College). Advanced targeting systems acquire and engage targets in under two seconds, far quicker than the average human being's reaction time, let alone the necessary time to realize the error and override the system. This on-the-loop scenario is effectively one where the human is out-of-the-loop, because the most he can do is explain what already happened. *Id.*

[61] Stephen Knouse, *Towards a Psychological Theory of Accountability*, INTERFACES 9 (1979). These studies have been tied to Knouse's theory of accountability. Knouse opines that when an individual does not feel that his position imposes on him a significant trust or duty, he does not feel responsible for his job. In this case, when an operator perceives his position to be futile—because he knows he would likely be incapable of preventing a malfunction or error in the system's judgment—he will lose motivation to be attentive. *Id.*

[62] Michael N. Schmitt, *Autonomous Weapon Systems and International Humanitarian Law: A Reply to the Critics*, HARV. NAT'L SECURITY J. (FEB. 5, 2013, 2:07 PM), http://harvardnsj.org/2013/02/autonomous-weapon-systems-and-international-humanitarian-

international law calls for erring on the side of human reason, then systems will be expected to allow their operators appropriate response time, which would help diminish human propagated errors (errors in coding or misinformation) and allow for legitimate override capabilities.

The question becomes, which approach will result in more lives saved—mechanical or human judgment? As long as disparity exists between the two, the bar for acceptable collateral damage cannot be raised, and the futile involvement of weapon systems operators will be exacerbated.

C. Air

If there is one domain in which autonomous systems seem more of a reality than science fiction, it is the air. There is something about a sleek, lethal system drifting through the night sky that sends shivers up one's spine. The media does not have to work very hard to ignite fears over the Obama Administration's use of drones.[63] There has yet to be an unmanned aerial vehicle (UAV) that attacks its own target fully autonomously.

In 2007 Britain initiated Project Taranis to develop a semi-autonomous UAV system that could fend off an attacker, deploy weapons, and relay intelligence back to its mission commander. This UAV system was built from the previously successful Raven UAV project and was designed to allow a single mission commander to authorize the deployment of a weapon after the system acquires a target.[64] The actual product was so impressive that it stirred the concern

---

law-a-reply-to-the-critics/ (If the standard for targeting accuracy and predication capabilities is higher, then the standard for acceptable collateral damage and errors in judgment will also be heightened. Such standards would become part of the review process for autonomous systems.).

[63] Jim Kouri, *Obama Drones Creating Fear Among Americans,* THE EXAMINER (FEB 7, 2013), http://www.examiner.com/article/obama-drones-creating-fear-among-americans. This is an example of a media article centered around the unease Americans feel about the Obama administration's use of drones. The concept of "eyes in the sky," make Americans fear for their own privacy.

[64] BAE Systems, *Taranis*, http://www.baesystems.com/product/BAES_020273/taranis. The system is designed to program an unmanned aerial vehicle (UAV) to follow a flight path into enemy territory, identify a target, have that target verified by a mission commander, and deploy a weapons system.

of a number of anti-autonomous activists.[65] The system uses electro-optical and radar sensors to acquire its target, and after it receives authorization, it can deploy a weapon from either of its two weapons bays.[66]

Not to be left behind, the United States' plan for unmanned aerial system (UAS) development over the next few decades focuses largely on similar pursuits. A stated end-state for the U.S. Air Force's long-term UAS plans are UAVs that "find, fix, finish" targets from a single platform.[67] Although a follow-on 2009 study emphasized the need for "man in the loop" systems, it also included timeline planning for fully autonomous targeting. By fiscal year 2025, the plan requires the development of sufficient policy and doctrine to deal with UAS with autonomous targeting capabilities.[68]

But if it takes to 2025 for the policies to be in place, they may come too late. In 2012 the Air Force Research Laboratory awarded a $10 million contract to Boeing for the development for an autonomous UAV prematurely named "Phantom."[69] The system is intended to be an all-around intelligence, surveillance, reconnaissance, and strike system. It will be employed with the Textron Common Smart Submunition system. This system uses a platform called BLU-108 for target acquisition, and Boeing has committed to improve the system for enhanced target

---

[65] Robert Verkaikm, *Britain's Taranis Drone Picks Its Own Targets, but Experts Warn Could Mark Start of Robot Wars*, INFOWARS (Jan. 2013), http://www.infowars.com/britains-taranis-drone-picks-its-own-targets-but-experts-warn-could-mark-start-of-robot-wars/. The specific concern from activists raised by the system's December 2012 test flight was that the mission commander would be responsible for more than one system and the drive for autonomy would end in removing the mission commander from the loop entirely.

[66] *UK Authorizes Project Taranis UCAV Technology Demonstrator*, DEF. UPDATE (2007), http://defense-update.com/products/t/taranis-ucav.htm (noting that the system is partially sponsored by the UK Ministry of Defense as part of their Strategic Unmanned Air Vehicle Experimental Programme).

[67] PHANTOM (UAS) FLIGHT PLAN 2000–2047 (2000). The UAS development was projected to focus initially on sensor capabilities to focus on the first two parts of that end state.

[68] U.S. AIR FORCE, U.S. AIR FORCE UNMANNED AIRCRAFT SYSTEMS FLIGHT PLAN 2009–2047 (2009).

[69] Bill Carey, *Boeing Phantom Works Develops 'Dominator' UAV*, AIN ONLINE (Nov. 2, 2012), http://www.ainonline.com/aviation-news/ain-defense-perspective/2012-11-02/boeing-phantom-works-develops-dominator-uav. The four-year study for this UAV is targeted to be complete in 2014.

discrimination capabilities. The system is projected to be completed by January of 2017.[70]

And the U.S. Navy would not be far behind with its own autonomous strike UAV. Tested on the USS *Truman*, the X–47B prototype is proof that the U.S. Navy has similar projections as the Air Force for autonomous flight. The X – 47B is designed to fly not only without a pilot but without a remote pilot as well. Instructions are given to the UAV from an operator on board the aircraft carrier. Although it will not be tested with a weapon, the vehicle possesses a large weapons bay. The Navy hopes to field half a dozen autonomous combat UAVs by 2020. To achieve this objective, it initiated a competition for the next version of the X–47B in early 2013.[71]

Thus far, the U.S. Navy has been pleased with the prototype's performance. A large hurdle to overcome in removing a pilot from the equation altogether was the need to identify and maneuver around sailors on the aircraft carrier prior to and following take off. The UAV's ability to do so is a testimony to its distinction capabilities. Another concern was overcoming the risk of electromagnetic interference between the aircraft and the carrier's abundance of radar systems. The tests on the USS *Truman* have proved highly encouraging thus far.[72]

IV. Morality and the Means of Warfare

Thus far this study this article has discussed the way the international community has codified the principles of LOAC and the capabilities of existing and developing autonomous weapons, but long before General Order 100 and the Geneva Conventions, moral philosophies guided the

---

[70] Bill Carrey, *Boeing Phantom Works Develops 'Dominator' UAV*, AI ONLINE (Nov. 2012), http://www.ainonline.com/aviation-news/ain-defense-perspective/2012-11-02/boeing-phantom-works-develops-dominator-uav (The system will carry a Small Diameter Bomb system, a precision strike weapon designed for minimized collateral damage).

[71] Sharon Weinberger, *X–47B Stealth Drone Targets New Frontiers*, BBC (Dec. 18, 2012), http://www.bbc.com/future/story/20121218-stealth-drone-targets-life-at-sea (explaining that the X–47B's maker, Northrop, will compete against a variety of companies who have a long history of serving the military, including Lockheed Martine and General Atomics. The project is part of the U.S. Navy's Unmanned Combat Air System Demonstration Program).

[72] *Id*. Although its first take-off test did not occur until 2013, the aircraft was tested on board the USS *Truman* for its maneuverability multiple times during 2012. *Id.*

ways in which states and organizations fought.[73] Recalling these philosophies will be important in assessing how international law should govern autonomous weapons. These philosophies were often embodied by concepts of honor and chivalry. In a sense, the universal principles of morality are the most common ground that exists in international law.[74] From those principles stem the few *jus cogens* principles of law, norms that are so well-founded and widespread that they are considered intransgressible and not up for debate.[75] Thomas Aquinas, a moral legal theorist, suggested that the best way positive laws can honor morality is to simply "promote good and avoid evil."[76]

For LOAC, the promotion of good and avoidance of evil is embodied, in part, by the four core principles. The moral decision comes into play in the presence of gray areas, where there is no clear way to avoid harm or violence altogether. This is most often seen in the principle of proportionality, specifically in the tension between minimizing collateral damage and attaining military victory.[77] Many states that ascribe to Botero's philosophy of *raison d'état*[78] do not see this tension. To him, the dominant goal of the state is preserving the

---

[73] Mosely, Alexander, *Just War*, INTERNET ENCYCLOPEDIA OF PHIL. (2014), http://www.iep.utm.edu/justwar/. This concept of *jus in bello* that is at the core of the Law of Armed Conflict developed largely from philosophies of honor and justice during the Greek and Roman Empires. Religious scholars created moral philosophies to dictate when war was justified, such as Saints Augustine and Thomas Aquinas. *Id.*

[74] Alexander Boldizar & Outi Korhonen, *Ethics, Morals, and International Law*, 10 E.J.I.L. 282 (1992). Despite differences in how cultures interpret positive laws, the values the laws are intended to protect stem from senses of morality embedded in human nature.

[75] Jasmine Moussa, *Can* Jus ad bellum *Override* Jus in bello*? Reaffirming the Separation of the Two Bodies of Law*, 90 INT'L REV. RED CROSS 10 (Dec. 2008) (These norms are considered to be so universally strong that legal rulings and proclamations are unnecessary to support them. They are embodied by the domestic laws of every state. A common example is that unjustifiable murder is bad for all of society).

[76] William O'Hara, *Drone Attacks and Just War Theory*, SMALL WARS J., Sept. 2010, at 2. Aquinas described this sentiment as "just intention." He believed that if governments seek to enact laws that always reflect this principle, then morality will always prevail. *Id.*

[77] *Id.* at 7. The more likely it is that collateral damage can be minimized, the more leeway a state has to pursue an attack it deems a military necessity. *Id.*

[78] Borelli, Gianfranco, *The Italian Art of Political Prudence,* 1996, *available at* http://www.filosofia.unina.it/ars/rofs.html. Borelli is a 16th century Italian philosopher who took inspiration from Machiavelli in analyzing the motivations of the Western state. He theorized that states seek to obtain enough power to be stable then maintain it at any cost. *Id.*

power it has obtained.[79] Thus, in most situations, victory on the battle field must be the primary consideration of the state. The International Court of Justice created a new category for human rights laws, such as those contained in the LOAC, referred to as those that are *intransgressible*. Although they are weighted more heavily than common state practice, it will not go so far as to label them *jus cogens.*[80]

What does this mean for autonomous weapon systems? States are more likely to comply with weapons laws that appeal to a common sense of morality and yet also respect their self-defense concerns. This means that the most effective international regulations on robots need to incorporate the most basic principles on which states agree but that do not appear too utopian. Modern moral legal theorists believe that the best way to do this is through an instrumentalist approach as opposed to a consequentialist approach.[81] This is the preferred method because it teaches an actor *how* rather than *what* to think, and thus is more amenable to future change and innovation.

Adopting this school of thought, most moral legal practices acknowledge the need for human reason in applying rules properly in a given context. In other words, these legal rules are *evidence-relative.*[82] This is extremely important when considering the states that ascribe to Bolero's' *raison d'état* theory. Morality can only prevail if the restrictions it places upon a group do not completely destroy its chances of achieving victory on the battlefield.[83] In the same light, if a state

---

[79] Moussa, *supra* note 72, at 970 (arguing that this "survival of the fittest" mentality is not an excuse for disregarding international law. Instead, it says that international law should respect the reality that when a state is in danger of being obliterated it will always act to save itself first).

[80] 1966 I.C.J. 99 (Advisory Opinion on the Threat or Use of Nuclear Weapons). In 1996 the International Court of Justice acknowledged that extreme cases of self-defense may require a state to breach principles of the Law of Armed Conflict. This would only apply is the state's very existence were at stake. *Id.*

[81] Adil Ahmad Haque, *Law and Morality at War*, Rutgers School of Law Research Paper Series page number 6 n.114, at 6 (May, 16 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2061375. In essence, instrumentalism says that the way in which something should be evaluated is the effectiveness of the method as opposed to the actual outcome, which is known as a consequentialist approach.

[82] *Id.* at 4 (An evidence-relative rule obligates agents to assess certain situational aspects in determining how/when the rule should be applied. This infers that the most moral legal rules are not binary in nature; that is, there are additional answers beyond "yes" and "no.").

[83] *Id*. at 5. Moral laws become seen as "utopian" ideals that are apt to be ignored when states believe them to significantly impede necessary military actions. International law

believes that its enemies will not comply with the restrictions, it will not adhere to them due to fear of injury.[84] While it may acknowledge such restrictions as morally right, it will deem the need to protect the life of its citizens as more important.

V. Conclusion

The question remains: how should international law govern autonomous weapons? Given the current international law framework, technical capabilities of such systems, and the fundamental moral values that create globally common ground, what is the solution? As discussed above, internationally shared moral philosophies demand attempts to minimize unnecessary injury without giving up any rights to self-defense. Laws that focus more on methodology, rather than outcomes, are more likely to gain adherence because states will not feel as if their legitimate options for attaining military victory have been prohibited.

The current capabilities of autonomous weapon systems improve upon human distinction capabilities in terms of target acquisition; yet, this improvement can only be utilized when a target can be predetermined before the weapon is deployed. In instances of uncertainty, autonomous systems lack reasoning capabilities equal to those of a human being. This could potentially be solved by allowing programming systems to always err on the side of caution, but it means giving up a number of opportunities to achieve a military victory that a state may not be willing to forego, another example of the difficult-to-strike balance between strategic and humanitarian considerations. Increased standards of precision when making an attack may very well raise the bar for what is considered a proportional attack during a conflict, but precision only matters if the way in which the weapon is coded is flawless. Since humans are not flawless, the work they perform will usually contain errors.

The current regime for weapons law emphasizes three reviews conducted at different points in the weapon creation process: pre-

---

as a body of "soft" law is only as strong as its supporters. An important consideration in international weapons regulations is not creating laws that will be effectively ignored. *Id.*

[84] *Id.* at 9–10 (pointing out that this mostly refers to the idea that international laws that are not multilaterally followed become moot. If only a few actors adhere to them, those actors will likely be harmed by states not adhering to them.

development, post-development, and pre-fielding. Considering the moral philosophies highlighted above, the first and last may be the most important (that is, not *what* does the weapon do, but rather *how* does it do it). Given the technical imperfections of autonomous systems, the final phase should require some way to solve errors in the weapon's coding, and the first phase should address the issue of distinction when uncertainty exists about a target.

The final step in coming to a substantive decision about the legal use of autonomous weapon systems is deciding how these two phases can best embody the principles of proportionality and distinction. As stated above, the heighted bar for what is considered a proportional attack can only stand as long as the weapon has no errors in coding. Minimizing collateral damage is the fundamental goal of proportionality; thus, if the risk of an error is too high, then that risk overshadows the weapon's technical capabilities. In terms of distinction, the toughest question is often when a target is no longer a valid target—or the opposite, when civilians divest themselves of their protected status. This is the issue of civilians directly participating in combat. There needs to be a way in which weapons can be designed to tell when a civilian is or is not a valid target.

Given the current framework of the international community through the LOAC, the present technical capabilities of modern weapons, and the overall moral goals of International Human Rights Law, the first review should ensure that the autonomous weapons system will be designed to keep a human being "on-the-loop." The weapon may be capable of discerning and attacking a target without consulting the human operator, but there should be a level of oversight that can allow for control of the weapon in the event that an error in coding causes the weapon to make a mistake. Additionally, due to the risk of an enemy remotely re-programming the weapon to malfunction, appropriate oversight is necessary to prevent weapon misuse.[85] The final review should test the functionality level of that design intent. The human operator must to have sufficient time and direct oversight to control the actions of the weapon. This is critical to commanding a weapon in situations of uncertainty. Although technical capabilities may improve to a level

---

[85] Although not expressly discussed in this study, a major concern regarding autonomous weapons is that the enemy will be able to hack into the system's software and re-program it to meet enemy objectives. If the enemy is a non-state actor that does not abide by the LOAC, then this is an important consideration for protecting civilians.

where the degree of oversight can be more limited, current capabilities render direct human oversight absolutely necessary. An "on-the-loop" requirement is a logical balance between international humanitarian law and self-defense concerns that the international community can reasonably be expected to accept.

Yet, not everyone is apt to agree with mere *regulation* of these weapons systems. Several groups who emphasize human rights as the primary concern of international law are calling for a complete prohibition on weapons systems that can select and fire without human intervention.[86] One of the more tenuous arguments these groups make is that these systems would lack the ability to exercise human compassion, which would put civilians at an increased risk of becoming collateral damage. This argument comes from the concept that robots do not have the capacity to exercise human emotion in general. Human emotion often results in actions taken out of fear, revenge, and shock. There is not sufficient evidence that human restraint taken out of compassion would save any more lives than programming systems to err on the side of caution while removing the possibility of revenge killings and other attacks employed in a rush of emotion.

A more substantial argument is that countries themselves could use these systems as a reason to develop systems that touch and even cross the lines of the LOAC, because they feel removed from the chain of responsibility.[87] This author would respond that such an issue is not an issue of the law but, rather, one of enforcement. As the concept of command responsibility had to develop,[88] its application to autonomous

---

[86] *Q & A on Autonomous Weapons*, HUM. RTS. WATCH, Oct. 21, 2013, at 3. *Human Rights Watch* published a review in 2012 entitled *Losing Humanity: The Case Against Killer Robots* that advocates for a complete ban on autonomous weapon systems. This Q & A outlines the primary arguments in the paper and responses to similar papers such as this one that advocate regulation above prohibition.

[87] *Id.* While international law may view the commanders who deploy these systems, as well as those responsible for coding them, as responsible, several states will be tempted to foster an environment where command responsibility does not extend to autonomous systems that are incapable of asserting human reason over a situation. The "out of my hands" mentality would be an easy trap into which many militaries will fall.

[88] Eugenie Levine, *Command Responsibility*, GLOBAL POL'Y FORUM (Feb. 2005). The legal concept of command responsibility can be traced to the Ordinance of Orleans in 1439, which applied a blanket responsibility to commanders for acts of their subordinates. After WWII, the *Yamashita* case applied a "must have known" standard to this responsibility. Post-Vietnam, the concept of "should have known" developed. In application to autonomous weapons, commanders that deploy a system in an unlawful way would be responsible for acts it commits. *Id.*

weapons systems will as well. The groups respond to this argument by arguing that complete prohibition would be easier to enforce than regulation.[89] As discussed above, this author disagrees. Particularly in an age of sophisticated groups of armed non-state actors, a prohibition on autonomous weapons systems is unrealistic, and this unrealistic ban would disillusion many actors from compliance with international weapons laws completely.

There remains one final question. This article addressed how the current international legal framework should be applied to autonomous weapons systems, but is that enough? Does this framework need to be adjusted in order to account for emerging technologies such as autonomous weapons systems. This author would propose not so much a change to the existing laws as a clarification. The application of human reason is littered throughout the LOAC. As scientists, policy makers, and legal scholars attempt to apply human reason to technological capability, a more substantive standard must be developed against which weapons systems can be measured during the weapons testing process. Ultimately, the end of the day the purpose of the LOAC is to protect humanity; thus, the ways in which it protects itself from the horrors of war should continue to emphasize human reason as an acceptable standard.

[89] *Id.* Human Rights Watch contends that, in the same way blinding lasers were preemptively banned completely, autonomous weapons should be as well. However, this fails to account for the fact that this is more of a regulation, because laser technology is still allowed, just one use of it has been banned. *Id.*

AN EXTRAORDINARY LIFE SPAN: A SUMMARY AND ANALYSIS OF *AN ORAL HISTORY OF THE HONORABLE WILLIAM A. McCLAIN*

UNITED STATES ARMY (1943–1946)[1]

MAJOR DAN DALRYMPLE[*]

I believe in a greater humanity that transcends race, color, and creed. Therefore, I believe in the Black Man's Destiny—that somewhere, sometime in this land of ours, though black-skinned and kinky-haired, he shall climb the mountains of life, hand in hand with his white brother, and emerge above the clouds of blackness into the sunlight of freedom and social justice. [2]

I. Introduction

---

[*] Judge Advocate, U.S. Army. Presently assigned as Senior Defense Counsel, Fort Campbell, Kentucky. LL.M., 2013, The Judge Advocate General's Legal Center and School, Charlottesville, Virginia; J.D., 2004, Western New England University; B.A., 2000, Vanderbilt University. Previous assignments include Rule of Law Attorney, Kandahar, Afghanistan, 2010–2011; Special Counsel, U.S. Department of Justice, Civil Division, Washington, D.C., 2009–2011; Litigation Attorney, U.S. Army Litigation Division, Arlington, Virginia, 2008–2009; Brigade Judge Advocate, 504th Battlefield Surveillance Brigade, Fort Hood, Texas, 2006–2008; Legal Assistance Attorney, III Corps, Fort Hood, Texas, 2005–2006. Member of the bars of Ohio, the District of Columbia, and the Supreme Court of the United States. This article was submitted in partial completion of the Master of Laws requirements of the 61st Judge Advocate Officer Graduate Course. The author wishes to thank Mr. John C. Norwine, Executive Director of the Cinncinnati Bar Association and Mr. Tim M. Burke, of Manley Burke, for their cooperation, and to especially thank Robert A. Budinsky III, for his assistance with research at the Cinncinnati Museum Center at Union Terminal.

[1] Major Jim Gibson & Major Stacy Flippin, An Oral History of William A. McClain, (2003) [hereinafter Oral History] (unpublished manuscript, on file with The Judge Advocate General's School Library, United States Army, Charlottesville, Virginia). The manuscript was prepared as part of the Oral History Program of the Professional Communications Department at The Judge Advocate General's School, Charlottesville, Virginia. The oral history of the Hon. William A. McClain is one of over seventy personal histories on file with The Judge Advocate General's School Library. They are available for viewing through coordination with the School Librarian, Daniel Lavering, and offer a fascinating perspective on key leaders whose indelible influence continues to this day. Mr. McClain died on Tuesday, February 4, 2014. He was 101 years old.

[2] William A. McClain, *Our Scroll of Destiny* (Apr. 28, 1934), *in* Oral History, *supra* note 1, app. C, at 8.

William A. McClain was a World War II era African American Judge Advocate. While his longevity in years is noteworthy by itself, more so is the scope of his achievements and the constellation of personal connections he forged. Born into poverty in the Jim Crow South, he rose to become an accomplished orator, lawyer, judge advocate, city solicitor, state court judge, and leader in the civil rights movement. Along the way, he broke down racial barriers, often with the help of white teachers and colleagues, as well as the personal involvement of a governor, senator, and future Supreme Court Justice. Many of his professional accomplishments occurred in the City of Cincinnati, a conservative bastion, and hotbed for racial unrest.[3]

This article is a summary and analysis of interviews conducted with the Honorable William A. McClain in 1999 and 2003, interviews later transcribed and bound in *An Oral History of William A. McClain*, which is maintained at the Library of The Judge Advocate General's Legal Center and School, United States Army, Charlottesville, Virginia.[4] The article introduces Mr. McClain by discussing the personal challenges he overcame, along with the professional experience and accomplishments he amassed, while identifying the character attributes that contributed to his success. In particular, this article highlights his ability to forge relationships, transcend boundaries, and serve as an example of leadership.

II. Early Life, Education, and Background

A. A Humble Upbringing

William A. McClain was born in Sanford, North Carolina, on January 11, 1913. He was born out of wedlock to a teenage mother; his father could not read or write.[5] During his early childhood, he and his

[3] *See generally* John Kiesewetter, *Civil Unrest Woven into City's History*, CINCINNATI ENQUIRER, July 15, 2001, *available at* http://www.enquirer.com/editions/2001/07/15/tem_civil_unrest_woven.html. *See also* Kevin Osborne, *Reflections on Riots & Race—A Decade Later, Differing Views Persist on Causes, Aftermath*, CINCINNATI CITY BEAT, Apr. 6, 2011, *available at* http://www.citybeat.com/cincinnati/article-23047-reflections_on_riots.html.
[4] The Library Catalogue is accessible at http://www.jag.iii.com.
[5] *Hundreds Celebrate Judge's 100th Birthday: Judge William McClain Turned 100 Years Old Friday* (NBC WLWT broadcast Jan. 13, 2013), *available at* http://www.wlwt.com/wlwt.com/news/local-news/cincinnati/Hundreds-celebrate-judge-s-100th-birthday/-/13549970/18115716/-/w0comz/-/index.html#ixzz2RD4PtHJJ.

mother moved to Springfield, Ohio, to live with his maternal grandmother, Eva Duvall. For a time, McClain's grandmother raised him and his mother, just fourteen years his senior, "almost as siblings."[6]

In Springfield, the family lived in a five-room house without utilities or even a phone. Though eventually they did get electric light, through high school McClain would study by lamplight. All in his household had no more than a fifth grade education and were not able to provide much by way of cultural or civic discourse during his formative years. McClain credits a white school teacher at Elmwood Elementary School, Augusta Wiegle, as imparting to him what he describes as his first defining moment.[7] With her support, McClain began to buckle down at school and took an interest in learning and academic accomplishment that would serve him for a lifetime. Though "separate but equal" was the law of the land then and beyond, as set out in *Plessy v. Ferguson*,[8] McClain never attended a segregated school and never had an African American teacher through high school. He attended Springfield High School and, though it was an integrated school, he was one of only five African Americans in a class of approximately three hundred.[9]

McClain finished near the top of his class, graduating with honors in 1930. That same year, he received a scholarship to Wittenberg College in Springfield, now Wittenberg University. Though not on a full scholarship, McClain was able to focus on his studies, thanks in no small

---

[6] Barry Horstman, *William McClain at 100: A Legacy of Firsts*, CINCINNATI ENQUIRER, Jan. 10, 2013, at C5. When McClain was about twelve, his mother remarried and "'became a positive force." *Id. See also* Oral History, *supra* note 1, at 2.

[7] Oral History, *supra* note 1, at 2–5.

> One day I was in the playground playing and being very [mischievous] with a lot of black youngsters, and I was trying to be the baddest guy on earth. And she called me in and told me, she says, ["]Bill, you know, you're not like the others. . . . [Y]ou have an opportunity to make it in life . . . I'm expecting you to be a very good student.["] And she began to take me to give me a cultural experience by taking me to movies and operas and to things of culture and invite me down to her house. And she inspired me.

Id. at 2.

[8] 163 U.S. 537 (1896) (upholding the constitutionality of a Louisiana law mandating "equal but separate accommodations for the white and colored races"), overruled by *Brown v. Bd. of Ed.*, 347 U.S. 483, 495 (1954) (concluding "that in the field of public education the doctrine of 'separate but equal' has no place").

[9] Oral History, *supra* note 1, at 3–4.

part to personal loans his grandmother, a domestic servant, took out for his education.[10] He also worked to support himself by taking a job as a waiter at a Wittenberg fraternity and by doing yard work for white families. McClain was the only African American among the student body during his freshman year. While somewhat isolated among a campus of around eight hundred, McClain received vital support through his local African Methodist Episcopalian church, both for book costs and in developing the public speaking skills that would soon garner national recognition.[11]

B. Finding His Voice and Transcending Race

As a child, McClain had a stammer and a stutter. He began working on his speaking skills at evening Sunday school services featuring discussions and formal debate. Despite still being "a little raw," a pastor and a religious studies student began coaching McClain and he competed in an annual oratorical competition.[12] Though McClain never won that contest, it gave him valuable experience.[13]

Despite this preparation, during his freshman year, when McClain tried out for Wittenberg's debate club, he was not accepted. Fourteen of his white counterparts had been chosen, but from this rejection, McClain received a blessing: a philosophy about himself and about race.

> [I]f I ever failed in white competition as I did in class to accomplish what I wanted to accomplish, I always

---

[10] Eva Duvall, McClain's grandmother, was his "main supporter and the real inspiration[]" in his life. *Id.* app. A, at 1. From her he learned the importance of being well-dressed and maintaining a sharp appearance, an attribute he would be known for throughout his life.

> She said for every "A" I got in school she'd get me a pair of argyle socks. . . . I had a lot of argyle socks. So I always believe in good public appearance. Sell yourself. You see, sometimes your first impression may be your last impression. It could be your last chance. You have some persons [who] don't like you from the get-go [then] you're through. You've always got to survive that first impression.

Id. at 155–56.

[11] *Id.* at 5–8.

[12] *Id.* at 8.

[13] *Id.* at 9.

> eliminated at first all the non-racial reasons; did I study hard enough, did I work hard enough. I never tried to give an excuse—a racial reason. . . . . I didn't use black as an excuse. And I didn't have at that time, and still don't have, the philosophy of the underdog. Victimology . . . I didn't have that. And that was lucky for me. It made me highly competitive.[14]

Undeterred—in fact motivated—McClain took every speaking course offered at Wittenberg. He received As in each. By his junior year, he had been able to correct, but not to eliminate, his stammering and was offered a place on Wittenberg's oratorical squad.[15]

During the first squad meeting, McClain was singled out among the group. Though the rest of the students were free to pick their own topic, Dr. Paul Brees, a professor in the Speech and Drama Department, told McClain to devote his oration to the issue of race. He was thrown—unsure of how he could compete against white students, in a white setting, by crafting a message on a subject likely to be unwelcome, and delivering it as the lone African American. Though familiar at an early age with W.E.B. DuBois,[16] this was the 1930s; the iconic speaker on race of the 20th Century, Martin Luther King, Jr., was still a child at this point, the mountaintop was not yet a dream, and televised examples of rhetoric did not exist. With no further instruction from Dr. Brees, McClain set out to define for himself the race issue. He read the orations of past national contest winners, read every book he could on the issue of race, and began drafting his speech over the summer.[17]

When classes resumed in September, and the oratorical squad had their first meeting of the year, McClain was "the first in the class to complete his research and his writing and was ready for Dr. Brees's critical review before anyone else."[18] The following day, Brees sat McClain down and began,

> Bill, this is the best speech I've ever read on the race problem. I've read a lot of them and heard a lot of them.

[14] *Id.* at 9–10.
[15] *Id.* at 10–11.
[16] Trevor Coleman, Editorial, *A Well-Deserved Honor for A U-M Legal Barrier Breaker*, DET. FREE PRESS, Apr. 26, 2002, at A10.
[17] Oral History, *supra* note 1, at 11–15.
[18] WILLIAM A. KINNISON, MODERN WITTENBERG 66 (2011).

> . . . [N]ow, we're going to have to take and groom you and get rid of your defects and hone you into a good speaker. And if this works then I have to go to [Wittenberg's] President and ask him can you represent Wittenberg. And I have to tell the others that you're the one.[19]

The selection of William McClain as Wittenberg's entrant in the Old Line Oratorical Contest would not be official that quickly or that easily, however. Before McClain would be chosen, he had to be honed and polished as an orator. Over the final months of 1933, the two rehearsed in secret; McClain spent hours refining his delivery before the mirror, and in the end, Brees had no trouble following through on his word. He notified Wittenberg's President, Dr. Rees Edgar Tulloss, that McClain was the proposed nominee for the intercollegiate competition.[20]

Dr. Tulloss was not known for his support of civil rights,[21] but appeared content with McClain as the nominee. Dr. Brees went on to notify rival coaches of Wittenberg's unconventional selection of an African American as its competitor, and then the rest of the oratory squad, whose reactions ranged from shock to surprise, as McClain recalled it.[22] The rest of the college community had its misgivings as well.[23] On February 9, 1934, McClain addressed a packed house at the chapel in Recitation Hall.[24] His speech, "Our Scroll of Destiny" won over the audience and they gave him a standing ovation. McClain remembered it as the greatest moment of his life.[25]

---

[19] Oral History, *supra* note 1, at 15.
[20] *Id.* at 16–17.
[21] KINNISON, *supra* note 18, at 67.
[22] Oral History, *supra* note 1, at 17.
[23] KINNISON, *supra* note 18, at 66–67. This may have factored into the timing of McClain's debut of his speech to Wittenberg College. Traditionally, the nominee delivered a preview of his presentation the day before to departing for the contest, but McClain was scheduled to do so several days in advance. Oral History, *supra* note 1, at 17. The administration may have been hedging its bet on McClain, affording itself enough time to change course. It may have been concerned about the student body rejecting the notion of one of its, by then total of two, African American students acting as representative for the whole student body. *Id.* at 7. *See also* KINNISON, *supra* note 18, at 66–67.
[24] KINNISON, *supra* note 18, at 66.
[25] Oral History, *supra* note 1, at 17.

From Wittenberg, McClain went to the Ohio statewide competition at Muskingum College in New Concord. He met and faced off with contestants and coaches from all over the state, and advanced through six elimination contests to win the Ohio orator championship. He was the first African American and the only Wittenberg student to do so.[26] But as an African American, during the competition, he was not allowed to stay on the campus of Muskingum College, or at any boarding house in New Concord, and instead stayed at the home of a school janitor.[27]

Even as McClain advanced to the national competition to deliver his message that the color of a man's skin is not a test for his Americanism,[28] and that character should not be swept aside due to color,[29] he faced race-based prejudice in everyday life. While driving to Northwestern University in Evanston, Illinois, along with Dr. Brees, Mrs. Brees, and their children, the group stopped at a roadside restaurant. McClain was told by the proprietor that he could not eat in the dining area and McClain withdrew to the kitchen while the Brees were seated. The Brees' son went to the kitchen to check on McClain and ended up sitting down to join him in the kitchen. Soon, the Brees sat down in the back as well. Curious, the proprietor asked what was going on, and upon learning of McClain and the purpose of his travel, declared that lunch would be on the house.[30]

At the Nationals, McClain was the fifth of six speakers. The final speaker was James Pease from Indiana who had won two other oratorical contests,[31] and was strongly favored to win. When Pease took second place, even before McClain's name was announced, the crowd began applauding, and once he was declared the winner, "bedlam just broke loose."[32] The only black contestant, the poor boy from Springfield—who was forced to stay at the local black YMCA off of the Northwestern

---

[26] Amy M. Borror, *Breaking Down Barriers: One Member's Journey Through Life and Law*, OHIO LAW., July/Aug. 2003, at 7.
[27] KINNISON, *supra* note 18, at 67.
[28] William A. McClain, *Our Scroll of Destiny* (Apr. 28, 1934), *in* Oral History, *supra* note 1, app. C, at 6.
[29] *Id.* at 7.
[30] Oral History, *supra* note 1, at 19.
[31] Wilbur Lloyd, THE SCROLL OF PHI DELTA THETA, June, 1934, at 284–85 (noting that after Pease won the Indiana state competition he won at the national Pi Kappa Delta convention, besting five other state winners).
[32] Oral History, *supra* note 1, at 21.

campus while competing—was the 1934 National Interstate Oratorical Association competition champion.[33]

McClain returned triumphant to Wittenberg and was chosen to deliver the annual Oak Oration address during his commencement in June.[34] Still, Wittenberg remained resistant to changing its official race policies. Fraternities aside, membership in twenty-six organizations was closed to African Americans. The policy precluding residence in college dormitories would not be placed on the school's agenda for eradication for another fifteen years.[35] McClain remained undeterred, and was not bitter, observing nearly seventy years later:

> You have to believe in people. I believe that if you have somebody . . . that sees something in you . . . will help you—and that's been my life. So I didn't get involved in all this hating white folks business because white folks had helped me. . . . They helped me though high school. They helped when I was in college. I always had people who helped me because they saw something in me to help me. And I have a philosophy that if you have opportunities you should exhaust all the opportunities and chances that you have. And when they're gone others will multiply if you're interested in yourself and you present yourself as a person who wants to be somebody, somebody will help you. I've found that to be true.[36]

C. University of Michigan Law School

Though he had applied and been accepted to Harvard and the University of Chicago, McClain chose to attend the University of Michigan based on his personal relationship with an alumnus. As a high school student, he had spent summers working in the office of an African American lawyer in Springfield, Sulley James. James had attended the

---

[33] *Id.* at 20–21.
[34] KINNISON, *supra* note 18, at 375.
[35] *Id.* at 67.
[36] Oral History, *supra* note 1, at 48.

University of Michigan School of Law and was McClain's inspiration to become a lawyer.[37]

Despite the path blazed some 33 years earlier by Sulley James, McClain and others continued to come face-to-face with racism while at the University of Michigan. Six months after he had taken the nation by storm at the oratorical championship, McClain observed the treatment of Willis Ward, a track and football star who would later become a friend. Ward's example of grace while literally benched by bigotry[38] would inspire McClain to overcome the racism of a teammate in Ann Arbor, and of his fellow lawyers in Cincinnati. Before those times would come, and as had been the case at Wittenberg, McClain was prevented from living in a dormitory on the University of Michigan campus. The only African American in a class of 450, both written and unwritten rules kept him isolated from the Lawyers Club dormitory, part of the law school quadrangle. He was held at arm's length from the social, professional, and fraternal advantages his classmates enjoyed. With joining and participating in a study group unworkable, McClain was left largely on his own.[39]

Even within these constraints, McClain participated in the Henry M. Campbell moot court competition his first year. He was paired with another student, from the South, who balked at the notion of working with an African American. Fortunately, a Jewish student agreed to step in as McClain's partner, arguing two cases. The following year, the two won second place; McClain figures it was not quite the "time for a Negro and a Jew to win."[40] Still, as one of the four top finishers, McClain was to sit as a student judge his final year, and would have his tuition paid for his service.[41] A position as a judge was especially valuable for McClain;

---

[37] *Id.* at 7, 22.

[38] *Id.* at 174. In October 1934, the University of Michigan was slated to host Georgia Tech, and Ward was Michigan's best player, as well as one of the best-known college football players in America. Brian Kruger & Buddy Moorehouse, *Willis Ward, U-M and An Honor Whose Time Has Come*, DET. NEWS, Oct. 11, 2012, at B3. Georgia Tech refused to play the Wolverines unless Willis Ward was benched. Though his teammates cried foul when the Michigan coaches acceded—and one, future President Gerald Ford, temporarily quit the team—Ward decided on his own to sit out the game, asking his teammates to take the field. *Id. See also* Gerald R. Ford, *Inclusive America, Under Attack*, N.Y. TIMES, Aug. 8, 1999, at 15.

[39] Oral History, *supra* note 1, at 28. *See also* William McClain, Editorial, *Level U-M's Playing Field at Last*, DET. FREE PRESS, Apr. 17, 2001, at A7.

[40] Oral History, *supra* note 1, at 24.

[41] *Id.*

though he had a few hundred dollars set aside, without the currency of the judgeship he may not have been able to pay the rest of his way through law school.[42] It is even more telling, then, how McClain chose to share his good fortune. Beyond the finalists, a fifth judge's position was available, and the top four finishers could select who would be named. At McClain's insistence, the white Southern student who had refused to partner with him was selected.[43]

> So everybody was shocked in law school that I turned my cheek. But I called him to tell him that he was . . . under consideration. I said, ["Y]ou know you wouldn't sit with me—wouldn't argue with me last year. All right, are you willing to sit on the bench with me?["] So he said, yes. And he apologized very profusely. And we became very, very good friends.[44]

McClain and his one-time rival, also named Bill, would remain friends for decades until the latter's death, in 2000.[45] These experiences in adolescence and early adulthood informed McClain's attitude and professional outlook throughout his life and career.

D. Early Career

The only African American in his class, McClain graduated from the University of Michigan School of Law on June 9, 1937.[46] He returned to Springfield to take the bar exam, but missed passing by a few points.[47] Though he loved Springfield, McClain felt that it was too small and rural for him to be able to succeed financially and nearby Cincinnati offered more opportunities.[48] Without funds to re-take the exam, McClain was

---

[42] Julie Kemble Borths, *Retired Judge William McClain Found Path by Exceeding Expectations*, CINCINNATI HERALD, Nov. 6, 2010, *available at* http://www.thecincinnatiherald.com/news/2010-11-06/Front_Page/Retired_Judge_William_McClain_found_path_by_exceed.html.
[43] McClain, *supra* note 39.
[44] Oral History, *supra* note 1, at 25.
[45] *Id.* at 25–26. *See also* McClain, *supra* note 39.
[46] McClain, *supra* note 39.
[47] Kemble Borths, *supra* note 42.
[48] Oral History, *supra* note 1, at 40.

taken in by a Cincinnati attorney, a man McClain came to call benefactor, law partner, and friend.[49]

It would be nearly impossible to tell the story of McClain's arrival to and life in Cincinnati without discussing Theodore M. Berry, himself a pioneer in civil rights, known to some as "Mr. Cincinnati."[50] Berry served on the Cincinnati City Council, as vice mayor, and in 1972 was elected the city's first African American mayor. McClain first met Berry following the 1934 national oratorical contest. The Cincinnati NAACP began its first of a series of monthly radio broadcasts on the local WKRC radio station, and featured McClain as the debut subject on July 29th.[51] Berry was among the series' sponsors,[52] and McClain found in him a kindred spirit, a potential mentor or partner with whom to pursue shared ambitions and goals.[53] The day McClain was admitted to the Ohio bar in February of 1938, he became a part of Berry's law firm.[54]

Eager to begin his practice focusing on civil rights matters, McClain encountered forces on all sides that would lead him to shift his approach.

> So when I came down into Cincinnati it was the most prejudice[d] town in the country. When I got off the train at Union Terminal the yellow cabs would not pick me up and ride me. I hailed down a black cab to take me where I was going. And I came into Mr. [Berry's] office as an associate. And at that time black lawyers were not well thought of. They practiced in police court and

---

[49] Amanda Chalifoux, *Judge McClain Reflects on Lifetime of "Firsts,"* UNIV. MICH. SCH. OF L., L. QUADRANGLE, Spring 2011.

[50] Tom O'Neill, *Ted Berry, Mr. Cincinnati, Dies at 94*, CINCINNATI ENQUIRER, Oct. 16, 2000, *available at* http://enquirer.com/editions/2000/10/16/loc_ted_berry_mr.html. Also born to an unwed mother and a father he hardly knew, Ted Berry achieved early success, and met with resistance based on his race. His high school valedictorian, Berry was forbidden to walk alongside his white classmates in the graduation procession. After completing law school at the University of Cincinnati, Berry became the first African American assistant prosecutor in Hamilton County. He was president of the local chapter of the National Association for the Advancement of Colored People (NAACP), an office McClain would also hold from 1940 to 1942. *Id. See also* Oral History, *supra* note 1, app B, at 9.

[51] Press Release, Cincinnati Branch News of the NAACP (n.d.) (on file with author) (obtained from the personal papers of William McClain maintained by the Cincinnati Museum Center).

[52] *Id.*

[53] Oral History, *supra* note 1, at 42.

[54] *Id.* app. B, at 2.

> traffic court, minor offenses. And they never had major cases. And the bench didn't think much of them. And the bar didn't think much of them. And we couldn't join the Cincinnati Bar Association. Although the Cincinnati Bar Association was the authority that supervises, we couldn't belong because we were black.[55]

Not long after he began practicing, McClain was arguing a civil rights case before a local judge, Stanley Struble, who would later serve as a significant influence.[56] After the trial, Struble asked McClain to his chambers and offered what was at first an unwelcome observation. Judge Struble noted that McClain was spending a great deal of effort on civil rights and racial matters, pouring his energy into a single area of focus. Putting it bluntly, Struble said, "You're an outstanding *black* lawyer . . . . Why don't you use your talents and try to become an outstanding *lawyer*?"[57] At first, McClain was discouraged, thinking he was being dissuaded from pursuing a cause of great personal importance.[58] But later, a client he had represented on several small matters, paying on an installment basis, was involved in an accident in which the other party was clearly at fault. When McClain heard his client was injured and contacted him, the young attorney was soon disappointed to learn that the client he had stood beside for so long was looking for other representation. Because African American attorneys were not well respected by the courts, the client was looking for a white lawyer to handle the case. Reflecting on Judge Struble's words, and confronted with the low esteem members of his race held within the profession, he would leave the civil rights issues for his law partner. McClain elected to focus on his own abilities as a practitioner, in the hopes of raising the esteem for African American lawyers in the eyes of Cincinnati's courts and citizens.[59]

Determined to branch out, McClain took an interest in the Cincinnati Solicitor's Office. He submitted and re-submitted an application for a job, at one point seizing upon a news report of a pending vacancy in

---

[55] Oral History, *supra* note 1, at 41.

[56] *3 Greats Battled Barriers—McClain, Scripps, Sewell Honored By Chamber*, CINCINNATI ENQUIRER, Dec. 21, 2002, *available at* http://enquirer.com/editions/2002/12/21/loc_greatest21.html (announcing McClain as one of three recipients of the Great Living Cincinnatians award and highlighting Judge Struble as an influence).

[57] Borror, *supra* note 26, at 7 (emphasis in original).

[58] Oral History, *supra* note 1, at 42.

[59] *Id.* at 41–43.

order to press John Ellis, the City Solicitor, for a position.[60] After several months, his efforts met with success, and in February of 1942 he became the first African American assistant solicitor for the City of Cincinnati.[61] Though the early going was not easy, neither was it all focused on his legal career. McClain was fortunate to meet the best friend of Berry's secretary, Roberta White, whom he would later marry.[62] The two would spend over 65 years together until her death in 2011.[63] Though often separated by McClain's military service, the two began their married life together during the second World War.

III. Army Service

With World War II already underway, and the United States heavily involved in the war effort, McClain was soon called upon to serve. He was drafted and ordered to report for military service on October 13, 1943. John Ellis submitted a leave of absence for McClain two days before.[64] Though his contemporaries were receiving direct commissions into the Navy, or even the Army, McClain found himself 30 years old, a practicing attorney for six years, and a "buck private."[65] He remembered it as the saddest moment of his life.[66]

He soon warmed to the military experience in ways he had not anticipated. Though surrounded by younger soldiers during basic training at Sheppard Field in Northern Texas, McClain was running alongside them and keeping up. He found an athleticism that had eluded him in his younger years, and his height of 5' 5"[67] seemed to no longer hold him back. Moreover, he grew into himself in other ways. Apart

---

[60] Letter from William A. McClain, to John D. Ellis, Solicitor of City of Cincinnati (Sept. 25, 1941) (on file with author).
[61] Oral History, *supra* note 1, app. B, at 2.
[62] Kemble Borths, *supra* note 42.
[63] Horstman, *supra* note 6, at C5.
[64] City of Cincinnati, Interdepartment [sic] Correspondence Sheet from John D. Ellis, Solicitor, to Walter V. Majoewsky, City Personnel Officer (Oct. 11, 1943) (on file with author) (requesting that McClain "be granted leave of absence without pay effective as of" his report date).
[65] In 1943, it became increasingly difficult for all branches of the Army to offer direct commissions due to War Department constraints. *See* Fred L. Borch, *An Officer Candidate School for Army Lawyers?—The JAG Corps Experience* (1943–1946), ARMY LAW., July 2012, at 1.
[66] Oral History, *supra* note 1, at 44–45.
[67] *Id.* at 3.

from a familiarization with the Army, his six weeks of basic training, in a segregated setting, afforded him his first total emersion in African American culture. Previously, as the only, or one of a few, African Americans in school, his only contacts with African Americans outside of the home was in churches or limited social settings.[68]

> I had never had any real exposure to the black underclass. But in the Army I was in it with the black underclass. They taught me how to curse. They taught me how to gamble. They taught me all the things that blacks do, you know. And I began to understand more of my own culture than I understood before.[69]

After Sheppard Field, McClain was sent to Air Force mechanics school at Clarion Field near Denver, Colorado. Though McClain grasped the theoretical aspects of the training, and received positive evaluations, he did not take as well to the technical areas of emphasis during the training. Fortunately, he did not spend a great deal of time turning wrenches, thanks to his ability to exert leverage in other ways. Though the details are unclear, McClain requested assistance in accession to the Judge Advocate General's (JAG) Department[70] through Senator Robert A. Taft of Ohio.[71]

Though McClain did not hear back from Taft's office, he eventually received orders to leave mechanics school before training was complete. He spent a brief period of time at Tuskegee Air Field in Alabama before learning that he had been accepted into the JAG Department. While at

---

[68] *Id.* at 45–47.
[69] *Id.* at 46.
[70] At this time the JAG Corps was known as the JAG Department. The name changed as a result of the Act of June 24, 1948. *See* UNITED STATES ARMY, THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS, 1775–1975, at 198 (1975); Borch, *supra* note 65, at 1.
[71] It would not have been the first time Senator Taft had heard of William McClain. McClain's law partner, Ted Berry, had been recommended to Ohio's Governor, John Bricker, for appointment to the Ohio Defense Council, in order to represent the interests of African Americans in Ohio on defense related matters. When Berry's appointment foundered in the Hamilton County Committee, he contacted Taft for assistance and Taft intervened. Letter from Senator Robert A. Taft, to Theodore M. Berry (Nov. 28, 1941) (on file with author). The letter of thanks to Senator Taft for his personal intercession, sent on Lawson, Berry, and McClain letterhead, was dated days prior to the bombing of Pearl Harbor. Letter from Theodore M. Berry, to Senator Robert A. Taft (Dec. 3, 1941) (on file with author).

Tuskegee, McClain encountered African American officers for the first time, including then-Colonel Benjamin O. Davis, Jr. When he reported for the 7th Judge Advocate General's Officer Candidate School (JAGOCS) at his alma matter, the University of Michigan,[72] McClain would be one of only two African American officer candidates in attendance, the other being Robert Ming, a University of Chicago graduate.[73]

Though the Army was still segregated along racial lines, JAGOCS was blended in several ways. Blocks of instruction focused on marching, military bearing, weapons familiarization, and land navigation, as well as substantive classroom legal training.[74] Within the classrooms, officers and enlisted students sat side by side.[75] Most significant for McClain, as a member of the military, he was finally able to live and dine in the law school quadrangle. The experience went a long way to alleviate the negative experiences from his student days at the University of Michigan.[76]

On September 7, 1944, McClain graduated JAGOCS and received a commission as a second lieutenant.[77] He and Ming were among the first few African American candidates to complete JAGOCS[78] and to become

---

[72] Oral History, *supra* note 1, at 50. In August 1942, the Judge Advocate General's School, U.S. Army (TJAGSA) was activated at the University of Michigan. The following year, the Judge Advocate General's Officer Candidate School was established to enable enlisted Soldiers to obtain branch training and to receive commissions as first or second lieutenants. *See generally* Borch, *supra* note 65, at 1.

[73] Even before his accession into the JAG Department, pioneering civil rights lawyer William Robert Ming, Jr. was an accomplished attorney. While still a Private, he was furloughed to handle a case before the United States Supreme Court. After leaving the Army as a captain, he worked with Thurgood Marshall on the briefs in *Brown v. Bd. of Ed.*, 347 U.S. 483, 495 (1954). In 1960, Ming was part of the trial team that defended Martin Luther King, Jr. on perjury charges related to tax evasion. The team obtained an acquittal from an all-white jury in Montgomery, Alabama. Ming himself was later prosecuted for failing to file income tax returns and, despite paying back taxes and filing the returns, was sentenced to sixteen months in federal prison. In declining health, he was released to a veteran's hospital in Chicago before his death in 1973. *See* Jim McElhatton, *Standing on 'the Shoulders of Bob Ming*,*'* WASH. TIMES, Dec. 7, 2008, *available at* http://www.washingtontimes.com/news/2008/dec/7/standing-on-the-shoulders-of-bob-ming.

[74] Borch, *supra* note 65, at 3.

[75] *Id.* at 1.

[76] Oral History, *supra* note 1, at 108–09.

[77] *Id.* app. A, at 11–12.

[78] Oral History, *supra* note 1, at 27.

JAG officers.[79] Though their numbers were small, there were still challenges in finding assignments for these young officers. One individual not just instrumental to McClain's assignment and that of his peers in the JAG Department, but important to the overall integration effort was Truman Gibson,[80] a friend of Bob Ming and chief adviser on racial affairs to Secretary of War Henry L. Stimson. Assignments at that time were delicate matters due to segregation and Gibson worked behind the scenes to look after African American Soldiers.[81]

McClain's first assignment was to the relative safety of the Office of The Judge Advocate General in Washington, D.C., where he reviewed courts-martial before they went to boards of review. As McClain's six years of legal experience were primarily in civil practice, this initial six-month assignment was a good transition. The biggest threat he faced in D.C., it turned out, was the gender disparity. With so many men away fighting, the ratio of women to men in the capitol appeared to McClain to be one hundred to one. Though he enjoyed the social scene, he missed the young secretary he had met in Cincinnati. At one point he phoned Roberta and said, "You better come down here and marry me because it's rough down here." The two were wed on November 11, 1944, in the chapel at Howard University.[82]

---

[79] *Id.* app. B, at 10. Messrs. Ming and McClain were trailblazers, but the first African American judge advocate, Major Adam E. Patterson, to enter the JAG Department did so during the previous world war. Major Adam E. Patterson was commissioned a judge advocate in 1918.

[80] Oral History, *supra* note 1, at 53–58. *See also* Richard Goldstein, *Truman Gibson, Who Fought Army Segregation, Is Dead at 93*, N.Y. TIMES, Jan. 2, 2006, *available at* http://www.nytimes.com/2006/01/02/national/02gibson.html.

[81] Gibson described the racial situation in a 2002 interview with the Columbus Dispatch in this way:

> It was complete, absolute segregation. . . . The training facilities were in the South. The attitude was that Southern officers understood "those people." White bus drivers in military towns were deputized and armed. That was their approach to handling Southern black soldiers. I tried to put out fires. We were dealing with the killing of black troops.

Goldstein, *supra* note 80.

[82] Oral History, *supra* note 1, at 58–60.

From the banks of the Potomac, and now with his wife at his side, McClain moved to his next assignment at Fort Huachuca, Arizona, where he served as a trial counsel. It was Roberta's first introduction to military life on an installation; the two lived in on-post quarters, and she kept busy working with the Red Cross. The two found a social network among the officers assigned to a largely African American medical group, all of whom outranked McClain. As junior as he was, McClain was the only prosecutor on the installation, trying many cases against line officers serving as defense counsel. He felt that the trial outcomes were generally fair, and that if panels were biased at all, it was to the benefit of the accuseds. There were no high-profile cases and the bulk of his workload amounted to what would be called misdemeanors back home, and few of his cases involved white accuseds.[83]

After only a few months at Fort Huachuca, Roberta returned to Ohio when McClain was transferred to the less settled Godman Air Field in Kentucky. Godman was the location of the 1945 court-martial of three African American officers accused of shoving a Provost Marshal guard while they, along with 98 others, challenged the segregation of an Officer's Club at Freeman Field, Indiana. The three forced their way into the club; all 101 had been arrested, flown to Godman, and confined to quarters for refusing to sign an acknowledgement that they had read and understood a base regulation which effectively segregated the Officer's Club.[84] Twenty-two years before he would break the color barrier in the Nation's highest court as the first African American Justice, Thurgood Marshall, at the time serving as the NAACP's national legal counsel, urged McClain's former law partner Ted Berry to defend the Freeman Field Officers; two were acquitted.[85]

When McClain arrived at Godman Field sometime two weeks later, he detected no lingering effects while serving as legal advisor for then Colonel Benjamin O. Davis, Commander of the 477th Fighter-Bomber Composite Group. The two did not have a close working relationship,

---

[83] *Id.* at 61–66, 77.

[84] CHARLES E. FRANCIS, THE TUSKEGEE AIRMEN: THE MEN WHO CHANGED A NATION 241–43(1997). For further details, see Major John D. Murphy, The Freeman Field Mutiny: A Study in Leadership (March 1997) (research paper for Air Command and Staff College), *available at* http://www.dtic.mil/cgi-bin/GetTRDoc?Location=GETRDoc.pdf&AD=ADA397891; http://www.au.af.mil/au/awc/awc gate/acsc/97-0429.pdf.

[85] Theodore Berry, *94, Civil Rights Pioneer, Dies*, N.Y. TIMES, Oct. 17, 2000 available at http://www.nytimes.com/2000/10/17/national/17BERR.html.

which McClain attributed to their disparity in rank.[86] But McClain, now a First Lieutenant, was nonetheless impressed with the bearing, pride in appearance, and emphasis on discipline Davis exuded.

> [H]is idea was that we were Afro-Americans so we couldn't make any kind of mistakes. So you got to play it more than to the rule. He was a stickler to doing it to the letter of the law. And he always told them that ["]if you're going to do anything that is not military, go away from the flagpole. Get the hell off the base.["][87]

In 1946, with the war winding down, McClain returned to Ohio when Davis and the 477th moved to Lockbourne Airfield near Columbus. Though working for Davis, the most disciplined military man McClain had ever met, had been a wonderful experience, McClain opted at Lockbourne not to make the Army a career and returned to Cincinnati.[88] He was honorably discharged on May 24, 1946.[89]

---

[86] Oral History, *supra* note 1, at 74. It may have also been the Freeman Field Mutiny and politicization of the ensuing court-martial which led Davis to maintain a distance from his military justice adviser during this time. Shunned while a cadet at West Point, Davis regarded having been refused entry at a Fort Benning Officer's Club during his first duty assignment as "one of the most insulting actions taken against him in 37 years of military life." Richard Goldstein, *General Benjamin O. Davis Jr. Dies at 89*, N.Y. TIMES, July 06, 2002, *available at* http://www.nytimes.com/2002/07/06/us/general-benjamin-o-davis-jr-dies-at-89.html. Upon being chosen by the Convening Authority to sit on the Freeman Field panel, and being the senior member, Davis was concerned that the findings in the case could hurt his career. FRANCIS, *supra* note 84, at 240. In the end, Davis was challenged and did not sit on the panel. *Id.* His career progressed quite well, as he became the first African American general officer in the Air Force in 1954, and he went on to receive a fourth star. Goldstein, *supra*.

[87] Oral History, *supra* note 1, at 74.

[88] *Id.* at 68–75.

> [W]hen I was about to be shipped out for discharge at Lockburne many of the officers were making a choice of whether they were going to be regular Army. And I had to decide what I wanted to do. And I decided that I didn't want to do that. I decided that I did not want to be a regular JAG officer. I thought of going back home and being a civilian.

Id. at 75.

[89] *Id.* app. A, at 17. *See* Appendix (providing an image of McClain during this period).

IV. Post-Army Career

A. The Queen City's Lawyer

McClain returned to the City Solicitor's office in Cincinnati after his discharge, but few expected he would make a career of it and rise through the ranks to lead the office himself. The Solicitor who had hired him told McClain as much from the start; he should not get too comfortable. "John D. Ellis appointed me to the Solicitor's staff of attorneys. He told me I could not do certain things in the office because I was black. I was supposed to get some experience, then be on my way."[90] McClain began his professional development anew, seizing upon opportunities wherever they presented themselves. "The Solicitor's Office made a lawyer out of me at the expense of the City of Cincinnati. When I needed a deposition, there was no problem about the cost. When I needed an investigator, there was no problem about the cost."[91] He took on the drudgery work that no one else was keen to tackle, looking for moments to excel.

> I would wait for the next opportunity to break down a barrier and then do it. While I was waiting, I would study and get ready. I started out doing research for trial lawyers and interviewing witnesses. When you are in an organization, you have to figure out what you have to offer it. As a minority, you have to find that ingredient that the organization needs. That's your ticket for success and promotion. You have to convince a few folks you have the skills that they need so that they can plead your case when an opportunity for you comes along. Those are a few things that I learned in my struggle for success. I'm not worried about race, I'm worried about opportunity.[92]

Eventually, this effort would pay off, resolving whatever doubts lingered about the talent of the young African American attorney, even as newly hired white assistants would be paid a higher starting salary.[93] In the days before computers, while pouring over cases and conducting

[90] Oral History, *supra* note 1, at 23–24.
[91] *Id.* at 23.
[92] *Id.* at 25.
[93] *Id.* at 128.

research, McClain compiled notes and catalogued and indexed those items that he expected to use at some point. He called the six black notebooks he assembled his "black bibles." They gave him an authority and credibility that sustained him while working in the Solicitor's office.

> [W]hen I went into court . . . I had to always be prepared to back up from my black Bibles any point I was going to make. Soon it got so that when I ever went before a judge and reached for that black bible after I made my objection, he knew . . . it was in there. . . . And so those black bibles were kept religiously. I put anything of any consequence that was applicable to municipal law and trial work in those bibles. . . . I got a reputation that I was a good lawyer, well schooled and well versed.[94]

It was these bibles, and a case involving a slip and fall on a sidewalk that would eventually cement, as it were, McClain's skills as a trial lawyer. Leveraging his work on case law to handle motions and briefs, McClain was allowed to sit second chair on *Kimball v. City of Cincinnati*.[95] Though the city lost at trial, McClain wrote the brief that convinced the appellate court to reverse and he was allowed to act as lead counsel at retrial. Though a loss for McClain, the second verdict amounted to less money for the plaintiff upon retrial than it had been initially. But McClain persevered, reading every case available and appealed to the Supreme Court of Ohio, where he argued without notes. After prevailing there, McClain recalls, "I came back to the city and that cleared up the idea that I couldn't try jury cases. So that's how I won my right to be a trial lawyer."[96] McClain eventually became the City's chief trial counsel.[97]

But McClain's duties and accomplishments at the Solicitor's office extended beyond the courtroom. His work with the legislation section allowed him to draft ordinances and he became familiar with the work within several other sections[98] by the time he was appointed Deputy Solicitor in 1957.[99] His civic contributions extended still further, taking on several cases addressing racial inequality in Cincinnati. He resigned

---

94 *Id.* at 130.
95 116 N.E.2d 708 (Ohio 1953). *See also* Oral History, *supra* note 1, at 125.
96 Oral History, *supra* note 1, at 128.
97 *Id.* at 125–28.
98 *Id.* at 115–18.
99 *Id.* app. B, at 2.

from the Cincinnati NAACP, where he had served as President, upon joining the Solicitor's office,[100] but contributed to a string of victories. Having argued and prevailed in cases involving the integration of theaters and hotels before county courts in the 1940s,[101] McClain, along with Ted Barry, was part of a 1951 federal court settlement in which the Cincinnati airport agreed in writing to serve all patrons, regardless of color.[102]

While serving a larger cause, McClain was also learning on a basic level about leadership. Though largely an outsider fighting his way in—the only African American in the Solicitor's office from 1946 until 1963[103]—as he moved into supervisory roles he faced adjustments. He began evaluating which attorney was best suited for a particular case and assisting others with their case strategy. Leading was something he simply had to learn how to do. Meanwhile, he developed tools as a deputy, which would allow him to make changes when he took charge.[104]

When he became the City Solicitor in 1963, at the age of 50, no other city with a population of over 500,000 had an African American as its chief legal adviser.[105] McClain supervised 22 assistant city solicitors and a total staff of 50. In taking charge, he would draw upon the example of Willis Ward at the University of Michigan and reapply the spirit of reconciliation McClain displayed there with his initial moot court partner and lifelong friend.[106] At the time McClain assumed the Solicitor's

---

[100] McClain was President of the Cincinnati Branch from 1940 to 1942. *See* Oral History, *supra* note 1, at 190, app. B, at 8.
[101] Oral History, *supra* note 1, at 188–90.
[102] *Airport Diner Opened to All*, AFRO-AM., May 5, 1951, at 3.
[103] Oral History, *supra* note 1, at 133–34.
[104] *Id.* at 151–52. McClain had a supervisor who, while a genuinely nice individual, was not very communicative. In order to maintain situational awareness, McClain would "come down on Saturdays and go through the out box in the secretarial bay to find out what was happening." *Id.* Knowing that a Deputy could be called upon to be Acting Solicitor at any time, McClain as Solicitor held regular staff meetings with his Deputy and Chief Counsel, and copied them on key correspondence. *Id.*
[105] *Cincinnati's Legal Head*, EBONY, June 1963, at 87 (quoting Senator McClain).
[106] Oral History, *supra* note 1, at 146. After edging out a colleague for the position of Solicitor, McClain went about winning over those who had opposed him. He approached the head of the secretary pool, offering her increased responsibility and a pay raise, on the condition that she commit to being a loyal team player. The same approach worked to win over his former rival to serve as Deputy Solicitor. This not only rounded out his staff, but compelled his one-time opponent to reverse hateful, racist things said in the run-up to McClain's appointment. McClain went to his competitor for the solicitor's job and offered him the position, provided he would be

office, it was reported that he had "touched all the right bases," as in, he was "an active Republican in a Republican city."[107] As it turns out, leaders of Cincinnati institutions of perhaps greater weight than the Republican establishment would weigh in on McClain's pedigree and selection.[108]

> loyal to me, straight with me, and run my shop for me when I'm absent. . . . [He] came back within an hour and told me that he could do that. Then he had to go around City Hall and reverse himself with all those people that he had badmouthed me on. And when it was known that I had appointed Wally my deputy city solicitor some folks didn't believe me because of the way he had badmouthed me. But then I brought him in. [S]ometimes it's good to turn the cheek because you're your own worst enemy. [D]on't burn your bridges behind you—because your worst enemy may walk over that bridge and become your best friend. That's happened to me in life. So never burn your bridges behind you. Always be willing to turn your cheek.

Id. at 147–48.

[107] *Cincinnati's Legal Head*, *supra* note 105, at 87. Around this time McClain's comments on civil rights issues during a speech in Cleveland attracted interest and praise from then–former Vice President, and future President, Richard Nixon. Letter from Richard M. Nixon, to William A. McClain, Solicitor of City of Cincinnati (Dec. 14, 1965) (on file with author) ("There has been too much demagoguery and too little sense in much of the civil rights discussion during recent months and your remarks, therefore, stood out even more because of their constructive clarity and courage.").

[108]

> When I was formerly considered for city solicitor I had to go to the President of Proctor and Gamble. . . . Neil McElroy. So I went up one morning in my [O]xford gray suit and cordon shoes and clean shirt and tie. And I called Mr. McElroy one day to sit and have coffee with me. He didn't ask me any questions. But they wanted to observe what I looked like and acted like as a person. As a minority, could I be city attorney of a major city. Then he wanted me to go see Joseph A. Hall, who was President of the Kroger Company. What he wanted was the main corporate leaders in Cincinnati's approval of this appointment. So I did the same thing with Joe Hall. They both were in an approving situation. But I had to get that approval. Whether as a black I looked like I could play the part and do the part.

Oral History, *supra* note 1, at 154–55. Proctor and Gamble remains a household name today, but so was Neil McElroy at one time. On the cover of *Time* magazine in October 1953, McElroy was a vanguard in the creation of the soap opera as a marketing tool. TIME, Oct. 5, 1953. He appeared on the cover again several years later while serving as Secretary of Defense. TIME, Jan. 13, 1958. While with Kroger, Joe Hall brought the

Before long, McClain would show the nation his character and leadership, as Cincinnati was pulled into the turmoil of riots following the assassination of Martin Luther King, Jr. When the City Manager was away, the City Solicitor served as the Acting City Manager,[109] as was the case in April 1968. McClain would be one of the many heads of major American cities to grapple with and speak out on how and when police would respond with lethal force to the sudden rush of violence sweeping the nation.[110]

But his duties would range well beyond what judge advocates today would term operational law as pertains to the Rules for the Use of Force. A day in the life of the City Solicitor touched a diversity of practice areas that made news, from imposing punishment on police officers as determined by disciplinary proceedings,[111] recommending an increase in court fees to cover increasing costs for court services, urging the sale of city land for the construction of low cost housing, opposing amnesty on traffic citations, and instituting a newspaper recycling program.[112] In one instance, he was able to provide an on-the-spot correction of sorts to a Cincinnati police officer who had racially profiled him.[113]

---

grocery chain "into the modern age—from the corner store to the supermarket." Oliver M. Gale, *Joe Hall, Urban Visionary*, CINCINNATI, June 1993, at 76.

[109] Oral History, *supra* note 1, at 119.

[110] *See, e.g.*, Ron Youngblood, *'Shoot Order' Fans National Controversy*, CHI. DAILY DEFENDER, Apr. 18, 1968, at 4 ("[N]aturally we will use whatever force is necessary to apprehend criminals during riots. We will, however, always exercise restraint and conform to normal police procedures. Police always have had the right to fire at escaping felons, but not persons committing a misdemeanor.").

[111] *See, e.g.*, *McClain Suspends Patrolman*, CINCINNATI POST, Mar. 18, 1972.

[112] *Way Seen for City to Take Over CTI*, CINCINNATI POST, Nov. 9, 1971, at 28.

[113]

> Back when I was the City Solicitor I was going out to my Cadillac to get a car wash. And I happened to be driving at the same speed that the other car was running. And when that car turned off, I hear a siren coming in. . . . [A] police officer pulled me over and stopped me. I asked him politely, ["W]hat did I do, Officer?["] He said, ["Y]ou were speeding.["] I said[, "I] couldn't be speeding.["] Everybody had passed him by but me and he did nothing. But when I came by in a Cadillac, well dressed, he may have thought that I was a drug racketeer or something. But he stopped me. So I asked him his name and so forth. I told him who I was. Of course, then he was ashamed of himself. I got his badge. I said, ["Y]ou and your supervisor appear in my office tomorrow morning.["] So he came in and I told him that there was no doubt the fact he stopped me was

B. Taking on and Entering the Establishment

1. Bar Fight

It was again the matter of race that brought McClain into the national spotlight as he fought for several years to join the Cincinnati Bar Association (CBA). Ohio attorneys are subject to discipline before the state bar, with local organizations, such as the CBA, empowered to handle grievances.[114] When he applied for membership in 1946, the CBA had no African American members. When his application was first denied, the CBA treasurer resigned his office in protest, stating in a letter to the CBA president:

> The action of the Bar Association in refusing to admit William [A]. McClain to membership because he is a Negro is indefensible. . . . We should be the leaders in erasing distinctions of color and religion as a criterion of professional ability. This man whom we have refused to admit is a person of good character and an American citizen, and served his country in the war for three years.[115]

While 28 white applicants easily became members, a 35% vote against him tanked McClain's first application.[116] Soon, proposals emerged to change the admission standards, easing the requirement for an 80% affirmative vote to join. This effort fizzled at first,[117] and though McClain was admitted to another professional group, the Cincinnati

---

> because I was a black in a Cadillac. And that wasn't a very good thing.

Oral History, *supra* note 1, at 118–19.

[114] *See, e.g.*, SUP. CT. R. FOR THE GOV'T OF THE BAR OF OHIO § 3 (C)(1) Certified Grievance Committees.

[115] *Negro Is Rejected by Cincinnati Bar*, N.Y. TIMES, Oct. 31, 1946, at 36. "Many others called Mr. McClain and said they were going to resign as well. But Mr. McClain issued a statement, requesting them not to do so." HERE IN OHIO, July 1947, at 10 (on file with author).

[116] *Cincinnati Bar Association Group Moves to Alter Admission and Lift Ban on Negro*, N.Y. TIMES, Nov. 2, 1946, at 10.

[117] *Bar Association Rejects Change in Voting Plan*, CINCINNATI TIMES-STAR, Apr. 26, 1947 (revealing that two proposed amendments to change the CBA's constitution's membership provisions failed at the group's annual meeting).

Lawyer's Club,[118] his second application to the CBA failed.[119] In the end, after a four-year fight, McClain credits one of his sponsors, a Cincinnati attorney and future Supreme Court justice, Potter Stewart, with helping him take his place among the members of the local bar.[120] McClain's admission to the CBA in October of 1950[121] brought Cincinnati in line with Ohio's other major cities in terms of minority attorney acceptance.[122]

2. Benched

During his time at the Solicitor's Office, McClain became an adjunct professor in and around Cincinnati, primarily teaching municipal law. He began at University of Cincinnati Law School in 1963 and at the nearby Northern Kentucky University's Salmon P. Chase Law School two years later, teaching at both until 1972.[123] That same year, he left the Solicitor's office and joined the firm of Keating, Muething & Klekamp, becoming "the first African American to serve in a major law firm in

---

118 *Negro Attorney Elected Member of Lawyers Club*, CINCINNATI POST, Jan. 16, 1947 (noting that the induction of McClain—the organization's first African American—came after a "stormy session" and that one member "who was outspoken against acceptance of McClain" resigned in protest). McClain also sought membership in other organizations in his campaign to join the CBA. While made an honorary member of the Lucas County Bar Association, the co-located Toledo Bar Association denied him entry, in part to avoid becoming entangled in the affairs of the CBA. *Toledo Bar Refuses Lawyer Denied Cincinnati Membership*, CHI. DEFENDER, Nov. 22, 1947, at 7.

119 *Bar Group Again Refuses Negro*, CINCINNATI POST, Oct. 18, 1947 (reporting a 200 to 121 vote in favor of McClain). McClain remained positive in the face of the ongoing adversity, saying at the time he was, "gratified to know that still a majority of the members are willing to allow any lawyer, regardless of race, color or creed, to be a member. To condemn the entire association in this action would be to condemn the majority as well as the small minority." *Id.*

120 Oral History, *supra* note 1, at 132. McClain's co-sponsors, at the time of his final application to the Cincinnati Bar Association, were Paul Steer—the CBA treasurer who had resigned in protest of McClain's denied admission—and Potter Stewart. *See* Appendix, *infra* (providing a copy of McClain's Sept. 15, 1950, application card).

121 *Bar Unit Admits Negroes: Cincinnati Association Elects 2 for First Time in Its 78 Years*, N.Y. TIMES, Oct. 25, 1950, at 41.

122 *Local Bar Group Only One in Ohio to Ban Negroes—Study Shows Other Associations of Lawyers Raise No Racial Issue*, CINCINNATI POST, Feb. 19, 1948 (cataloguing the acceptance of African Americans in Cincinnati professional groups of doctors and dentists and that the bar associations of Cleveland, Columbus, Dayton, and Akron already had African Americans among their members).

123 Oral History, *supra* note 1, at 118–19.

Cincinnati."[124] While there, McClain would handle contracts and real estate matters[125] before branching out further as general counsel for the Small Business Administration.[126] When William Keating, who left Keating, Muething & Klekamp to become a member of the House of Representatives, returned from Washington to Cincinnati in 1974, the former judge recommended McClain to fill a vacancy on the Hamilton County Court of Common Pleas, a post no African American had ever held.[127]

It was not difficult to foresee how Keating's recommendation would be received in the state capital. The Governor of Ohio at the time was a Republican, like McClain; moreover, Governor James Rhodes had graduated from Springfield High School in 1930 along with McClain.[128] Upon taking the bench in February of 1975, at age 62, McClain said:

> There's no white judge . . . that can understand a black defendant coming before him like I can, and know all the nuances and frustrations that blacks must experience in a white power structure. . . . To be successful in the white power structure, you have to know the survival techniques. . . . And yet I have lived and socialized in the black community, so I know the feeling and aspirations of black people. So, with this mixture, as a judge I feel I can have better insight on trying to give justice to those who come before me.[129]

---

[124] Borror, *supra* note 26, at 28.
[125] Oral History, *supra* note 1, at 157.
[126] *Id.* at 164.
[127] *Id.* at 166. *See also* William J. Keating Sr., *The Cincinnati Enquirer—Congressman Became Publisher, Chairman*, CINCINNATI ENQUIRER, Sept. 27, 2009, *available at* http://news.cincinnati.com/article/20090927/BIZ01/308010025/William-J-Keating-Sr-Cincinnati-Enquirer.
[128] Oral History, *supra* note 1, at 98. *See also* David Shutt, *James A. Rhodes, 4-Term Governor, Dies*, TOLEDO BLADE, Mar. 5, 2001, *available at* http://www.toledoblade.com/State/2001/03/05/James-A-Rhodes-4-term-governor-dies.html. Rhodes may be most widely remembered for his decision amid anti-war demonstrations in 1970 to order Ohio National Guard troops onto the Kent State University campus. The troops opened fire, killing four students. *See* John Kifner, *4 Kent State Students Killed by Troops*, N.Y. TIMES, May 5, 1970, at A1.
[129] Bill Furlow, *For Judge McClain, It's Not His First First*, CINCINNATI POST, Feb. 25, 1975. In his brief stint on the bench, McClain had at least one opportunity to live up to this ideal. McClain granted so-called "shock probation" to a sixty-one-year-old real estate agent who had embezzled "$70,000 from the New Orphan Asylum for Colored Children of Cincinnati." *Embezzler Put on Probation*, CINCINNATI POST, Nov. 13, 1975.

After filling out the unexpired term to which he had been appointed, McClain faced a bitter re-election contest in 1976 and lost to a white judge who sat in a lower, municipal court.[130] The loss was frustrating for several reasons. Besides an inconsistent result in the polls—winning the popular vote within the City of Cincinnati, but not in the surrounding county—McClain felt for the first time that he lost a challenge due to his race.[131] McClain would not be done with his time serving the courts, though, and would go on to serve as municipal court judge and then trial referee in Hamilton County from 1977 until 1980.[132]

C. Post Judgeship Career and Legacy

Starting in 1980, McClain returned to the field of municipal law with the firm of Manley Burke, where he would practice for another two decades.[133] While there, he also served as Law Director for the village of Lincoln Heights, north of downtown Cincinnati, and continued to practice into his nineties.[134] Other than giving up driving, he did not slow down a great deal.[135] He was active in the Masons and the Sigma Pi Phi Fraternity for many years,[136] received numerous civic honors,[137] and worked to mentor and expand opportunities for other attorneys.[138]

The defendant's conditions of probation required him to make restitution to the satisfaction of the orphanage trustees; he agreed to do so by surrendering five deeds to properties he owned and by making monthly payments to the orphanage. *Id.*

[130] Oral History, *supra* note 1, at 166. *See also* Horstman, *supra* note 6, at C5.

[131] Borror, *supra* note 26, at 8. *See also* Oral History, *supra* note 1, at 177–78.

[132] Borror, *supra* note 2618, at 8. *See also* Oral History, *supra* note 1, app. B at 3.

[133] Oral History, *supra* note 1, at 184–85.

[134] Horstman, *supra* note 6, at C5.

[135] Oral History, *supra* note 1, at 104.

[136] *Id.* at 102–04, 193–99.

[137] McClain's numerous honors include

> the 2010 Fifth Third Bank Profiles in Courage Award and the Greater Cincinnati Chamber of Commerce's 2003 Great Living Cincinnatian Award. . . . He has also received honorary diplomas from the University of Michigan, Wittenberg University, the University of Cincinnati . . . and Wilberforce University. His church, Allen Temple A.M.E., dedicated a fountain in his honor in 2003.

Kemble Borths, *supra* note 42. Among his other recognitions are "the 1999 CBA Trustees' Award, the 1997 Ellis Island Gold Medal of Honor, the 1997 Race Relations Award from the Ohio Dr. Martin Luther King Jr. Holiday Commission and membership in the National Bar Association Hall of Fame." Borror, *supra* note 26, at 29.

[138] One area of focus for McClain was minority and female lawyers. Oral History,

McClain had several scholarships established in his honor, which primarily benefit African American students.[139]

V. Conclusion

McClain's satisfaction about the breaking of boundaries peaked the day Barack Obama was elected President, as one of McClain's law partners later recalled. The partner, a prominent Democrat, related that McClain, "called me up to his office and said, 'I never thought I'd live to see the day.' And this coming from a Republican!"[140] Having lived to see many such days, for McClain there was little mystery as to how anyone can surmount any challenge. Looking back on his long life of accomplishments, he explained with both determination and modesty how he had done it.

> So, I think for a poor boy in Springfield, Ohio, the Lord's been good to me. I've been able to prove that there's really no excuse in life such as poverty, racism, classism, or any other kind of negative circumstances that prevents you from achieving your selfhood. And that's the main goal in life is obtaining your selfhood no

---

supra note 1, at 134. While City Solicitor, McClain hired a young female attorney unable to obtain a position with the corporate firms in Cincinnati because of her gender. She became Cincinnati's first female Solicitor. *Id.* at 158. He also served as a mentor for Sharon Zealey, who worked with him at Manley, Burke. *Id.* at 134. She would go on to become the first woman and the first African American to serve as U.S. Attorney for the Southern District of Ohio. Connie A. Higgins, *U.S. Attorney Credits Strong Role Models, Hard Work For Success*, COLUMBUS DISPATCH, Jan. 27, 1999, at 3D (quoting Zealey, who named McClain, among others, as a mentor without whom she would not have succeeded).

[139] Oral History, *supra* note 1, at 200–01. The William A. McClain Scholarship was initiated by a donation from McClain's former firm, Keating, Muething & Klekamp, and is administered by the Black Lawyers Association of Cincinnati. It is typically "awarded to a Black law student attending any accredited law school who has demonstrated leadership potential, . . . a dedication to the Cincinnati community, and has expressed a financial need." Black Lawyers Association of Cincinnati Scholarship Information (Mar. 28, 2013), http://cincyblac.org/Scholarship.lasso. The Honorable William A. McClain Scholarship was started by Cincinnati businessman Carl Lindner in 1996 at Wittenberg University, and each year benefits an African American student from the greater Cincinnati area. Wittenberg University, Office of Financial Aid—Endowed Scholarships (Mar. 28, 2013), http://www5.wittenberg.edu/administration/financial_aid/endow.html.

[140] Horstman, *supra* note 6, at C5. On the occasion of his 100th birthday several years later, McClain was excited at the prospect of a congratulatory telephone call from the President. *Id.*

> matter who you are. That's been my goal. I had some things to overcome, and I just worked hard and overcame them.[141]

William McClain's recent death was the frequent subject of honorary gatherings and news reports.[142] His vast collection of personal papers is maintained by the Cincinnati Museum Center, part of Union Terminal, where as a recent law school graduate new to Cincinnati he could not hail a taxi.

---

[141] Oral History, *supra* note 1, at 94.
[142] *See* Appendix (providing a recent photo of McClain).

Appendix

Photo courtesy of The Cincinnati Post
William A. McClain — Assistant City Solicitor, Cincinnati: "— Legislation Must Not Get Too Far Ahead of Education."

Photo appeared in HERE IN OHIO, July 1947 at 10 (on file with author) and is reprinted with the permission of Scripps Media, Inc.

Cincinnati, Ohio, September 15, 1950

The Cincinnati Bar Association
Cincinnati, Ohio

Gentlemen: I hereby make application for membership in the Cincinnati Bar Association and attach check covering initiation fee and first year's dues.

Date Applicant Admitted to Ohio Bar: 11 (Day) 2 (Mo.) 1938 (Yr.) William G. McClain (APPLICANT)

Office Address: 509 Central Ave. & Room 214 City Hall

Res. Address: 3005 Walter - Apartment 203

Telephone No.: Cb 2121-22 & GA 5700 - Line 337 PL 5250

We, the undersigned, hereby recommend the above Applicant for membership in the Cincinnati Bar Association.

MEMBER Potter Stewart MEMBER

(Over)

Image provided to author through the generosity of the Cincinnati Bar Association.

Photo originally appeared in Horstman, *supra* note 130, at C1 *available at* http://news.cincinnati.com/article/20130109/NEWS01/301090145/At-100-McClain-looks-back-legacy-firsts and is used with permission from The *Cincinnati Enquirer*/Joseph Fuqua II.

THE TWENTY-FOURTH ANNUAL MAJOR FRANK B. CREEKMORE LECTURE[1]

RODNEY A. GRANDON[*]

I appreciate the introduction. And it is indeed my pleasure to be here today in front of my colleagues, and many of my friends.

Indeed, it is a pleasure to be here today to talk about a subject that has over the years become increasingly important to me as a government contracts practitioner: fraud remedies. Fraud remedies, for most of my career, were nothing but a footnote. This is probably the case for most acquisition professionals in this room and certainly for our clients. Fraud was a subject I did not have to deal with in my day-to-day acquisition-related duties. Not my problem. And, that is absolutely wrong.

I want to do a survey. How many in this room, by a show of hands, have in their portfolio procurement fraud remedies, or any aspect of procurement fraud remedies? Okay. Actually, it is a trick question. As acquisition professionals, each of you has in your portfolio responsibilities to deal with procurement fraud. And that really is the takeaway I have for you today. You are a part of the team, whether you recognize it or not.

An effective procurement fraud remedies program is captured in Department of Defense (DoD) Instruction 7050.05.[2] That instruction

---

[*] This is an edited transcript of a lecture delivered on November 15, 2012, by Mr. Rodney A. Grandon, to attendees of the 2012 Government Contract and Fiscal Law Symposium, members of the staff and faculty of The Judge Advocate General's Legal Center and School, their distinguished guests, and officers of the 61st Judge Advocate Officer Graduate Course at The Judge Advocate General's Legal Center and School, Charlottesville, Virginia.

Rodney A. Grandon is a member of the Senior Executive Service, and serves as the Deputy General Counsel for Contractor Responsibility, Department of the Air Force, Washington, D.C. In that capacity, he is the Air Force's Suspending and Debarring Official, and is responsible for providing legal advice concerning contractor responsibility matters to senior Air Force and Department of Defense (DoD) leadership, as well as leading the Air Force's Procurement Fraud Remedies Program. Before assuming his present duties, Mr. Grandon served as the Chief of Procurement Law and Chief Trial Attorney for the United States Coast Guard.

[1] The Major Frank B. Creekmore Lecture was established on January 11, 1989. The Lecture is designed to assist The Judge Advocate General's School in meeting the educational challenges presented in the field of government contract law.

requires each of the military services to have a central coordinating activity that is responsible for communicating, coordinating, and controlling fraud remedies within that specific military service; in fact, more broadly, with external stakeholders to include agency leadership, our friends in the Department of Justice (DOJ), and any other individuals or organizations affected by a given set of circumstances.

Instruction 7050.05, unfortunately—and I know there are a lot of folks from civilian agencies out there—has not been exported effectively to the civilian agencies. I recently came out of the Coast Guard within the Department of Homeland Security (DHS). When I arrived at the Coast Guard, I was stunned to discover that not only was there no *effective* procurement fraud remedies program, there was not a procurement fraud remedies program in existence at all. There was no effective program or process for suspensions and debarments, even though at the time the authority for suspensions and debarments rested with the head of the contracting activity in the Coast Guard. The DHS has come under a lot of heat recently from the Hill and from the Government Accountability Office (GAO) along with many other civilian agencies for not taking these responsibilities seriously.

Frank Creekmore graduated from Sue Bennett College, London, Kentucky, and from Berea College, Berea, Kentucky. He attended the University of Tennessee, School of Law, graduating in 1933, where he received the Order of the Coif. After graduation, Mr. Creekmore entered the private practice of law in Knoxville, Tennessee. In 1942, he entered the Army Air Corps and was assigned to McChord Field in Tacoma, Washington. From there, he participated in the Aleutian Islands campaign and served as the Commanding Officer of the 369th Air Base Defense Group.

Captain Creekmore attended The Judge Advocate General's School at the University of Michigan in the winter of 1944. Upon graduation, he was assigned to Robins Army Air Depot in Wellston, Georgia, as a contract termination officer for the southeastern United States. During this assignment, he was instrumental in the prosecution and conviction of the Lockheed Corporation and its president for a $10 million fraud related to World War II P-38 Fighter contracts. At the war's end, Captain Creekmore was promoted to the rank of major in recognition of his efforts.

After the war, Major Creekmore returned to Knoxville and the private practice of law. He entered the Air Force Reserve in 1957 and returned to active duty in 1952. Major Creekmore remained active as a reservist and retired with the rank of Lieutenant Colonel in 1969. Mr. Creekmore died in April 1970.

[2] U.S. DEP'T OF DEF., INSTR. 7050.05, COORDINATION OF REMEDIES FOR FRAUD AND CORRUPTION RELATED TO PROCUREMENT ACTIVITIES (4 June 2001).

The essence of an effective procurement fraud remedies program[3] really comes down to something as basic as promoting communication and cooperation among the various stakeholders to achieve understanding and alignment necessary to pursue and execute appropriate fraud-related remedies. Who are those various stakeholders?

You can really boil it down to three fundamental stakeholders, the first being the attorneys. The attorneys include the acquisition lawyers who are responsible for giving advice to the contracting officers and program officials. It also includes the procurement fraud counsel. Some agencies assign attorneys fulltime to work procurement fraud matters. I know the Navy, the Army, and the Air Force have very effective, very robust programs and very proactive programs that rely on fulltime procurement fraud counsel. So we have our attorneys as the first set of stakeholders.

The second set of critical stakeholders are the acquisition professionals. When I say acquisition professionals, I mean big "A" acquisition, to include the contracting specialists, contracting officers, purchasers, and other program personnel.

Lastly, we have, along with the acquisition community and the lawyers, the investigators as the third set of stakeholders. The investigators include the Inspectors General (IGs) and agency-specific investigative activities such as the Coast Guard Investigative Service and Defense Criminal Investigative Service. These are the three major elements or the three critical groups of stakeholders in an effective procurement fraud remedies program.

And what is the key? The key is to make sure that those organizations or those three sets of stakeholders are moving more-or-less in the same direction when presented with a given set of circumstances. More importantly, it requires that there be communication at the inception of a matter. When somebody first discovers some indication of procurement fraud, that information needs to start flowing early on in the process. Historically, what we have seen in procurement fraud remedies programs are agencies waiting for an

---

[3] *See, e.g.*, U.S. DEP'T OF AIR FORCE, INSTR. 51-1101, THE AIR FORCE PROCUREMENT FRAUD REMEDIES PROGRAM (2012), *available at* http://www.safgc.hq.af.mil/shared/media/document/AFD-111103-005.pdf.

indictment or conviction before they think of doing anything that might be considered a procurement fraud remedy.

That is way too late in the process. Agencies lose opportunities when they wait for that indictment or conviction. Consideration of procurement fraud remedies has to begin at the inception of an investigation when information is first presented that there may be fraud relating to a given contract or program. And it is necessary to begin that communication, that cooperation, and to begin looking at what remedies are available and to do that as early as possible in the process, particularly as it relates to contract remedies.

Often when government officials consider the elements of an effective procurement fraud remedies program, they think of civil recoveries, they think of criminal penalties, and they think of suspension and debarment. They forget that there are many contractual remedies the agency has at its disposal. In many cases, contractual remedies offer the biggest bang for the agency in terms of returning dollars back to contracts and programs that have been victimized by misconduct.

If an agency waits for the criminal and civil actions to be completed, what ultimately happens if there is a recovery is that the agency will not get the benefit of the dollars recovered because the associated program funds have already canceled. They are gone. Instead, the recovered money goes back to the Treasury.[4] The agency itself must still find funds to cover the cost associated with repairing or replacing that defective product or service that was compromised by the fraud.

Securing effective contract remedies requires agencies to be smart, aggressive, and proactive. Agencies can revoke acceptance. Agencies can begin termination proceedings. Agencies can go and get their money back if they have already paid that money, or they can withhold payment if they have not yet made payment to the contractor. Contract remedies can be almost endless. Agencies are only limited by the creativity of legal counsel and their clients.

With that as context, what I really want to do and intend to do today is to focus on a specific case involving a Coast Guard program. The case has lessons for everybody in this room on how agencies can effectively

[4] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-04-261SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 5-79-80 (3 ed. 2006).

conduct a procurement fraud remedies program, as well as the challenges that result when agencies do not have an effective program.

Case Study Overview

In the late 1990s the Coast Guard had a need for new patrol boats. The patrol boats that the Coast Guard had were old, and they were very expensive to operate. The need to recapitalize was not limited to the patrol boats; the need extended to almost all of the Coast Guard's surface and air assets. There was a need to move out very aggressively to replace these assets. Thus, the word "Deepwater" came into being. The Deepwater program was based on turning over many major systems acquisition program responsibilities to a lead systems integrator, a construct that ultimately experienced all sorts of problems, including the failure to secure a replacement for the aging patrol boats.

Anyway, so jump forward approximately ten years. The Coast Guard now has a new contract in place for the Fast Response Cutter, a cutter that will be used to replace the old patrol boats. The Coast Guard believes the Fast Response Cutter is an excellent ship, one capable of surpassing many expectations in its performance capability. The problem for the Coast Guard is that the contractor for the Fast Response Cutter is alleged to have defrauded the Coast Guard on the earlier Deepwater effort to replace the aging patrol boats, causing the Coast Guard to waste almost $100 million. That is the situation the Coast Guard finds itself in today.

Every time the Coast Guard puts money on this contract, what happens? By way of example, when the Coast Guard exercised options for the Fast Response Cutter at the end of 2011, a critical piece by Alice Lipowicz, dated March 5, was published in the *Federal Computer Week*[5]:

> Coast Guard Commandant Admiral Robert Papp appeared at a dockside ceremony in Lockport, Louisiana, with the governor and other dignitaries on March 2 to

---

[5] Alice Lipowicz, *Coast Guard Commandant Celebrates Contractor While DOJ Lawsuit Is Pending*, FCW: THE BUS. OF FED. TECH., Mar. 5, 2012, *available at* http://fcw.com/articles/2012/03/05/coast-guard-cmdt-papp-celebrates-contractor-while-lawsuit-is-pending.aspx.

accept delivery of the latest cutter from federal contractor, Bollinger Shipyards.

But going unmentioned at the large gathering was that the Justice Department eight months ago went to court to accuse Bollinger of making false statements to the Coast Guard on a related contract. That unresolved False Claims Act lawsuit brought by the DOJ seeks unspecified damages expected to be in the millions of dollars from Bollinger. Bollinger appears to be experiencing little fallout from the lawsuit, and the U.S. Attorney General's Office seems to be mostly on its own with little support from the other federal agencies in the lawsuit.

DOJ brought the legal action against Bollinger Shipyards in August 2011 to recoup an unspecified amount of money from Bollinger [for allegedly] making false statements about the hull strength of eight patrol boats it was elongating for the Coast Guard under the Deepwater program. The Coast Guard rejected the completed boats as unseaworthy, and eventually refashioned, and then terminated, the Deepwater Program.

* * *

The agency's total contracts to Bollinger to date were valued at $597 million, the company said at the time. The total value of the contracts is 1.5 billion, if all options are exercised.

At the ceremony on March 2, Papp praised Bollinger and appeared overjoyed at the new cutter . . . .

In an interview afterwards, Papp described the current lawsuit as something the Department of Justice chose to pursue and said that it had no impact on future contracts . . . .

Folks, that is bad press. Our friends in the DOJ, who read the same stuff that we do, were not happy with that one.

Now let's fast-forward to 2012. In September of 2012, the Coast Guard ordered another six ships from Bollinger Shipyards, and again the negative press came out, this one dated October 11. It was a blog from a retired captain, and it states:

> U.S. taxpayers can be excused for smelling something foul in the $250 million the Coast Guard recently awarded Bollinger Shipyards to build six additional fast response cutters. The six are a part of a $1.5 billion contract to build up to 34 [FRCs].
>
> Bollinger is the defendant in an ongoing Justice Department civil suit filed in August 2011 that claims that the Lockport, La.-based shipyard "made material false statements to the Coast Guard under the Deepwater Program."[[6]]
>
> After news of the lawsuit broke last year, Coast Guard Commandant Adm. Robert Papp commented on Deepwater at a hearing, stating that, "we weren't prepared to start spending this money and supervising a project this big."
>
> Six months later, however, the government apparently forgot all about the pending Bollinger lawsuit and was prepared to spend the money posthaste. But don't blame Bollinger. They didn't award the Coast Guard contract to themselves.[7]

I use these article excerpts to illustrate the problem that was created for the Coast Guard by not having an aggressive, robust, proactive procurement fraud remedies program—a program that would have promoted early consideration of all appropriate fraud remedies, thereby

---

[6] United States v. Bollinger Shipyards et al., No. 2:12-cv-00920, at 2 (E.D. La. Jan. 30, 2013), http://www.gpo.gov/fdsys/pkg/USCOURTS-laed-2_12-cv-00920/pdf/USCOURTS-laed-2_12-cv-00920-0.pdf (citing R. Doc. 1 at 4–5).

[7] Capt. Max Hardberger, *Despite Suit, Feds Give Bollinger Another $250 Million*, WORKBOAT.COM (Oct. 11, 2012), *available at* http://www.workboat.com/blogpost.aspx?id=18649.

better positioning the Coast Guard to respond to the inevitable challenges aimed at the Fast Response Cutter contract. And there were questions from the Coast Guard's stakeholders, the press, and members of Congress: "Really, folks, really? You're pursuing this? You think this is a good relationship, a good business partner?" Oh course, the Coast Guard had little choice but to support the Fast Response Cutter contract with Bollinger.

Deeper Dive into Deepwater[8]

Back in the late '90s, mid-2000s, the Coast Guard had a dire need to recapitalize practically every asset that it had. At the same time, the Coast Guard did not have the program professionals, the acquisition professionals, and, to some extent, the legal support necessary to take on this multi-billion dollar challenge.

Recognizing this gap, the Coast Guard entered into a contract to use contractors as lead systems integrators. You all remember lead systems integrators—a widely acclaimed strategy to let industry guide government programs down the path of righteousness and goodness. This program was known as Deepwater.

The Coast Guard selected a Lockheed Martin/Northrop Grumman joint venture team to serve as lead systems integrators. Bollinger Shipyards, Inc., was part of the industry team responsible for the effort to extend a 110-foot patrol boat into a 123-foot patrol boat. Bollinger proposed to cut the end off the 110s and extend the boats about thirteen feet. The end product supposedly would be better able to handle Coast Guard missions. Throughout the pre-award process, there were some people scratching their heads asking if Bollinger really could cut the end off of a ship and extend it such that it could go out into rough seas for unrestricted use. Bollinger assured those asking questions that the company had done the engineering calculations and that the project was viable. Bollinger said, "Trust us." The Coast Guard did.

---

[8] The facts concerning this case study were drawn from the Complaint filed by the United States in the matter of *United States v. Bollinger Shipyard, Inc., et al.*, in the United States District Court for the Eastern District of Louisiana. Subsequent to the delivery of the 2012 Creekmore Lecture, the court granted Bollinger's Motion to Dismiss. United States v. Bollinger Shipyards et al., Case No. 2:12-cv-00920, sec. R (5), doc. 71 (Oct. 21, 2013), http://www.gpo.gov/fdsys/pkg/USCOURTS-laed-2_12-cv-00920/pdf/USCOURTS-laed-2_12-cv-00920-0.pdf.

The effort was awarded in 2000, which included the 123 foot patrol boat effort. The patrol boat, you have to understand, is the workhorse of the Coast Guard's coastal fleet. It performs as a multi-mission asset, and is responsible for performing critical coastal missions. The existing 110 foot patrol boats had operated for approximately twenty years with no major structural failures. Now, that does not mean that the patrol boats did not have maintenance and repair challenges. Things broke as they aged, yes; but basically the vessel itself was sound and had done an incredible job. In fact, the 110s are still a major asset today in the Coast Guard inventory.

Pre-award, the Coast Guard expressed concerns about the structural integrity of the proposed 123s. Bollinger assured the Coast Guard, in response, that indeed the elongated vessel would meet the strengths necessary to perform the Coast Guard's missions. The Coast Guard relied on those representations. The effort was subcontracted by the prime to Bollinger. Bollinger had control over the 123 effort.

Bollinger had built the 110s, and the 110s were an incredibly effective boat for the Coast Guard. The Coast Guard was confident that Bollinger had the ability to build boats. Bollinger was responsible for the entire design and engineering of the 123 effort, including the strength calculations that go to the heart of this matter. Bollinger was required to submit these strength calculations as part of the data deliverables under the contract. The Coast Guard placed a total of eight 123s on contract. All of them structurally failed; all of them were useless. The 123 effort was halted and the ships parked dockside. The Coast Guard has eight of the 123s sitting dockside of no use whatsoever except for potential scrap value. That's it.

Let's talk about the alleged wrongdoing in this suit. Bollinger had to perform the section modulus strength calculations. While I am not a Naval engineer, I understand the section modulus calculation is absolutely critical in determining strengths of the ship. As concerns mounted about the structural integrity of the 123, the Coast Guard suggested that Bollinger bring in neutrals parties to review the effort. Bollinger was not interested.

The Coast Guard relied on Bollinger's representations that the 123s would have sufficient structural integrity to meet the Coast Guard's mission. It turns out that the Coast Guard's reliance may have been misplaced. The evidence indicates that Bollinger used a host of different

assumptions and variables, some of them arguably unreasonable, to conduct its strength calculations. Some of Bollinger's calculations reflected sufficient structural integrity; others reflected a lack of structural integrity. Bollinger passed on to the Coast Guard only those calculations establishing the ship would meet the required strength.

What do we find in Bollinger's internal e-mails? This is from a senior Bollinger corporate official: "[W]e did lead the Coast Guard into a false sense of security by telling them early on that of the Section Modulus for a 123 would be 5230 inches cubed as opposed to the real number just above 2600."[9] It takes about 3,000 or 3,200 or greater to have a ship that will be structurally sound. That is the problem.

The Fast Response Cutter

Now, we transition to the Fast Response Cutter. The 123 failure left the Coast Guard with a huge problem. It had 110-foot patrol boats that were getting increasingly expensive to operate, and losing the ability to support the Coast Guard's coastal missions.

As part of the post-Deepwater acquisition strategy, the Coast Guard set off on a plan to develop and have built—designed and built—a Fast Response Cutter (FRC). The Coast Guard selected Bollinger to build the Fast Response Cutter.[10] The Coast Guard is thrilled with this vessel. It is an incredibly competent, capable, vessel. The Coast Guard likes it, and wants more of them. The contract includes options for fifty-eight of the vessels. Bollinger delivered their first FRC in 2012. Everybody's thrilled with this thing. The contract efforts continue today, and I believe it has another five or six years associated with it.

I moved over to the Coast Guard in May of 2011. The FRC contract had been awarded at that point. I was interested in how the Coast Guard acquisition community concluded Bollinger was responsible for purposes

---

[9] *Id.* at 13.

[10] Press Release, Bollinger Shipyards, Inc., Bollinger Receives Award of Fast Response Cutter "Sentinel" Class from U.S. Coast Guard (Sept. 26, 2008), *available at* http://www.bolingershipyards.com/news-resources/Bolling-Receives-Award-of-Fast-Response-Cutter-Sentinel-Class-From-US-Coast-Guard (providing picture of the Fast Response Cutter).

of the FRC award.[11] I was told that "Bollinger is a very competent contractor. They can build a good ship, we're very happy with them. They are a very competent design-build operation. We looked at them very closely and ultimately concluded that they could build the Fast Response Cutter. We wouldn't want them to try to modify one of our vessels, but we trust them to build from scratch one of our vessels." And that was the essence of the pre-award responsibility determination.

It was clear to me that the Coast Guard had considered Bollinger's failed 123 effort as part of the contracting officer's pre-award responsibility determination. It remained unclear to me, however, to what extent the contracting officer had considered Bollinger's ethics, compliance, and oversight controls. Regardless, the company had been determined responsible to receive a contract.

Could the Coast Guard have reached a different conclusion? Should they have reached a different conclusion? I think there is enough gray area that the contracting officer's decision reasonably could have gone either way.

Fraud Remedies—Considerations and Consequences

The Coast Guard has a problem. It has a contractor that it believes engaged in fraudulent activity, and the Coast Guard needs to do business with that contractor. The Coast Guard is now wedded to that contractor because the Coast Guard wants and needs the FRC. Bollinger is now starting to deliver FRCs. Every time the Coast Guard puts money on the FRC contract, individuals on the Hill go crazy, and the press starts churning up their blogs and their reports. The Coast Guard is stuck with this bad situation. How does the Coast Guard go about balancing and reconciling these conflicting interests?

A. Stakeholders

Any solution had to focus on the interests of critical stakeholders. Who are those critical stakeholders?

---

[11] *See* Federal Acquisition Regulation (FAR) subpt 9.1 (2012); 48 C.F.R. subpt. 9.1 (2012).

Leadership: Coast Guard senior leaders were concerned: "What's going on with this false claims act suit? What are we going to do? We're going to award options, and they're going to go after us again. What do we say?"

Operators: The Coast Guard operators and users are partisans in this fight. The 110-foot patrol boats are not as useful as they had been over the preceding decades. The operators are expressing concerns about going out in rough seas with the old 110s. And, by the way, the operators had learned that the new Fast Response Cutter was an incredible boat; they wanted to get them as quickly as possible.

Acquisition community: The acquisition community is willing to respond to its customers' needs. It does not want to deal with fraud-related allegations either. Notwithstanding these pressures, the Coast Guard was forced to deal with matters pertaining to fraud involving its FRC contractor, in large part, because of the congressional demands and because of the adverse press.

DOJ: The DOJ became one of the Coast Guard's stakeholders. The DOJ had been involved with the 123, and it was necessary for the Coast Guard and the DOJ to work the fraud allegations together, even as the Coast Guard moved forward with the FRC contract.

Congress and other oversight activities: I have already touched on that. Other oversight activities included the Department of Homeland Security, the Office of Management and Budget, the Government Accountability Office, and the public.

B. Remedies

I talked about the elements of an effective fraud remedies program; it has to be proactive, it has to be robust. But what are the remedies? The remedies can be broken into four buckets: Criminal, civil, contractual, and administrative. When I say administrative, I mean suspension and debarment. So let's go back to the case study.

1. Criminal

By May 2011, the decision as to whether or not to pursue criminal charges against Bollinger Shipyards had come and gone. Could we have pursued something criminally? I don't have a good answer at this time.

2. Contractual

In May 2007 the Coast Guard revoked acceptance; that was a good first step. We sent a demand letter saying, "Give us our $97 million back." The Coast Guard had discussions with Bollinger, but there was no contractual recovery. While there may have been some evidentiary challenges associated with obtaining a contractual recovery, the Coast Guard also was in a position to get dollars back from a False Claims Act recovery. At this time, however, the demand letter is outstanding.

3. Civil

A civil complaint was filed July 2011, after approximately five years of investigation. The delay in getting the complaint filed created problems for the Coast Guard. During an investigation, matters sometime look worse than they really are. At least when you have a complaint filed, the allegations are limited to specific facts and circumstances. The uncertainty created by the ongoing investigation was a huge problem for the Coast Guard.

At the time of filing the False Claims Act damages were unspecified. The Justice Department took the view that the government was entitled to treble damages based on all amounts spent by the Coast Guard on the 123 effort. Ninety-seven million times three comes up to almost $300 million. Given the need for the FRCs, it would do the Coast Guard no good to have Bollinger bankrupted by the False Claims Act suit.

Why did the Coast Guard need Bollinger? The FRC was a contractor-owned design; the Coast Guard did not own it. So if to the Coast Guard severed its relationship with Bollinger Shipyards, the Coast Guard would have at least two or three years before it could get a new contract awarded. The Coast Guard would have to go through all of the design efforts again. Before the Coast Guard could start getting ships delivered again, it probably would be eight to ten years down the road.

That was not satisfactory to the Coast Guard operators seeking a new and more reliable cutter. That was unsatisfactory to Coast Guard leaders. That was unsatisfactory to the Coast Guard. So, again, the Coast Guard needs Bollinger Shipyards to produce and deliver the FRC.

And now the DOJ is saying Bollinger owes the government $300 million. Bollinger Shipyards is a privately held company. The Coast Guard was certain that if Bollinger were hit with a huge judgment, the company was going to go belly up. That is something that the Coast Guard could not tolerate in this process. That was a point of contention with the DOJ: how do we get an effective remedy that does not kill a critical contractor?

There were discovery challenges. All of you know discovery: it is horrible and when you have a little organization like the Coast Guard, it is exceptionally horrible. That being said, the Coast Guard seems to be doing okay.

The civil suit also had an adverse impact on the FRC contract. Every time the Coast Guard put money on the FRC contract, stakeholders and critics questioned the wisdom of doing so because of the False Claims Act suit. While we now have specific facts and circumstances to talk about, the civil suit has an adverse programmatic impact on the FRC, and it continues to be a public relations challenge for the Coast Guard. Moreover, once the False Claims Act suit was filed, it took away from the Coast Guard the ability to control a great deal of the messaging surrounding the contractual relationship with Bollinger.

The False Claims Act suit also keeps the Coast Guard tied to the unsuccessful Deepwater program. Rather than looking at the many positive developments achieved by the Coast Guard's acquisition community since Deepwater terminated, the outside focus kept getting pulled back to the problems associated with the Deepwater program. The Coast Guard does not want anything to do with the Deepwater program. As you may have noted from those press clips in the beginning, the press still likes to drag the Coast Guard through the Deepwater mess.

The press reporting concerning the civil suit also makes it more difficult for the Coast Guard to manage communications with government stakeholders. I am not so sure those quotes from the commandant in the press reports were entirely accurate, but Coast Guard

stakeholders in the DOJ were furious that the Coast Guard was taking public positions perceived as being contrary to the DOJ's litigation positions. After reading the press communications the DOJ trial attorney demanded: "How could your commandant say that? The Coast Guard is undermining our litigation, making it impossible to work this case." The DOJ was not particularly interested in the current state of the relationship between the Coast Guard and Bollinger concerning the FRC. DOJ's focus was on pressing the fraud case against Bollinger. Coast Guard efforts to explain the current need for Bollinger to the DOJ did little to heal the rift.

There's one other factor I want to touch on involving an agency's relationship with DOJ when the DOJ's litigation posture in a fraud matter adversely impacts on the agency's programmatic and contractual needs. Too often when such tension arises, agencies retreat from smart program management or contracting, taking the position that the agency cannot play in what is perceived as DOJ's space because only DOJ has the ability to settle fraud cases. Agencies take the position that they will not touch the matter. It is fraud; it is the DOJ's matter. We cannot settle. We cannot do anything.

That is not the right answer. The DOJ does have the exclusive authority to settle, resolve, and compromise matters relating to fraud,[12] but in many cases the contractual remedies are within the control of the agency, as those remedies appropriately constructed do not serve to settle, resolve, or compromise fraud. Clearly, there should be communication and cooperation with the DOJ, or perhaps the Assistant U.S. Attorney who might be working that matter, but from a contractual remedy standpoint, in most cases the agency controls the remedy.

And, frankly, if I am a DOJ attorney, I want to be able to go to that jury in my fraud case and say, "Hey, the agency was victimized. It doesn't bleed, no bruises, no contusions, nothing like that, but look at this. It is angry. It revoked acceptance. It terminated this contract. It recovered its money. It showed that it was upset with this contractor. By sitting on its rights, including contractual rights, an agency does a disservice to the strength of the civil litigation that may follow. Think about that relationship.

---

[12] Executive Order 6166, June 10, 1933 (provisions of this executive order do not appear in the *Federal Register*).

4. Administrative

Around the time the civil suit was filed, the Coast Guard issued a Show Cause Letter to Bollinger.[13] The Show Cause Letter is a letter that notifies Bollinger Shipyards that the Coast Guard believes the company has engaged in conduct that casts doubt on the company's present responsibility. Bollinger was given a specified number of days to provide the Coast Guard with any information the company believed established its present responsibility.

In response to the letter, Bollinger Shipyards hired attorneys familiar with contractor responsibility matters, which is good, frankly, very good, because those attorneys knew what needed to be addressed by Bollinger. In response to the Show Cause Letter Bollinger moved out smartly to strengthen its internal controls, to create an ethics program, and to begin thinking about who were the right people to be doing its quality assurance, who were the right people to be doing its testing. They made personnel changes. And Bollinger took these steps in a very short period of time.

Based on the company's assurances, the Coast Guard entered into what is essentially an administrative agreement, or compliance type agreement, with Bollinger in which the Coast Guard required Bollinger to hire an independent consultant who would look at their systems, controls, and ethics programs, and report unfiltered directly back to the Coast Guard.[14] The Coast Guard also asked the company to make quarterly reports to the Coast Guard about what it was doing to improve the areas that the Coast Guard thought indicated a potential lack of responsibility.

The Coast Guard has been satisfied with the improvements that the company has made. I believe that through this process the Coast Guard

[13] When considering present responsibility under the FAR Subpart 9.4 (48 C.F.R. Subpart 9.4), agencies increasingly have been using Show Cause Letters to develop the record without first excluding contractors from contracting with the government. A Show Cause Letter provides the government and the contractor with the opportunity to engage in a dialogue that ultimately permits the government to make a more informed determination of whether there is a need to protect the government's interest by excluding the contractor.

[14] *See* Defense Federal Acquisition Regulation Supplement (DFARS) 209.406-1 (2012); 48 C.F.R. 209.406-1 (2012) (If a debarring official determines that debarment is not necessary, the official may enter a written agreement that includes appropriate terms and conditions.).

has helped Bollinger to become a better company, but just as importantly from the Coast Guard's standpoint, the Coast Guard now has real facts that it can take to the Hill, that it can show the GAO and other overseers, establishing that this company is, in fact, presently responsible. They may not have been a couple of years ago, but the Coast Guard is looking at *present* responsibility, and presently Bollinger is responsible.

Lessons Learned

When Congress gets involved, as you all know, agencies quickly lose control over what is going on. Agencies can get battered around and the best way an agency can position itself is to think ahead, particularly when it relates to fraud. Be proactive, be robust, and move out swiftly so that the agency has facts, and not speculation, that can be used to respond to overseers and critics. When agencies give them facts, as opposed to opinion, agencies get a lot more traction.

Damages. The Coast Guard is still working this. What would the Coast Guard do if the government ultimately prevails and is wildly successful with the False Claims Act suit and secures a huge verdict against this company? What does the Coast Guard do? It likely will come down to the Coast Guard, the DOJ, and Bollinger being very smart and figuring out some sort of a structured settlement that makes the government whole, yet allows the company to continue.

Discovery. You all know the hassles associated with that. It just gets worse as we learn more about the expectations associated with e-discovery and the fact that we are being held to a present-day standard when most of the e-information in this case goes back to the late '90s when the Coast Guard did not have sophisticated e-systems, and the e-systems that the Coast Guard did have frequently are stored on brittle tape that may or may not work. Agencies are required to spend lots of money on forensics. It can be a nightmare.

Aligning with the DOJ. I want to make it very clear I do not in any way intend to malign the Department of Justice. I think the DOJ attorneys are outstanding. I think they do a great service, but there is some learning that has to go on focusing on how the DOJ and agencies can effectively coordinate and work fraud remedies together. The DoJ and the investigators supporting DOJ's efforts must break with past practices in which they direct the acquisition community to stand down

during an investigation and related litigation. That has been a way of doing business in the past that is inconsistent with the current focus on promoting parallel proceedings.[15]

Lastly, in many fraud cases the biggest bang for the buck for the agency, program, or contract, is going to be aggressively pursuing contractual remedies. Agencies should work them, keep the DOJ informed, but recognize that in most cases agencies do not need DOJ's approval to take advantage of contractual remedies.

An aggressive, proactive procurement fraud remedies program is critical if federal agencies are going to successfully fight fraud. Each of you as an acquisition professional has a role to play.

With that, I think, my time is up.

[15] Memorandum from Office of the Attorney General, for All United States Attorneys et al., Coordination of Parallel Criminal, Civil, Regulatory, and Administrative Proceedings (Jan. 30, 2012).

THE TWENTY-NINTH GILBERT A. CUNEO LECTURE IN GOVERNMENT CONTRACT LAW[*]

HONORABLE JACQUES S. GANSLER[†]

---

[*] This article is based on the transcribed edited lecture delivered by the Honorable Jacques S. Gansler to members of the staff and faculty and students attending the 2012 Government Contract and Fiscal Law Symposium on November 16, 2012, at The Judge Advocate General's Legal Center and School, U.S. Army, located in Charlottesville, Virginia.

The Cuneo Lecture is named in memory of Gilbert A. Cuneo, who was an extensive commentator and premier litigator in the field of government contract law. Mr. Cuneo graduated from Harvard Law School in 1937 and entered the United States Army in 1942. He served as a government contract law instructor on the faculty at The Judge Advocate General's School, and he then taught at the University of Michigan Law School from 1944 to 1946. For the next twelve years, Mr. Cuneo was an administrative law judge with the War Department Board of Contract Appeals and its successor, the Armed Services Board of Contract Appeals. He entered the private practice of law in 1958 in Washington, D.C. During the next twenty years, Mr. Cuneo lectured and litigated extensively in all areas of government contract law and was unanimously recognized as the dean of the government contract bar.

[†] The Honorable Jacques S. Gansler joined the faculty of the University of Maryland School of Public Affairs, in January of 2001 where he holds the Roger C. Lipitz Chair in Public Policy and Private Enterprise. He teaches graduate school courses and leads the school's Center for Public Policy and Private Enterprise, which fosters collaboration among the public, private, and non-profit sectors in order to promote mutually beneficial public and private interests.

Previously, Dr. Gansler served as the Under Secretary of Defense for Acquisition, Technology and Logistics from November 1997 until January 2001. In this position, he was responsible for all matters relating to Department of Defense acquisition, research and development, logistics, acquisition reform, advanced technology, international programs, environmental security, nuclear, chemical and biological programs, and the defense technology and industrial base. Dr. Gansler oversaw an annual budget of over $180 billion and a workforce of over 300,000.

Prior to this appointment, Dr. Gansler was Senior Vice President and Corporate Director for The Analytic Sciences Corporation (TASC), Inc., an applied information technology company, in Arlington, Virginia, from 1977 to 1997. During his tenure, Dr. Gansler played a major role in building the company from a small operation into a large, widely-recognized and greatly-respected corporation, serving both the government and the private sector.

From 1972 to 1977, he served in the government as Deputy Assistant Secretary of Defense (Material Acquisition), responsible for all defense procurements and the defense industry; and as Assistant Director of Defense Research and Engineering (Electronics), responsible for all defense electronics Research and Development.

His prior industrial experience includes: Vice President (Business Development), International Telephone and Telegraph (I.T.T.) (1970–1972); Program Management, Director of Advanced Programs, and Director of International Marketing, Singer Corporation (1962–1970); and Engineering Management, Raytheon Corporation (1956–1962).

What I want to do today is talk about 21st century acquisition issues. I want to start with the most obvious issue, namely the budget cycle. If I had brought my crystal ball with me, I would tell you what is going to happen with sequestration, but I did not, I left that at home. So I do not know where this will go, but I do know that it is not going to go up; it is going to go down. And that is pretty clear.

I want to point out a couple of things. When I was Under Secretary the acquisition budget was about 180 billion. Now that has sort of doubled. And now, as it heads down, the question is: How are we going to get what we need for the next generation, with fewer dollars? And I am going to cover that in my talk.

I might point out that the budget peaks have been growing, and there are some people who erroneously think this is a natural law; every eighteen years we get another peak. The reality is that it is exogenously driven; and, of course, and we do not know what is going to happen in the future (e.g., a Pearl Harbor, a 9/11, or what; and when). Thus, uncertainty is the big issue. But I can say that historically what has always happened is that whenever the budget has plummeted, the first three things to go are these: travel, training, and research. And there is no question in my mind that training and research are the wrong things to be cutting. Of course, it is giving up the future for the present, and there is an institutional inertia that favors that. Thus, that is the problem. The next thing that goes is the procurement account and that is what happened in the post Cold War period when we had to cut $100 billion; and $60 billion of that was out of procurement.

Dr. Gansler has served on numerous special committees and advisory boards, including Vice Chairman, Defense Science Board; Chairman, Board of Visitors, Defense Acquisition University; Director, Procurement Round Table; Chairman, Industry Advisory Board of Visitors, University of Virginia, School of Engineering; Chairman, Board of Visitors, University of Maryland, School of Public Affairs; member of the FAA Blue Ribbon Panel on Acquisition Reform; and senior consultant to the "Packard Commission" on Defense Acquisition Reform. Additionally, from 1984 to 1977, Dr. Gansler was a Visiting Scholar at the Kennedy School of Government, Harvard University (a frequent guest lecturer in Executive Management courses).

Dr. Gansler holds a BE (Electrical Engineering), Yale University; a MS (Electrical Engineering), Northeastern University; a MA (Political Economy), New School for Social Research; and a Ph.D. (Economics), American University. He is the author of five books and numerous other publications.

The danger, and the real problem we have, is that the difference between two sequential peaks (e.g., the Vietnam peak and the September 11th, 2011 peak), where the dollars went up significantly, unfortunately we also got a lot less equipment for the increased procurement dollars. What does that mean? Obviously, what it means is that the cost of each individual weapon went up dramatically. And so, as a result of getting far fewer weapons, we had a lot less force effectiveness. And I will cover that in a minute.

So what is the environment today? Great uncertainty; but we know a few things: the resources are declining, and the equipment and manpower costs are rising across the board. Demographics are also a major problem, in terms of the overall economy. Every year in America 10,000 people age into Social Security. Of course, the solution for that, which is shooting all of the old people, is not an attractive one. So we do have to face that and we are going to have that as a driving factor. In addition, we have the debt payments, depending on whose analysis you read in either 2014 or 2017, the payment on the debt alone will equal the entire defense budget.

It is pretty clear what direction the budget is going. Yet the world is changing rapidly: technologically, economically, geopolitically, (pick one) and that means we have to change. There is an enormous institutional resistance to that change, which I will cover later.

Globalization. No question it is a reality—technology, industry, labor—everything is globalized; except for Congress. I gave a talk recently where I did not know someone in the audience was from the press; and I made the observation: relative to globalization, Congress is a leading trailing indicator. There is no question in my mind that with all of the laws that are being passed, Congress does not recognize the reality of globalization. And yet, every U.S. weapon system today has foreign parts in it. The reason for that is because they are better, not because they are cheaper. We want to take advantage of globalization, and not fight it as much as we are. In many areas, technology exists outside of the United States that exceeds our own.

A simple example would be quantum computing. We are not ahead in that. I got a briefing recently—I am on the Defense Science Board—from the Army's Night Vision Lab, which said that we used to "own the night," because of our export controls, now the French "own the night," in terms of advanced night vision devices. So there are a lot of things

that we do that hurt us, relative to maintaining our technological edge. The most obvious thing is that the spectrum we have to cover, in terms of security, is huge and uncertain.

Now, if I gave this talk ten years ago, I would not have had pirates as an issue for national security. On the other hand, that is one of the issues. But, more important, I think, are cyber security and some of the other issues of the 21st century that we have to be able to handle. For example, today, roadside bombs are the largest single killer and maimer of U.S. troops—there is no question about that. We have to be able to handle all of these things, in addition to other elements like regional instability. Just pick up the paper today. See what is happening in the Middle East and it is easy to see that there is great danger and uncertainty. The way to prepare for all of these is known. We can prepare for each one separately, except we do not have the money to do it. It is unaffordable.

So, the only way to handle the situation is through rapid response; and the DoD is not known for rapid responsiveness. I have been teasing the Air Force about the reason their new airplane is called the F-22; in that it took just over twenty-two years to develop it. Now, think about that with the electronics in there. The electronics change every eighteen months and the system took twenty-two years to develop—and it is very electronic-intensive and cyber-intensive. So we have to change in terms of responsiveness, too.

Some summary statements have been issued relative to this new environment. Admiral (retired) Michael Mullen, who was Chairman of the Joint Chiefs, said, "Our number one security threat is the debt." Clearly the threat spectrum that I went through is a major issue relative to how we are going to handle it, and how we will respond to it; in terms of the uncertainty with the economy, and security. Put those two together and we have a real challenge facing us right now. Additionally, the weapons' cost growth needs to be controlled. A large share of it is caused by the "changes clause" in the contract, based on a study recently completed by the Research And Development (RAND) Corporation.

You know the game: "bid low and then maximize the changes clause." Some of you may have seen the photograph. It is a cynical contractor's yacht. Its little dingy is labeled "original contract," and the large yacht is labeled "changes clause."

How do you respond to this environment? It is very clear that we have to change the way we do business, across the board; particularly in the acquisition arena. We have to stress affordability. That is harder for us to do, because after 9/11 we were living in a rich man's world.

The budget was literally exploding. We have to be able to change and acquire less expensive 21st century elements that we need, like robots and unmanned intelligence capabilities. The war is different in the 21st century. It is a "war among the people," as contrasted to tank-on-tank engagements. More importantly, even the F-22, which I mentioned earlier, was not used in Iraq and Afghanistan. We need different things for the 21st century. However, we have to be willing to shift our resources in that direction, and there is huge institutional inertia and resistance to that shift.

I will give you a simple example. When I was the Under Secretary of Defense (1997–2001), two years in a row, the Air Force zeroed the budget for the first unmanned airplane, the Global Hawk. They did not want to pay for it because it did not have a pilot in it. But by that point, Israel had already demonstrated the effectiveness of low-cost unmanned airplanes in the Bekaa Valley; however, we needed them. So we directed the Air Force to buy them; and there are now 4,000 of them flying around. It clearly makes sense to shift your resources to 21st century needs, but there is a lot of resistance to doing that. As I mentioned earlier, the flexibility required is a shift to whatever the need is at this time.

Another thing I want to point out is the multiagency aspect. There is a combination of soft power and hard power that is going to be required. When my deputy, Admiral Oliver, went over to Iraq to set up a banking system, I was shocked, and so was he, at the fact that the State Department and the Defense Department were bidding against each other for labor; literally, who would pay more to get the labor. That is not cooperation. We are clearly going to have to combine the soft and hard power, no question about it.

And then there is the multinational aspect. I cannot think of any security scenario in the future in which we are not going to be in a coalition. For example, how do we solve terrorism by ourselves—if we do not have multinational cooperation? Or, how do we solve cyber security by ourselves—if the other country is not prosecuting their cyber attackers?

We have to do this on a multinational basis for 21st century scenarios. And, of course, the one that immediately comes to mind is China. You saw a lot of debate about that in the presidential primaries and election. Admiral Mullen said we are going to have to do joint exercises with the Chinese against the Pirates in the Gulf of Aquaba, which made sense to me. Secretary Panetta said we are going to try to start to partner with China. They are going to be the other economic superpower. They are going to be the other military superpower. The two choices are, obviously, we go to war with them, or we work with them. No choice there; it is an existential choice. We should push toward the partnership direction; I think that is very clear.

Next, we must change the way we do business. There are four ways to change the way we do business. (1) What goods and services should we be buying? That is, specifically, the "requirements" and "budget process." (2) How do we buy the goods and services? That is the "acquisition process." (3) Who does the acquiring? This is a critical one; the acquisition workforce. We want "smart buyers." And lastly, (4) who do we buy from? The industrial base. I think to do more with less, we are going to have to address all four of these and change all four of them. Right now we have current problems in all four areas. I will briefly cover all four of these.

Regarding what we buy, we have difficulty emphasizing cost as a requirement. It has not been the model for the last decade. When you live in a rich man's world, you do not worry about that, you just try and decide which car you are going to buy. You do not worry about what it costs. How do we shift the resources? Again, while overcoming institutional resistance. And then, how do we maintain "technological superiority" if we cut our research efforts; and if we are not willing to work cooperatively with people who have the state-of-the-art technologies. Specifically, how do we buy from commercial suppliers and international suppliers? I will talk about the barriers that we have created to doing that.

The logistics process is obviously one where the United States has world-class logistics people; like United Parcel Service (UPS), Federal Express (FedEx), Wal-Mart, Caterpillar and other U.S. industry suppliers. But, the Department of Defense (DoD) is not world-class in logistics. We spend the largest share of our acquisition dollars there and we are not responsive like the other logistics leaders. We are not reliable like the world-class leaders and we are certainly not low-cost. So this is

an area we have to move into. When you talk to FedEx or UPS, and ask them what business they are in, their first response is we are in the information business. When you talk to individuals in the DoD about logistics, they say "we pile up a lot of metal and put a lot of people on it, and we do a good job of it." That is a different response than logistics leaders, and it is the way we think about it.

Competition. We give speeches about competition, but we are doing some undesirable forms of competition. I will cover that below. I talked about rapid acquisition. One thing that I find really interesting is I did a Defense Science Board Study recently looking at what share of the total acquisition dollars go to buying services, versus buying goods. It may surprise you, but 57 percent last year went to buying services rather than goods; yet all of our policies, practices, and procedures are based on buying goods. And I would argue that buying an engineer is different than buying a tank. We certainly do not put the engineer through live-fire testing. And there are other things we do not do, but the reality is that buying a service is something we have to learn how to do much better. Using the same rules for buying goods as buying services just won't work.

Too many of the DoD acquisition workforce—and I will come back and talk about "who does the buying" in a minute—but too many people don't understand industry incentives. They think you can just do it through regulation and control; when the right way to do it is through incentives: creating incentives for industry to get higher performance at lower cost, rather than simply saying "do it the right way." It is not going to work; especially with sole-source suppliers. In the expeditionary operation in Iraq and Afghanistan, we had 170,000 contractors over there, and about 100,000 people in uniform. Yet we did not have many people monitoring those contractors. And, by the way, every day you are reading the paper about people being killed over there, the articles are always about the ones in uniform. There have been more contractors killed over there than there have been people in uniform. So it is a dangerous and different environment for contractors that are operating there.

In terms of who does the buying, there is no question, industry wants the government to have smart buyers, and the government needs smart buyers, so that's a major problem for us. Most of the senior people have retired, and 55% of the current DoD workforce have less than five years of experience—and the "mentors" are all gone. Additionally, as I noted

above, "training" is one of the areas to take the first cuts in a resource-constrained environment.

And then the fourth area, of course, is the industrial-base; and it is the public versus private question that Congress is now devoting their attention to. I am sure you are aware that the largest single caucus on Capitol Hill is the Depot Caucus; covering the weapons maintenance work being done. There are 135 members of the Depot Caucus and they recently passed a law that defines what work should be done sole-source by the public sector in these government depots which includes all software and modifications. They have expanded significantly what should be done in those depots and they have a law that says that 50 percent of all maintenance must be done in the depots. So, therefore, they are saying, we are going to increase the amount of sole-source work being done.

The issue here is not whether its public sector or private sector, the issue is whether it is competitive or not competitive. Congress has been outlawing public versus private competition. In spite of the data. For example, the Congressional Budget Office did a study showing that it was 90 percent more expensive to have the government do weapons maintenance than the competitive private sector.

The case here is the benefits of public/private competitions. In the past, over 60 percent of the time the public sector won because they really know how to do this non-inherently governmental work; and they are allowed to bid using their proposed "most efficient organization" (not what they have actually been using). The actual average savings has been over 30 percent. I will come back and give you some examples, but clearly there is this question of do we compete work of the wrench-turning kind of thing.

By the way, I would argue that wrench-turning is "not inherently governmental." I read the Constitution very carefully and it does not say anything about wrench-turning being an inherently-governmental function. So, clearly, we should be able to at least have competitors compete for that kind of work.

You have, I am sure, heard of Machiavelli, so I do not have to go through that history. In the 16th century he said that making change in government is hard. No question about it, you are going to get lots of resistance to change. When the DoD cut the size of its forces and

therefore proposed base closures, Congress said "not in my district." Well, we have not found a base where the base is not in somebody's district. So you cannot close any bases. The public/private competition—that I mentioned earlier—have already been eliminated.

Foreign sourcing, even though we have foreign parts in every weapon system (because the "buy American" law does not apply at the lower tiers), there is no question that foreign sourcing is an issue. Yet, the more important one is export control. I will come back to that.

The unions, particularly the government unions, are pushing for "in sourcing." And as I noted, Congress has eliminated "competitive sourcing" via public/private competition. To shift back to the Executive Branch, I gave an Air Force counter-cultural example of not having pilots in each airplane, but the same thing applies to all the Services. Picking on the Army this time, when the robots were sent over to Iraq and Afghanistan to pick up roadside bombs, rather than soldiers picking them up, it really sounds very desirable. The Army did not send the robots to the training schools; they only sent them over to Iraq and Afghanistan. It is sort of obvious why they made that decision, I think, they did not want the robots to become part of the institution. The same thing is true of the Navy. Every day the Secretary of the Navy gives speeches about the benefits of unmanned underwater systems, and yet the Navy is not funding them (because it is considered a threat to the submarines). This is the same way that cruise missiles were resisted so seriously by the Air Force, because they were a threat to bombers. You can understand why such "disruptive technologies" always face resistance. And businesses would like to maintain the same thing they have always built. So they will urge their Congressman to keep asking for things, even if the DoD does not ask for them.

We have to overcome that, but the primary thing required for change is strong leadership; which means at all levels, not just the one person at the top.

How do we satisfy the requirements? We need to worry about lower-cost systems and lower-cost services. How do we get them? One way to do it is to "make cost a requirement." We have successfully done this, for example, in the Joint Direct Attack Munition (JDAM) missile. I have a copy of the handwritten note from the Chief of Staff of the Air Force in which he said there are only three requirements for that missile. First, "it should hit the target," that is its objective, obviously. Secondly,

"it has to work when I push the button." That is the reliability. And third, "it should cost under $40,000 each; so I can get enough of them." Seems to me that is a pretty clear set of "requirements." That is the way you and I buy when we go out to buy things.

Today the JDAM missile hits the target, works, and costs $18,000 each, because it was designed to be a low-cost system and it was done competitively. They kept the competition going until the cost was demonstrated.

I will pick another example. When the Joint Strike Fighter was first being designed, it had a $35 million requirement per airplane, because we needed a lot of them. It was going to be the largest program in history; eleven nations were involved. Now, we kept the 35 million in the name, it is the F-35; but it costs about $130 million each; and that is why a lot of those 11 countries are backing out and why the United States is cutting back on its quantity as well. We have to learn to stick to the cost requirement. Additionally, most of the systems that they are going to be using in the future are going to be in a "net-centric system of systems." Yet, we still are writing requirements around individual platforms, rather than around optimizing the system of systems; including the security of that overall system, in terms of cyber security.

As I have pointed out earlier, balancing what we need versus what we would like to have, and what we have had in the past (e.g., ships, planes, and tanks), those are the things that have a lot of institutional inertia, but information systems, "land warrior" systems, and things of that sort, are what we are likely to need in the future, especially in the area of missile defense.

More than one hundred nations currently have ballistic missiles. Don't we need the capability against them? I was in one meeting in the Secretary's office where the Chief of Staff of the Marine Corps stood up on the table and said, "You are not going to use my money for missile defense." That is a true story. There is a strong institutional resistance to next-generation stuff.

Interoperability of systems, on a joint (multiservice) basis, is going to be an issue in the near future. An airborne system with a ground-based system, for example, today, are still not interoperable. But we also need this on a multiagency and a multinational-coalition basis.

When those hundred missiles are coming in against tactical forces, you do not want to pick up the phone and say, "Pierre, you take the first one. Hans, you take the second one. We will take the third one." We need an interoperable missile defense system in that case. And the United States just canceled the Medium Extended Air Defense System (MEADS) program, which was the multinational program operating within three countries for tactical missile defense, but it was not popular (with the U.S. Army) because it was multinational.

As I said, planning and exercising "as we fight" is beneficial, and since those large numbers of contractors are going to be out on the battlefield, they should be taking part in the exercises, but they are not. We exercise with the military alone and then we go overseas and more than 50 percent of our total forces are contractors. We should be exercising that way.

And, of course, maintaining technological leadership means continuing to fund research. I am assuming you are familiar with Lancaster's law, but I just want to emphasis the point. It states that total force effectiveness is proportional to individual weapon effectiveness times numbers squared. Thus, numbers matter more than individual weapon effectiveness. If that is the case, then we have got to worry about how much each weapon costs in order to get the quantity that is needed if the budget is resource-constrained. That is the challenge that we have right now. That is why cost has to be a requirement.

Now, going to the acquisition side. As I said, the JDAM proves cost can be a design requirement. We give speeches about competition all the time, but there is no question in my mind that if you continue to compete, you end up with the benefits of that. We have many examples of that (besides the JDAM case); for example, the "great engine war," which you may have read the case study on. For the F-15 and F-16, we had GE and Pratt and Whitney continuously competing for the share of the engines; and both engines got higher performance, higher reliability and lower cost.

The Air Force says they estimate a savings of about $4 billion as a result of that continuous competition. But today the Air Force has chosen not to compete the engine for the F-35 (with the same two suppliers)—in spite of the fact that engines are the highest maintenance cost of all of our maintenance costs. So therefore, you would think it

would make sense to worry about reliability of the engines. I will come back and cover what we are now doing relevant to competition.

Buying commercial products that are world-class. Why wouldn't we do that? One reason is that specialized cost accounting standards are a major problem for commercial suppliers. Building "dual-use" systems in the same factory, even if they are different products, causes problems. Like Boeing using the same building to manufacture the commercial and military transports together in Wichita. Because of government-required specialized cost accounting standards (in this specific case, the allocation of independent research and development (IR&D) by total sales (even though the IR&D was being done all for the government side), they had to allocate its share to the commercial side. Boeing said, this does not make a lot of sense. So they starting using two different factories and the price for both the commercial and military transports went up because they lost the economies of scale, from the higher volume in the one plant.

Another example is Boeing; they recently had to pay $15 million to export a 767; not normally thought of as a military airplane. On the other hand, why did they have to do that? Because one of the chips in the electronics was also in a maverick missile and, therefore, it could not be exported because the missile and its parts are prohibited from export because they are on the International Traffic in Arms Regulation (ITAR) list.

Now, you want a more absurd example? Some of you may be familiar with the "roomba" vacuum cleaners (the robotic vacuum cleaners). They have navigational software to avoid bumping into tables and chairs. Somebody in the DoD recently said we cannot export those because navigational software is on the ITAR list. So we cannot export vacuum cleaners! We just have to think this out. When the commercial world today is spending more on their research than the DoD is, we should take advantage of that, and not have the barriers to being able to use commercial equipment.

Information Technology (IT) systems. We have logistic systems in the DoD that do not interface with industry. That does not, again, make sense to me. We should have the whole enterprise included, as Wal-Mart and other commercial firms do. Clearly, as recently demonstrated in the case of healthcare.gov, the government should use IT practices from the commercial world. We talked earlier about rapid acquisition, about

buying services; and creating incentives. It seems to me that in the case of incentives, what you want is for industry to be rewarded if they get higher performance at lower costs; not punishment for doing that. That is what we do in the real world, of course; that is called price elasticity. Your prices fall, we buy more of it. That is what we should be thinking about; trying to figure out ways to do that.

How do we get lower cost, higher quality? The big challenge here is not recognizing that higher performance and lower cost is a technical challenge, it is not an accounting challenge: and we should be using advanced technology not just for performance, but for cost, and not just in the product but also in the manufacturing process; things of that sort. That is where the commercial world is, because in the commercial world you care about cost. We need to emphasize technology for cost and performance; and right now we have insufficient emphasis in that area. Cost is a cultural issue and that is where, in the commercial world, we take advantage of it.

Let's go back to acquisitions. Many of you have been hearing that what is unfortunately happening today, is that in order to deal with this declining budget we are going to shift to a buying practice of "low price, technically acceptable." Now, let me ask, how many of you drive a Yugo? That is low-priced, technically acceptable. An even better question for me to ask you may be how many of you get your heart surgery done on the basis of a medical degree and lowest hourly rate. Would you even ask if they ever did one before? And yet today—and I am sure many of you are aware of this—the national missile command and control systems has a request for proposal (RFP) out that is based upon a "low-price, technically acceptable selection criterion." To me, that is incredible. That is comparable to heart surgery. You and I buy on the basis of "best value," a combination of performance and cost; why can't the government do that as well?

Another area where we seem to be drifting away from what was intended is the "indefinite delivery, indefinite quantity" (ID/IQ) contracts. The idea behind it was to get two or three, maybe even up to four or five, highly-qualified people that could bid on a broad range of tasks, when each task comes out. So you know you have a quality supplier and you can get real competition among each of the tasks.

The Navy recently had an increase in the SeaPort-e contract. It now has 2,200 "winners." Think about that. A lot of these ID/IQs are

requiring everybody (all winners) to bid in order to be "fair." That means that the bidding and proposal costs skyrocket. The government has to read all of those 2,200 proposals on each task. It does not make a lot of sense. So we are just not doing things that make sense, I think, in that area.

There is also the "Better Buying Power 1.0" that you heard about, that has recently been put out by the DoD. It has a requirement in there that every service contract will be re-competed every three years. That is a total disincentive to try to reduce your cost and get higher performance during those time periods, because you know that you are going to have to re-compete it. Why wouldn't they have simply added a second phase onto every contract saying it will be re-competed every three years unless you get higher performance at lower cost every year. In which case, you will receive a follow-on contract, with that same clause in it. That is a total incentive to keep the same thing going, keep lowering the cost and raising the performance. That is a reward for high performance at low cost. Why can't we put that into the contract instead of saying we are going to compete it no matter what you do.

The perverse form of competition that I really get a kick out of is you give an unsolicited proposal for a really new idea; and they say, "That is a great idea; we will compete it now, thank you." Are you going to give them any more ideas? No way. Why would I give you my ideas if you are going to take them out and compete them.

And I have also noticed lately that Congress and others have been pushing for the idea, that we will take your drawings and we will put them out for competition to "build to print," houses. You know, Joe's garage can build it much cheaper. Joe does not have an engineering overhead. And so, when you buy a car do you check the glove compartment to see if the drawings for the car are in there; so you can build your own car? That is not the commercial way of doing business and it does not make sense, in terms of taking away any of your intellectual property, but that also seems to be a shift that has taken place.

Next, who does the buying? Smart buyers are a really critical issue. We have to have people with experience and enough of them, but I would emphasize the importance of the experience not just "having taken the course." In the last fifteen years, we have not been emphasizing the

importance of the acquisition workforce; we have been undervaluing them.

Remember when we had the overpriced toilet seats, hammers, coffee pots, and stuff? Congress fixed that, right? They passed a law with two parts to it about the toilet seats. One, no toilet seats shall exceed $220; literally, that is a law. And secondly, that we add 5,000 auditors to make sure that the toilet seats did not exceed $220. So now you have to add 5,000 more people in the industry to match those auditors and the price for both the government and industry went up significantly. I think there are probably other ways to control the price of a toilet seat.

The acquisition workforce undervaluing came out in the post-Cold War period. Dollars went down, so the workforce went down (in terms of the numbers). What happened in this period was proper; you expect the dollars to go down, so the workforce goes down. It makes sense. Then Congress, (specifically, the head of the House Armed Services Committee, Duncan Hunter) said, "those are just 'shoppers,'" let's cut another 25 percent of them. So that was the reason for the big drop.

And then came September 11th, 2011. Zoom, the dollars went up, but we chose not to increase the workforce. And so it is not surprising that we have problems in this period with the dollars versus workforce. And, I would argue, the problem is not just quantity, it's quality, it's seniority. For example, the Army had five general officers with contracting backgrounds in the beginning of that cycle and then they had zero in 2007. The Air Force cut theirs in half, both civilians and the military. The Defense Contract Management Agency went from four general officers to zero. They went from 25,000 people to 10,000 people. I should point out that the government finally recognized its need, but the solution has been to hire interns. Essentially, people with no experience at all; today a little over one third of the federal government acquisition workforce has less than five years of experience. I think a lot of what I discussed earlier, in terms of practices that are happening, are the result of that lack of experience. Most important, most of those people do not have any industry experience. We used to have much more rotation (industry, government, industry, government, back and forth). We have largely cut out much of that as well. So without any understanding of what creates industry incentives, it makes it a lot harder to try to get higher performance at lower costs.

One of the things I have just done recently (at the University of Maryland) is establish a Master's program with a specialization in acquisition. I hope that helps to at least improve the workforce.

The last of the acquisition items is "from whom the government buys its goods and services." There was a Defense Science Board Report in 2008 that basically said that what we have done is we have consolidated the defense industry in the post-Cold War period, we went from fifty major firms to six major firms at the prime contractor level. We did not transform it for the equipment and practices that were needed for the 21st Century.

So, in order to do that, we need a clear vision of where we want to go, we need to be responsive, we need to be technologically-advanced, we need to be taking advantage of globalization, we need to be profitable so we can invest, we need to include the commercial, and, most importantly, we need to maximize the dual-use facilities.

I should emphasize this last point: recently China just came out with its dual-use defense industrial policy (i.e., build commercial and defense equipment in the same plants). Japan has always had it. If you toured any Japanese aircraft plant you would notice they are building commercial and military products with the same machine tools, and so forth. Russia has had it, and China is now explicitly emphasizing it, including investments for dual use. But, as I said earlier, we have regulatory and legislative barriers to integrating the operations, with the specialized export controls, data rights, cost accounting, etc. So we are hampering ourselves in this area; and yet the evidence, historically of the overall economy benefiting from military R&D, is clear. I am sure you are all aware of who paid for the Wright Brother's airplane. You know, that was the Army. And the Internet, that was not Al Gore, it was actually the Defense Advanced Research Projects Agency (DARPA); and jet engines, satellites, and so forth. Management skills, interchangeable parts were an Army rifle idea. And, of course, the military have benefited significantly from civilian R&D.

In areas such as biotechnology, nano-technology, information technology and many other areas, the civilian economy is well ahead of the DoD. Commercial industry has emphasized low-cost designs and manufacturing, and we should take advantage of high-volume when you can combine the two. So it makes much more sense for us to be integrating them (commercial and military) as dual use; but we have

barriers to doing it. We need to be able to help the government in integrating its systems of systems.

Unfortunately, the Justice Department has been putting a lot of pressure on government people, saying that we have to cut back on government to industry communication. When you and I buy, the first thing we do is market research. We try to find out what is out there: we talk to people who are in the business of supplying things. If the government is going to be stricter about whether you talk to every potential buyer or supplier, then that is what people are afraid of. They forget Sam's garage out in Kansas. They did not talk to them; they only talked to six others; and yet wrote an RFP for something. If they talked to the other six, then Sam's garage might protest or complain that they were not included. So the government people are now starting to get scared about detailed dialogue between government and industry, and I think that is terrible. We need to improve the communication between a supplier and a buyer; those two should be working closely together.

The appearance of conflicts of interest has become a major issue as well. I was chosen recently to chair a Defense Science Board Study on contract logistics, but was told I cannot accept because I am on the board of a company that does logistics. They basically said I would have influenced the results, where the results are pretty obvious in the first place. It seems to me that for not-inherently-governmental work, competing is obvious. Again, Congress is always giving speeches about the benefits of the free enterprise system's competition, and then passing laws that more than 50 percent of work has to be done sole-source in government-owned, government-operated facilities; seems counter to the speech they just gave the day before.

As, you know, President Obama proposed it, and Secretary Gates was following that by saying we are going to do more "in-sourcing" of work in the government. This is obviously being driven by the government union convincing Obama of the desirability of doing this. The Air Force proposed all of these jobs to be done in-house, the maintenance work—wrench-turning again.

In fact, the Air Force said they expected to get a 40 percent savings; and I'm sure you know why—because they were just comparing the hourly rate of the government worker versus the fully-loaded rate of the industry worker. In fact, I joked with Secretary Gates and said, "You know, the 33,000 people you are going to bring in (which is what he

proposed) are all going to sit out on the lawn." He said, "What do you mean?" I said, "You cannot have any charges for facilities, gas, heat, electric, building. Also, by the way, they don't get any legal support or any financial support, or any IT support, or any of your time; that is what overhead is."

And, unfortunately, there are a lot of people in the government that still do not appreciate that the Air Force would not say they are going to have a 40 percent savings on work that is not inherently governmental. There is a role for the government here, and I have no problem at all with the government managing, overseeing and, in fact, doing it, if they are the most cost-effective operation; so let them compete for it. But the idea that says you are going to have a 40 percent savings when the Congressional Budget Office did a study comparing maintenance and said that it was 90 percent cheaper to use competitive sources than it would be to do sole-source with the government, why wouldn't Congress read their own report? Why would they insist that we have competition for such work and why wouldn't the Air Force, in that case, have read that report as well?

By the way, performance went up significantly when these things had been shifted from doing it sole-source government to private competitors doing it; or with public/private partnerships. There was a distinct responsiveness improvement when they were contractor-based, and with significant improvement in availability. These measures matter (in regards to response time and availability). And when they had public/private competitions in the past, the public sector often won; and in many cases, for example the C-5 maintenance the Air Force awarded it to Warner Robins, their government operators subcontracted 60 percent of the work to the private sector.

In another case (of an auxiliary power unit), Honeywell won it and they subcontracted some of that to the Depot. But clearly that makes sense, i.e., the public/private partnership; but again it comes from the competitive environment. The legislated sole-source environment does not eliminate costs, it creates monopolies; thus, it does not have a tendency to minimize cost or maximize performance.

Today, we have to address affordability. So, we have to address the uncertainties; we have to address the workforce; we have to address the way we do business. People are the first and primary key to this, along with processes and actions. What we buy, how we buy, who does the

buying, and from whom we buy—all have to be changed; and that's a cultural change, and culture changes are hard.

The literature is clear, though, on how to make culture changes. And there have been lots of success stories on cultural changes. In fact, when I teach, I use fourteen case studies of examples of government culture change and in all cases, two things are required. One is the recognition of the need for change. I think, generally, people recognize that today there is a need for change. The 21st century is different from the 20th; we have a challenge, in terms of the budget, and we really need to address our acquisition workforce, put those together and there is recognition of the need for change and, I think, it is pretty widespread. Everyone says we need change, the problem is what changes. That is where "leadership" is the second requirement; leadership has to have a vision, a strategy, an action plan, and an ability to align and motivate at the lower levels. So you develop a leadership team not just an individual. Everybody is saying they want to do it, but the question is will "it" be the things that result in rapid response and lower costs, and higher performance, all at once. That is the challenge.

I guess it is partly because, in the sixth grade, I was voted the biggest optimist in the class; I still think things can be done. And I think it is a matter of people taking the lead in making it happen. I think it is going to take a lot of courage and strong leadership, in both the executive and legislative branches; and, certainly, right now, we have not seen that. Certainly not in Congress, they need parental guidance right now. They really have not been moving in this direction. Frankly, I think our men and women in the Armed Forces deserve this kind of a change. It is necessary to "get more for less," and I just think it can be done, if we all push together to get it done.

Thank you.

THE FORTY-FIRST KENNETH J. HODSON LECTURE IN CRIMINAL LAW[1]

---

* Congresswoman Loretta Sanchez represents California's 46th Congressional District. She began her congressional career in January of 1997 and is currently serving her ninth term in the U.S. House of Representatives.

A recognized leader on military and national security issues, Representative Sanchez is the second-highest-ranking Democrat on the House Armed Services Committee. She serves as the Ranking Member of the Tactical Air and Land Forces Subcommittee, where she is working to prepare Armed Forces for a new generation of security challenges. Representative Sanchez is also a senior member of the Subcommittee on Strategic Forces, where she served as Ranking Member during the 112th Congress. Representative Sanchez is a leader in securing non-proliferation programs funding. She works to implement missile defense systems that are effective and efficient. Democratic Leader Nancy Pelosi appointed Representative Sanchez to the prestigious Board of Visitors of the U.S. Military Academy at West Point and Ms. Sanchez also sits on the U.S. Air Force Academy Board of Visitors.

Representative Sanchez is the leading voice in Congress for women in the military. She is founder and chair of the Women in the Military Caucus and is the highest-ranking female on the Armed Services Committee. Representative Sanchez championed efforts to allow female service members to serve in combat roles. She has implemented significant measures to fight sexual assault in the military, successfully updating outdated sexual assault provisions in the Uniform Code of Military Justice. She also led the legislative effort to implement a sexual assault database in the 2009 National Defense Authorization Act, Public Law 110-417, and to mandate rules for use of rape kit examinations. Representative Sanchez fought for better accountability of commanders by requiring commanders to conduct climate survey assessments in order to ensure healthy environments for service members. She has been a leader in improving oversight of sexual harassment cases in the military through thorough records of substantiated sexual harassment cases.

As a member of the House Homeland Security Committee and Subcommittee on Border and Maritime Security, Representative Sanchez provides strict oversight on important security issues, including the Transportation Worker Identification Credential (TWIC) card program and the US-VISIT Program. She guided key maritime security provisions through Congress in the Security and Accountability for Every Port Act (Safe Port Act) in 2006. She is also a member of the Subcommittee on Counterterrorism and Intelligence.

A product of public schools and Head Start, Sanchez is a graduate of Chapman University and American University's MBA program. Before serving in Congress, she was a financial manager at the Orange County Transportation Authority, an assistant vice president at Fieldman, Rollap and Associates, and an associate at Booz, Allen, and Hamilton. Congresswoman Sanchez is married to Lieutenant Colonel (Retired) Jack Einwechter. They have a son serving in the U.S. Army.

[1] This is an edited transcript of a lecture delivered on April 23, 2013 by Congresswoman Loretta Sanchez to members of the staff and faculty, distinguished guests, and officers attending the 61st Graduate Course at The Judge Advocate General's Legal Center and School, Charlottesville, Virginia. Established at The Judge Advocate General's School on 24 June 1971, the Kenneth J. Hodson Chair of Criminal Law was named after Major General Hodson, who served as The Judge Advocate General, U.S. Army, from 1967 to 1971. General Hodson retired in 1971, but immediately was recalled to active duty to

CONGRESSWOMAN LORETTA SANCHEZ[*]

Good morning, General Chipman, General Miller, General Darpino, General Cuthbert, Colonel Carpenter, faculty, students, judges, and friends. It is an honor to present the Hodson lecture in military justice.

I believe that I am the first non-lawyer to present this lecture, but don't worry because I have seen many episodes of *Law and Order*, *NCIS*, *JAG*, *CSI-Miami*, and I slept at a Holiday Inn Express last night. I am also married to a retired Army JAG, who formerly served as a professor at this wonderful institution.

Since 1997 I have visited American Soldiers, Marines, Airman and Sailors in many remote and dangerous places, including the Horn of Africa, Afghanistan, Iraq, and the jungles of Columbia with the Army Special Forces. I know what you do for our Country, and I have seen the hardships, the mortal threats, the risks that you face. I have also seen the sacrifices your families endure in these times of war. I am truly honored and privileged and humbled by the service that you have given to our country. So, I want to begin by thanking you for all you do.

I come before you at a very critical time in our nation. It is time of war and dynamic change in the United States military. We are living in an age of unprecedented threats, when our forces have been in combat for over twelve years. And we have seen dramatic changes in our military, in warfare, in the means and methods of war, in the way we organize, in the way that we fight our wars.

One example of such change is the repeal of the gender-based Combat Exclusion Policy, which we hope will end what I call the "brass ceiling" of the military. This change was not an exercise in social experimentation. Like you, Congress is committed to a strong and ready and effective military defense capability. Repeal of the Combat Exclusion was done to enhance our military readiness in recognition of the heroic contributions of women warriors, especially during the last twelve years of conflict. It has been said that "truth is the first casualty

---

serve as the Chief Judge of the Army Court of Military Review. He served in that position until March 1974. General Hodson served over thirty years on active duty, and he was a member of the original staff and faculty of The Judge Advocate General's School in Charlottesville, Virginia. When the Judge Advocate General's Corps was activated as a regiment in 1986, General Hodson was selected as the Honorary Colonel of the Regiment.

of war." Well, I would say that war has a way of exposing essential truths and purging entrenched prejudices.

The Army led the way in integration of the races in World War II, setting an example for our nation and enhancing the readiness of the force. In the same way, the change to the Combat Exclusion Policy will ensure that female soldiers are co-equal in the American defense forces. In that regard, I am proud to share the stage today with General Darpino, who I believe is the first female Commander of this Legal Center and School. Thank you, General, for your example to all of our troops.

As the senior woman on the House Armed Services Committee, nothing has been more important to me in this Congress than the matters that affect the readiness, morale, good order, and discipline of our Armed Forces. "Discipline is the soul of the Army,"[2] and I believe that military justice and the JAG Corps play a critical role in maintaining that discipline and that readiness. Those of us who work on military justice in Congress look to the JAG Corps as a partner, a source of reliable information, and our best hope for maintaining the military justice system that is worthy of our American values.

We are here today to speak frankly about the current state of military justice and the growing belief among many of my colleagues in the Congress that fundamental changes to military justice are needed to address the specter of sexual assault and sexual harassment in our military workplace. You are all familiar with the troubling statistics the Department of Defense (DoD) estimates that there are about 19,000 rapes a year in our military forces.[3] That's over fifty a day, and that is unacceptable.

A Soldier today, even in a time of war, is more likely to be sexually assaulted than to be killed or wounded by hostile forces. And yet we also know that less than twenty percent of sexual assaults are reported. Why is that? It is because victims do not believe that they will get justice, and criminals do not believe that they will be punished.

---

[2] George Washington. "Discipline is the soul of an army. It makes small numbers formidable; procures success to the weak, and esteem to all." Letter of Instructions to the Captains of the Virginia Regiments (29 July 1759).

[3] *See Military Sexual Assault Epidemic Continues To Claim Victims As Defense Department Fails Females*, http://www.huffingtonpost.com/2012/10/06/military-sexual-assault-defense-department_n_1834196.html.

I know that we have confirmed these numbers through countless surveys, studies and anecdotal evidence. Many want to compare these statistics against the criminal justice statistics in civilian jurisdictions. Comparisons to civilian criminal justice systems may yield some useful insights; but there is a strong sense that military justice can, should, and must do better than the civilian world. You have the tools and the resources to do better, and the national security of our nation demands that you do better. This is not a woman's issue; it is a commander's issue, it is a leadership issue, it is your issue. It is your issue because it is your duty is to enforce and defend the law and you are responsible for the welfare of every soldier entrusted to you by the American People.

A series of high-profile sexual assault cases and the military response have caused some to lose confidence in the military justice system. Like it or not, the entire concept of a command-driven military justice process is now under intense congressional scrutiny. The purpose of this lecture is to offer you a current congressional perspective on military justice reform; to reason with you, as partners, about the process and the goals of such reform; and to challenge you to be responsible guardians of military justice, leaders of change in military culture and true partners with the Congress for the positive evolution of American's military justice system.

Let us review some essential background. How did we get here? Let us talk about how and why Congress is so focused on these issues. Since 9/11, the military departments have been called upon once again to do our nation's heavy lifting. You have been ordered into combat, into nation-building, direct action missions, detainee operations, military commissions, and countless other roles. You have been tested, scrutinized, criticized, and lavished with enormous appropriations and many well-deserved honors and recognition. All of that attention has also brought intensified congressional oversight, judicial scrutiny, and public interest in the welfare and the readiness of our forces.

Reports of sexual assault among our deployed forces and the controversial military commissions' process have focused enormous attention on our military justice system and the court-martial process. It is fair to say that scrutiny of military justice is greater now than at any other time since the inception of the Uniform Code of Military Justice (UCMJ) in 1950.

Sexual assault in the ranks has been an area of long-term interest to the Congress. This interest has often spiked in the wake of high-profile cases, such as the Tailhook scandal in 1991, systematic abuse of AIT trainees at Aberdeen Proving Ground in 1996, and reports of chronic sexual harassment and rape at the military academies in 2003. In 2004, we began to hear about assaults on our military women while deployed in OIF and OEF. This problem became a national scandal at the same time that we were hearing about prisoner abuse at Abu Ghraib, and congressional interest in military justice began to increase. These reports shook our confidence in military culture and discipline and caused intense interest in the response of commanders, prosecutors, and victim support systems.

What followed was a period of intense congressional and DoD focus on military justice and discipline. Department of Defense leaders acknowledged that there was a systemic, cultural problem of sexual assault and harassment in the ranks. And with the nation at war and facing such threats, military discipline and readiness took on a new urgency in our public discourse. Pressure for decisive action mounted on all sides, and both the DoD and Congress took steps to investigate the problem and to put in new measures to fight the internal threat of sexual abuse.

The period from 2005 to 2012 saw a broad range of legislative and executive initiatives to strengthen military sexual assault investigation, prosecution, and our victim support. Legislative and regulatory actions during this period addressed the revision of UCMJ Article 120; victim assistance programs; sexual assault prevention and response programs; a victim assistance evidentiary privilege; transfer of victims in appropriate cases; enhanced victim support services; creation of SAPRO in the Office of the Secretary of Defense (OSD); various training, database and reporting requirements; SAFE exam procedures (i.e., rape kits); special victim units; new command policies at the military academies; withholding of disposition authority in sexual assault cases to the special court-marital convening authority level, and other reforms and initiatives. You saw real and significant changes in law and policy over the past 10 years.

A great deal of systemic progress has been made, and we have seen some dramatic success in individual cases. We want to see these reforms take hold. I am encouraged, in particular, by the Army leadership in the implementation of real and effective special victim investigator and prosecutor teams. This is a tremendous program and I salute your

efforts. In fact, we liked it so much that the Congress mandated it in last year's National Defense Authorization Act. It is a model for all of the military services, and even civilian jurisdictions can learn from it. It is so great that eventually I expect that it will be a TV series (laughter).

So a great deal of work has already been done. Much of it is first class. And I believe if we give these reforms a chance to take root, that they will bear fruit. There are some statistical indications that the rate of victim reporting in the military has begun to increase. And I am familiar with specific cases where the Army SVU teams have done marvelous work, and they have achieved a standard of justice in many cases.

A year ago, my colleagues and I began to feel that these changes were actually making a difference. Then we got the reports from Lackland Air Force Base (AFB) of widespread sexual abuse, assaults, harassment.[4] Those reports landed in Congress with the force of a Joint Direct Attack Munition. It was, frankly, a very discouraging event for me. I flew to Lackland AFB, and I met with commanders and JAGs and investigators to see firsthand about these reports.

Ladies and gentlemen, over the years I have staked my reputation as a leader in this policy debate on the belief that we could work within the structure of the UCMJ, making significant adjustments while avoiding a radical reengineering of the military justice system. That is what I have been working toward. I also believe that military leaders were taking this crisis to heart and backing up their rhetoric with real reforms. I believed that in time, with the changes we had put in place, we could change the culture of the military, gain the initiative against sexual assault in the ranks, encourage victims to report, and ensure that sex offenders would be punished and would be eliminated from the ranks.

The Lackland cases embolden those who had been advocating for more radical change to the military justice system. And they have made it difficult to believe that we have made real progress in reducing sex crimes, increased reporting and prosecution rates in the twenty years since Aberdeen. In short, it has become harder to defend this military justice system in its present form. Then things got even more complicated in March 2013 when a GCMCA in Europe seemed to abuse

---

[4] *See 31 Victims Identified in Widening Air Force Sex Scandal*, CNN.COM, http://www.cnn.com/2012/06/28/justice/texas-air-force-scandal/ (last visited Mar. 13, 2014).

the Article 60 provision by reversing the conviction of a duly convicted officer who had attacked a female civilian nurse at Aviano Air Base in Italy—against the advice of his JAG, I might add. I realized that this was an aberration, but I cannot exaggerate the combined effect that these two incidents had on the opinions of my colleagues in Congress. Now, when leaders testify that there is a zero tolerance for sexual assault, there was new skepticism among congressional leaders.

The *Wilkinson* Article 60 case convinced many that not only do some senior leaders tolerate sexual assault, but they will go to extreme lengths to protect predators.[5] The *Wilkinson* case was the final straw for many members of the House and Senate, and we have seen the legislative response. We have seen dozens of new bills by my colleagues, both in the Senate and in the House. We have seen Secretary Hagel and various members of the Congress proposing to terminate the convening authority's power to reverse findings, except in summary courts. It has reinvigorated the discussion about possible structural reforms of military justice--from proposals to elevate disposition authority in sexual assault cases to the GCMCA level, to more robust reforms, such as taking disposition authority away from commanders and giving it entirely to JAG prosecutors or creating a centralized chief sexual assault prosecutor in the Pentagon. Some have advocated turning the entire system of military felony prosecution over to civilian jurisdictions.

This is the situation in which we are gathered today. Today there are a host of proposals pending in Congress to modify the military justice process. When I survey many of these proposals, I think about the old saying that "hard cases make bad law," and I am deeply mindful of the perils of hasty legislation. I recoil from the reactionary impulse to do radical restructuring, when so many excellent reforms are taking root and moving forward. My colleagues and I want to do the right thing. Nobody goes to Congress to do the wrong thing. The way to get this right is by getting you to help us get it right. We need the JAG Corps to partner with us to keep the UCMJ legislation reform on the right track. We know JAGs have played a valuable and sometimes heroic effort during the debates over interrogation policies, torture, commissions, detainees, etc..—you have helped us. We need your help now.

---

[5] Molly O'Toole, *Hagel Orders Military Sexual Assault Case Review As Controversy Comes to Congress*, HUFFINGTON POST POL., Mar. 13, 2013.

So let us turn to the main topic: the process and goals of UCMJ legislation reform and oversight. I firmly believe that the Congress and military leaders must work together on the basis of shared values and goals in order to maintain the effectiveness and the excellence of the military justice system. This vision of collaboration has not always been realized. Too often there have been antagonisms between the military departments and the Congress. This has to end. A lack of cooperation between the military departments and the Congress undermines intelligent reform and sometimes leads to bad law. Allow me to recommend this morning some ground rules for the process.

First, you must understand and embrace Congress's role in UCMJ reform. Article 1, Section 8, says "the Congress shall have power to raise and support Armies, to provide and maintain a Navy, to make rules for the government, and regulation of the land and Naval forces, and to make all laws which shall be necessary and proper for carrying into execution the foregoing powers."[6]

Under the Constitution the war-making power and the responsibility of raising Armies and Navies is shared by the legislative and executive branches. Yet, the power and responsibility for writing the rules to govern military justice is explicitly allocated to the Congress. As such, we are the architects and guardians of the military justice system. The President is the Commander in Chief, and his commissioned officers have the duty to execute the law and serve as responsible and conscientious custodians of our military justice system.

Congress recognizes that the responsibility of reforming the UCMJ is and should be a shared and collaborated responsibility. It is reflected in Article 36, which delegates to the President critical rule-making power under the UCMJ.[7] It is reflected in Article 146, which mandates a Joint Services Committee whose responsibility includes making proposals for UCMJ reform.[8] The power to make law implies the power to oversee its execution and implementation, because legislation is a perpetual cycle. This is called congressional oversight.

Congress has authorized and created courts-martial through the UCMJ, and we will modify the UCMJ if Congress believes it is

---

[6] U.S. CONST. art. 1, sec. 8.
[7] UCMJ art. 36 (2012).
[8] *Id.* art. 146.

necessary for the good order and discipline of the force and the defense of our nation. Congress does the work on military justice mainly through our annual authorization bill. Bills proposing changes to the UCMJ are vetted through the committee process, which includes requesting DOD to comment on the legislation, hearings, and reports. Hearings are not just political theater. We learn a lot in hearings if they are done correctly. We learn even more if we can get the essential information we need from the experiences of the people who are before us testifying. They shape our attitudes toward the reform. In order for the process to work well, there has to be an established relationship of trust.

Second, we must forge the relationship of mutual trust and respect between Congress and military leaders. Our public and constitutional responsibilities demand that we act, at all times, for the good of our nation. We must respect each others' views and treat every proposal with comity required by the separation of powers and constitutional roles, both the Congress and the Executive Branch. True, some proposals reflect a profound misunderstanding of military justice, but this should be reviewed as an opportunity to educate. Most members of Congress are eager to learn, open to persuasion, and they want to get it right. But it helps if a rapport has been established through mutually respectful engagement over the long haul. Make no mistake about it, Congress is a formidable power, and politics is a brutal battleground that can distort the goals of reform. You cannot afford to simply circle the wagons and hope that we will go away. Congress is a formidable partner, and it can also be a formidable challenge.

When legislative proposals from Congress are not taken seriously, law reform can sometimes be derailed. For example, when I initiated the proposal to reform Article 120 in 2004, my proposal was pretty simple. I said, "Let's base it on the sexual assault provisions in Title 18, U.S. Code, and use the civilian examples we have." The federal government and thirty-seven states have the same system for over 25 years, which meant we could carry over case law. My proposal did not exceed five pages, double spaced. But instead of partnership and collaboration, the Joint Service Committee opposed any reform of Article 120. They came to my office to explain all the reasons my bill was bad. What they did not count on was the determination among my colleagues to reform Article 120. And so the result was a hastily drafted alternative to my bill, which sailed through the Congress despite its confusing complexity and legal defects. After military courts ruled the double burden-shifting provisions unconstitutional, Article 120 was amended last year, making

it a little bit closer to my original bill. Cooperation with my original proposal, modeled on Title 18, might have avoided all this trouble, appellate litigation and legislative correction.

The most important lesson from that experience is that we must come together in the spirit of shared values and agree on what our goals for sexual assault prosecution should be. Let us agree on how to measure progress. What are the milestones? What is the measuring stick? Let us collaborate to develop programs that we believe will improve the system. We must discard the model of an angry Congress dictating radical reforms and embrace a two-way street where everyone participates in a sound policy development.

Third, we must approach the task with caution and due deliberation. This means we must lead, and not merely react to the latest horror story and the 24-hour news cycle, with all of its exaggeration and inevitable distortion. A reactionary approach leads to bad law most of the time. Instead, we should learn the facts, collaborate, reflect, deliberate, work together to solve systemic problems; and we must look at the issue strategically, not merely react to one problem at a time.

I am suspicious of any broad structural changes to the UCMJ as the solution to enhance prosecution of one category of offenses. Every justice system has bad verdicts or decisions that cause public outrage. But this is when we see the difference between true statesmen and mere politicians. True statesmen resist knee-jerk legislation, hasty restructuring of the system, and unfair denunciations of all commanders. Likewise, military leaders should not circle the wagons, indulge in denial or defend the indefensible.

I honestly believe that Congress needs to exercise what I call "strategic patience" in pursuing this reform of the UCMJ. We need to give reforms already implemented time to work to see if they solve the problem. What if we make major structural changes to the UCMJ and then we have another Aberdeen, another Lackland, something else happens like that? Should we then conclude that the reform was a failure or should we go on to another reform? Is that what we should do--one reform after another in an endless cycle of scandal and reform? No. We have to avoid this reactionary spiral and proceed more deliberately, because there is too much at stake to make hasty decisions and bad legislation; and I hope that we can agree on these process concerns.

Sexual assault, like any crime, is a fact of life that we must always fight and strive to prevent. We must understand its causes and learn how to control it effectively. Any population of young people far from home, under pressure, with healthy (or unhealthy) libidos, and occasional doses of alcohol will fall into sexual trouble. It is biology. We see a similar problem with sexual assault rates on college campuses. Also, to be fair, reporting of sexual assaults is a serious problem in all jurisdictions, and investigation closure rates and conviction rates are notoriously low in civilian as well as in military jurisdictions. Yet as the Lackland case reminds us, the problem of sexual assault can be particularly pernicious in a military setting where victims may be subject to the command of the perpetrator.

So we must continue to work for victims and for justice so that our land, air, and naval forces are ready to defend our nation. The goals for additional legislative reform and executive action fall under four broad headings.

Protecting the victim is an area of urgent concern and one of the areas where you can have a tremendous impact. I have to tell you, I've had women come in and tell me that they have gone to the hospital and that there is a military doctor there and half of them do not know how to do a rape kit. They were reading the directions for the first time. I had one tell me that she could hear behind the screen the doctor throwing a fit to another doctor that he even had to administer this. So we have to educate, train, and resource our victim support systems. Commanders have to embrace the responsibility to protect the soldier from sexual predators before and after a crime occurs. Punishing the criminal or transferring the victim to another unit may cause a difficult challenge for a unit; but failing to do those things will have a devastating impact on victims and combat readiness.

We need to do justice and deter crime. Notice that I did not simply say "punish the guilty." We must always preserve the rights of the accused. Americans are innocent until proven guilty. Doing justice means thoroughly and fairly investigating and trying these cases so that the guilty can be punished according to the offense and their individual culpability. False accusations, overcharging, or the rush to judgment can do tremendous harm to those accused of sexual assault. I worry that all the talk of "zero tolerance" and stripping commanders of Article 60 power could actually have a chilling effect on the appropriate exercise of

discretion and clemency, and I worry about unlawful command influence, writ large.

I am always amazed that people who are ordinarily defense-oriented in criminal matters, suddenly become like Inspector Javert in *Les Misérables*, where the crime involves sexual assault, becoming determined to punish without any regard to the rights of the accused. Similarly, some oppose military commissions and demand that Al Qaeda suspects be tried by regular courts-martial, because they profess to trust the UCMJ; but when it comes to American servicemen accused of sexual assault, these same people flip-flop and declare the UCMJ and the military justice system incompetent!

While such excessive rhetoric is troubling, please do not paint all of my colleagues with the same brush. What I advocate is evenhanded justice for victims and the accused alike. There are many verified stories of victims who were disappointed by the military justice system or mistreated by commanders. There are also stories that get less media attention of accused soldiers who are mentally, professionally, and financially devastated by false accusations of sexual assault or harassment. Military justice must meet both challenges effectively.

Another important factor is the preservation of command authority under the UCMJ. I have opposed radical restructuring of military justice because I know, from many years of legislating, that attempts to reengineer government systems, especially as a hasty response to a perceived crisis, are fraught with unintended consequences and rarely live up to their asserted expectations.

Military law has grown organically from centuries of experience. The UCMJ was forged through years of congressional and executive deliberations and accumulated wisdom of the greatest generation of Americans. Since 1951 it has been reformed in important beneficial ways, especially in the 1968 reforms, to make it the best military justice system in the world. Major General Hodson, for example, for whom this lecture is named, was influential in the passage of the 1968 legislation.

While some of my colleagues disagree, I still believe the commander is and must be the principal authority of military justice. This is rooted in one of the cardinal principles of war, unity of command. It is also consistent with the vital principle of command responsibility, and it reflects the realities of military organizations. We must be wary of any

proposal that would undermine command authority to maintain the cohesion, the readiness, and the discipline of our forces. Commanders must remain responsible and accountable for the readiness of any unit anywhere, at anytime, anywhere in the world. I doubt that, if we strip commanders of that responsibility, we can effectively hold them accountable for good order and discipline in other matters.

Proposals to centralize prosecution authority and functions in a chief legal officer at the staff judge advocate level are also, in my view, not likely to improve the investigation and prosecution of sexual offenses in the ranks for several reasons. First, military justice must remain command-driven. The commander sets priorities in a military organization. If good order and discipline is not a primary command mission and responsibility, a lawyer-driven justice program will not flourish in the military.

Second, military justice has to be portable. A chief sex crimes prosecutor located in the Pentagon, as some legislators would propose, is less likely to be effective in handling local crimes involving local witnesses, crime scenes, and evidence, especially in overseas combat zones.

Third, removing commanders from the disposition decision will undermine the quality of those decisions. I believe that the close interaction between the commander and his SJA or trial counsel produces a better disposition decision than a lawyer acting alone. The preparation required to advise the commander and the commander's independent judgment improves the legal advice given, and it offers the benefit of the give-and-take deliberation that goes on between two people.

The assumption that commanders are ignoring legal advice is not correct most of the time. And, thus, removing the commander from the disposition decision will not yield more positive results in processing sexual assault cases. While measures to enhance JAG authority in disposition decisions may have some merit, the commander must remain central to the process. By the way, that is not to say that proposals to curtail command authority in military justice matters should be automatically dismissed. We are going to take a look at such proposals, and I promise you that that is being actively looked at right now in the Congress.

Finally, we arrive at what I consider to be the heart of the matter, changing the military culture. When all is said and done, we must make positive changes to military culture. My commitment to cautious reform is a matter of legislative philosophy and seventeen years of legislative experience. I believe that we have a fundamentally sound military justice system under the UCMJ and the *Manual for Courts-Martial*. I also believe that there are ways to improve it and that close legislative oversight must continue. However, I do not believe that military justice is working as well as it should in the area of sexual assault reporting, investigation, and prosecution. I believe the source of this systemic failure lies not in the basic structure of military justice but in institutionalized attitudes of apathy, sexism, and some dereliction of duty with regard to caring for our soldiers.

My belief in the need for cultural change is based on hearing the stories of thousands of victims and working on this problem for the past two decades. Law reform alone will never solve the problem of sexual abuse in the ranks until the culture of the military changes. Commanders, military police, and JAGs must make the law a living and a powerful agent of change.

We have given you a military justice system with all of the tools and resources you need to succeed. We have given you the finest training of any military in the history of our world. We have created the most educated officer corps in the history of the world. We have given you military budgets larger than the military spending of all of the rest of the nations in the world. We have given you our sons and our daughters. There is no excuse for thousands of sexual assaults in this prior year, not one. We should not have them in the military, and it has got to end.

How do we change military culture in a way that will help solve that problem? We cannot legislate cultural change, but the prevention and the response to sexual assault in the ranks could change tomorrow, if the Army would simply live up to the values of loyalty, duty, respect, selfless service, honor, integrity, and personal courage.

Culture change must first and foremost be led from the top of every military organization. Let us be brutally clear: No commander who really cares about his or her soldiers would ignore a report of sexual assault. No commander who really cares can leave a victim under the direct supervision of the alleged offender. No commander who really cares about the law can ignore allegations of sexual assault or sweep it

under the dayroom rug. If we really believe in Army values, then we will work to eliminate sexual misconduct and punish duly convicted offenders. There is no place in the military for sexual predators, and there is no place in the military for leaders who would fail to lead in this mission.

Second, we must continue to aggressively respond to sexual assaults, including the precursor behaviors of sexual harassment, indecent assaults, etc. I do not need to lecture you on the severe impact that these crimes have on the military organization, but somewhere the connection between the rhetoric and the military practice is breaking down too often. We all know that the Army knows how to train and lead, so do it. Ensure that every Soldier, every Sailor, every Marine, every Airman understands that this is a life-and-death issue, that victims will be respected and protected, and that offenders will be punished.

Third, we must realize the promise of full equality for women warriors. While the Combat Exclusion Policy has been eliminated, it will take time to implement and to change attitudes that prevail in combat arms organizations. You know what I am talking about—the good ole' boy networks and, the Viking ship mentality. Some say its endemic, some say that it is needed in those units. I am here to tell you, it is not.

Finally, I believe that Judge Advocates can make a decisive difference. You can set the tone on this with your commanders. In order to deter predators, encourage victims to report, and eliminate offenders. You must make military justice work.

You all know how our democracy works when bad things happen: the media dramatizes the scandal; the Sunday talk shows spin; leaders hold press conferences; constituents call congressmen; special interest groups shift into high gear; everyone demands action. We hold dramatic hearings and demand executive accountability. The President calls the Secretary of Defense and says, "do something or you're out." Everybody has an opinion, and everybody scrambles to offer those opinions for significant action. Legislators write bills and make speeches. On the other side of the Potomac at the Pentagon, military leaders want more soldiers, they want more weapon systems, and they need more resources. So they rush to plug the holes in the system in order to placate the political beast. What happens in Washington is often mere theater, but it

is also strategically decisive and crucial to our war fighters on the ground.

Now let us think about this from a different perspective. Imagine that last night a female soldier was raped by her sergeant. And as the sun rises over Kandahar, she feels traumatized, alone, 10,000 miles away from home, and completely shattered as a human being. Mortar rounds claim the life of a soldier on the other side of the FOB that night. Her squad leader yells at her for failing to clean her M4 correctly. Her unit is supposed to escort the convoy through IED alley on the brigade MSR; everyone is stressed, tired, and extremely busy. She does not know whom to tell.

The commander and the first sergeant are laser focused on the mission at hand. She has never spoken to either one-on-one. She does not perceive them as the warm and fuzzy guys that she needs to go and talk to. She has never spoken to a JAG. She does not know where the military police are, the chaplain is from another denomination, and the field hospital is at another Forward Operating Base.

When she thinks about reporting the crime, she realizes that it could distract them from their mission at hand, and it could cost lives. And that makes her feel guilty, and that makes her feel scared. And she heard from another friend who reported a rape back at Fort Bragg that nothing happened. And she is ashamed. So she decides that a report will have to wait. She just wants to feel safe and proud, and she probably just wants to go home.

That soldier is a soldier about whom we speak today. That soldier is the reason that I care about this issue. She is the reason why we all want to take effective action to end the prevalence of sexual abuse in the ranks. She is depending on you.

You are responsible for your soldiers; and together we are the guardians of military justice. This is not just a political or policy issue, it is not a women's issue. It is about caring for soldiers and doing justice. Caring for soldiers has become the calling of my life, and I hope that it's the calling of your life.

Thank you.

BLEEDING TALENT: HOW THE U.S. MILITARY MISMANAGES GREAT LEADERS AND WHY IT'S TIME FOR A REVOLUTION[1]

REVIEWED BY MAJOR JOSEF DASKAL[*]

Public services are never better performed than when their reward comes only in consequence of their being performed, and is proportioned to the diligence employed in performing them.[2]

I. Introduction

On January 17, 2001, in his farewell address, exiting Secretary of Defense William S. Cohen shared with the audience the answer he had given when asked by foreign leaders how their military could be more like America's. It's not just rigorous training, advanced technology, and revolutionary tactics, he explained, "We have the finest military on Earth because we have the finest people on Earth, because we recruit and we retain the best that America has to offer."[3]

In *Bleeding Talent*, Dr. Tim Kane offers a different view of the American military. He proposes that the military indeed recruits the best America has to offer[4] and turns them into great leaders,[5] but fails so badly at retaining them that it should serve as a "cautionary tale" for other organizations.[6]

Ten years and two wars after Cohen's speech, when it was Secretary of Defense Robert S. Gates's turn to bid the troops farewell, he expressed

---

[*] Israel Defense Forces. Student, 62nd Judge Advocate Officer Graduate Course, The Judge Advocate General's Legal Center and School, U.S. Army, Charlottesville, Virginia.

[1] TIM KANE, BLEEDING TALENT: HOW THE US MILITARY MISMANAGES GREAT LEADERS AND WHY IT'S TIME FOR A REVOLUTION (2012).

[2] 2 ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS bk. 5, ch. 1, pt. 2, 211 (Edwin Canna ed., Methuen & Co.1904) (1776), *available at* http://www.econlib.org/library/Smith/sm WN.html.

[3] William S. Cohen, Sec'y of Def., Remarks as Delivered at Fort Myer, Virginia (Jan. 17, 2001), *available at* http://www. defense.gov/speeches/speech.aspx?speechid=320.

[4] KANE, *supra* note 1, at 7, 37–41.

[5] *Id.* at 43–51.

[6] *Id.* at 25, 85–107.

similar concerns. Speaking at the United States Military Academy at West Point on February 25, 2011, Gates alerted that the military's biggest challenge is this: "How can the Army break-up the institutional concrete, its bureaucratic rigidity in its assignments and promotion processes, in order to retain, challenge, and inspire its best, brightest, and most-battled tested young officers to lead the service in the future?"[7]

Gates's question echoed Kane's assertion that the "nearly blind to merit" personnel system, managed by "a faceless, centralized bureaucracy" is at the root of a retention crisis facing the military.[8] *Bleeding Talent* is aimed at proving this thesis, and providing an articulate answer to Gates's question, in an effort to "shape the debate on how to save the military from itself."[9]

II. A Broken Personnel System

Kane is an economist, an avid entrepreneur, and a former captain in the U.S. Air Force.[10] As a veteran—turned—entrepreneur, his milieu

---

[7] Robert S. Gates, U.S. Sec'y of Def., Speech at the U.S. Military Academy at West Point, New York (Feb. 25, 2011), http://www.defense.gov/Speeches/Speech.aspx?SpeechID=1539.

[8] Tim Kane, *Why Our Best Officers Are Leaving*, THE ATLANTIC, Jan./Feb. 2011, *available at* http://www.theatlantic.com/magazine/archive/2011/01/why-our-best-officers-are-leaving/308346/. Kane notes that Gates supported the views expressed in the article, but does not explain how, implying that the speech was a show of support. KANE, *supra* note 1, at 101. It is a well-founded theory. In fact, except for one point where Kane and Gates diverge, *id.* at 26, the speech parallels so many of Kane's claims, that one may wonder if he took part in its drafting. Note also that the article was largely founded on a survey of West Point graduates, coinciding with the chosen venue for Gates's speech.

[9] KANE, *supra* note 1, at 4.

[10] Dr. Tim Kane is a graduate of the Air Force Academy, and holds a Master's and Ph.D. from the University of California San Diego. He served as an intelligence officer in the U.S. Air Force, attaining the rank of captain, and founded a number of software companies. Dr. Kane held several positions as a professional economist, and currently serves as the Chief Economist of the Hudson Institute, a Washington think tank "dedicated to innovative research and analysis that promotes global security, prosperity, and freedom." *See id.* at 1–2, 5; Tim Kane, HUDSON INST. *at* http://www.hudson.org/learn/index.cfm?fuseaction=staff_bio&eid=TimKane (last visited Sept. 10, 2013); San Diego Cnty., California, Full Biography for Tim Kane, Candidate United States Representative; District 53; Republican Party (Mar. 5, 2002 Election), *at* http://www.smartvoter.org/2002/03/05/ca/state/vote/kane_t/bio.html (last visited Sept. 10, 2013); Tim Kane's Biography, *at* http://www.growthology.org/growthology/aboutgrowthology.html (last visited Sept. 10, 2013); The Hudson Inst. Mission

consists largely of former officers who went on to succeed outside the military. As an economist, he was puzzled by the contrast between the military's ability to foster his friends' and colleagues' leadership skills and its failure to retain them in uniform.[11] In *Bleeding Talent*, he approaches the issue armed not only with his three perspectives but also with a question to be answered: "Why does the U.S. military generate some of the finest, most entrepreneurial leaders in the world, but then mismanages them using the most risk-averse bureaucracy possible?"[12]

Kane suggests that the military is facing a retention crisis because its personnel system is flawed. Personnel managers are not willing enough to take risks and the system does not reward initiative. To prove this theory, he spares no effort. The result is a well organized, detailed, and meticulous analysis.

III. A Three-Act-Play: How the Best Join the Military, Why They Leave, and What the Solution Is

Kane ably guides the reader through the large amount of data, resources, and ideas at the basis of *Bleeding Talent*[13] by adopting an organized step-by-step approach. In the first part of the book, after a lengthy introduction, he provides evidence that the military is in fact a "leadership factory."[14] Laying the foundations by debunking the "myth of the stupid soldier," Kane goes on to prove that veterans are over-represented among corporate chief executive officers, and points out that their companies over-achieve.[15] He wraps up the argument by providing an explanation: early responsibility, excellent training, and a value-oriented environment enhance leadership capabilities.[16] So does the fact that the military culture is entrepreneurial, by various definitions of the term.[17]

Statement, *available at* http://www.hudson.org/learn/index.cfm?fuseaction=mission_mission_statement (last visited Sept. 10, 2013).

[11] KANE, *supra* note 1, at 3–4.

[12] *Id.*

[13] *See id.* at 235–54 (bibliographical notes to the book), 255–61 (a selected bibliography).

[14] *Id.* at 43.

[15] *Id.* at 37–41, 43–44.

[16] *Id.* at 45–52.

[17] *Id.* at 52–56, 60–61. *See also id.* at 62–85 (Kane's effort to show that many military leaders have shown entrepreneurial traits).

The heart of the book is in its second part. Kane relies on previously published studies and some examples to show that the military has been "bleeding talent" for a long time, a trend worsened by the years of fighting in Iraq and Afghanistan.[18] He then relates the results of a survey he administered, completed by a sample of 250 West Point graduates. The respondents feel that most of the best officers (an undefined term, in Kane's opinion the least biased alternative) leave the military; and point at the military bureaucracy as one of the main causes they have left the service, among other factors.[19] Additional findings are that the military is viewed as rewarding seniority over merit more than in the private sector, and that traits of the personnel system are perceived as the aspects of military life that least foster "innovative and entrepreneurial leadership."[20]

The survey is the first of Kane's two main contributions to the debate. Clearly, he views it as a completion of the missing link in the research about retaining talent. While previous surveys pointed in other directions, Kane's respondents indicated the personnel system as a significant attrition factor.[21] Thus, the survey corroborates his thesis, and supports his call for reform.

Before putting forward his reform proposal, Kane educates the reader about the history and mechanics of the military personnel system, crafted in the industrial era. Officers are expected to follow similar career paths and to be promoted at fixed times or leave the service. There is little room for rewarding merit or allowing for specialization. Management is in the hands of a centralized bureaucracy, focused on the military's broad needs and not on matching positions with talent or considering personal desires.[22]

Kane's proposal is his second meaningful contribution. Adopting a start-from-scratch approach, he advocates for a revolution: a shift from the All Volunteer Force (AVF) model adopted with the abolition of the draft in 1973, to a Total Volunteer Force (TVF). In the AVF, officers

---

[18] *Id.* at 85–94

[19] *Id.* at 95–99, 217–34.

[20] *Id.*

[21] *See* Lieutenant Colonel (LTC) Michael J. Slocum, Maintaining the Edge: A Comprehensive Look at Army Officer Retention 16–19 (2012) (unpublished M.Sc. dissertation, The Army War College), *available at* http://www.dtic.mil/cgi-bin/GetTRDoc?Location=U2&doc=GetTRDoc.pdf&AD=ADA561974.

[22] KANE, *supra* note 1, at 109–26.

join the military voluntarily, but have little or no choice of career path. The TVF will allow officers and commanders more choice, by replacing the centralized management of personnel with an internal market for talent. Career paths will not be dictated, for the most part, and officers will be able to apply for any position they wish to fulfill. Commanders will hire the best candidate among applicants, possibly including former officers. They may even be authorized to reward officers according to their skills. In the TVF system, promotions will be based primarily on merit and not seniority.[23] Kane's terminology is not coincidental. As he explains, many opposed the shift from the draft to the AVF model when it was proposed, but economic giants such as Milton Friedman strongly supported it.[24] In retrospect, the AVF model is widely acclaimed.[25] The comparison serves to show that the adoption of market mechanisms does not "lead to a mercenary, unprofessional force."[26] But it also draws a comparison between the author and those economic giants, and between his critics and others who have been proven wrong. Kane does not settle for putting forward a proposal. He showcases the responses to a second questionnaire where, facing criticism of his first survey,[27] he put

---

[23] *Id.* at 136–41.

[24] *Id.* at 7–8, 25–27, 170–76. *See also* David R. Henderson, *The Role of Economist in Ending the Draft*, 2 ECON J. WATCH no. 2, at 362 (Aug. 2005), at http://econjwatch.org/articles/the-role-of-economists-in-ending-the-draft; The Report of the President's Commission on an All-Volunteer Armed Force (New York, N.Y.: The Macmillan Company, 1970), in particular, 11–20, (relating the debate regarding the shift from the draft to an All Volunteer Armed Force (AVF)), 129–59 (addressing the main oppositions to the shift); *see also generally* BERNARD ROSTKER, I WANT YOU!: THE EVOLUTION OF THE ALL-VOLUNTEER FORCE (2006).

[25] KANE, *supra* note 1, at 7–18, 170–76. According to a 2011 poll, 74% of the public and more than 80% of veterans oppose a return to the draft. *See* PEW RES. CTR., WAR AND SACRIFICE IN THE POST-/9/11 ERA: THE MILITARY-/CIVILIAN GAP, October 5, 2012, *at* http://pewresearch.org/pubs/2111/veterans-/post-/911-/wars-/iraq-/afghanistan-/civilian-/military-/veterans. Kane asserts that the AVF is not only popular but also efficient, noting his findings on the quality of military personnel. KANE, *supra* note 1, at 7–8. Addressing the efficiency of the AVF is beyond the scope of this review. *See generally* ROSTKER, *supra* note 25; CONGRESSIONAL BUDGET OFFICE, THE ALL-VOLUNTEER MILITARY: ISSUES AND PERFORMANCE (2007) *available at* http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/83xx/doc8313/07-19-militaryvol.pdf.

[26] KANE, *supra* note 1, at 27.

[27] *Id.* at 100. *See also* Eric Tegler, *The Officer Market: The Army Responds*, at http://www.erictegler.com/wp-content/uploads/2011/03/http.www.defensemedianetwork.com_stories_the-officer-market-the-army-responds_.pdf (last visited Sept. 10, 2013). Interestingly, Kane mentions the story, without citing it. Instead, he cites the interview Tegler conducted with him prior to the Army's response. For another critique of the first survey, see also Erick E. Ricks, *No, Our Best Officers Are Not Running Off: 4 Officers Respond to That* Atlantic *Article,* FOREIGN POL'Y, Mar. 23, 2011, *available at*

elements of the proposed reform up for a vote. The results show unequivocal support.[28]

The third part of the book ties the remaining loose ends. Two chapters are devoted to reinforce the call for a revolution in personnel management. According to Kane, the military is not innovative and adaptive enough. Consequently, unconventional leaders are passed over for promotion. There are no means to recruit and retain individuals with unique capabilities, such as cyber warfare wizards and drone pilots.[29] An additional chapter is devoted to explain that market principles are not in contrast with military values, anticipating a likely criticism.[30] In the last chapter Kane notes one exception where in his opinion there is a need for more regulation: performance evaluations.[31]

IV. The Book's Unique Contribution

Bleeding Talent is not the first endeavor into the study of the military personnel system, nor the only work pointing at the possibility of serious retention problems among the officer ranks.[32] The main question is therefore, what is its unique contribution?

The answer is that *Bleeding Talent* is one of the most comprehensive, reliable, and approachable tales of the personnel system in the armed forces written so far. The quality of the research is outstanding. The book relies on hundreds of sources, including economic and strategic studies, interviews, surveys administrated by the author and by others, media publications, and more.[33] Sources are up-to-date and put to use in a scholarly manner, leaving no claim unfounded.[34]

---

http://ricks.foreignpolicy.com/posts/2011/03/23/no_our_best_officers_are_not_running_off_4_officers_respond_to_that_atlantic_articl.

[28] KANE, *supra* note 1, at 98–99, 132–35.

[29] *Id.* at 144–61, 183–98.

[30] *Id.* at 162–82.

[31] *Id.* at 199–15.

[32] *See, e.g.*, Slocum, *supra* note 21; Casey Wardynski, David S. Lyle & Michael J. Colarusso, *Towards a U.S. Army Officer Corps Strategy for Success: Retaining Talent*, STRATEGIC STUD. INST., January 2010, *available at* http://www.strategicstudies institute.army.mil/pdffiles/PUB965.pdf.

[33] *See supra* note 14.

[34] *Id.*

The author's unique perspective has a valuable contribution as well. His military experience is well reflected in the detailed description of facts, trends, policies and organizational traits. His passion for the subject shines through. His access to commanders, current and former officers, and prominent business leaders is also put to a good use, adding valuable insights and interesting ideas. In addition, his position as an insider-outsider[35] enables him to ask tough questions.

The book is also well organized. Every issue is tackled step by step, and every claim and idea is based on the ones previously exposed. Kane spots possible fallacies in his argument,[36] and probable criticism,[37] and presents answers and explanations. Finally, the book is also an enjoyable read. The author is an able narrator, and he alternates well between organizational analysis and skillful storytelling. His persuasive tone makes his arguments hard to overlook.

V. Not a Persuasive Tale

However, *Bleeding Talent* was meant to persuade that there is a problem, and to offer a viable solution, goals that are only partially met. A closer look at the book's three main additions to the existing body of knowledge reveals why.

The book's first meaningful contribution is the survey of officers. Although the author goes a long way to show that he adhered to strict rules in conducting it,[38] at least four weak spots are apparent. First, as others have argued, the sample is not representative.[39] Second, it seems

---

[35] KANE, *supra* note 1, at 7.

[36] For example, by explaining after pointing to the high number of veteran CEOs that "this military CEO story can be overinterpreted . . . there can be hiring bias," thus referring to a study that cannot be biased in the same manner, regarding the veteran CEOs' performance. *Id.* at 44.

[37] For example, by conducting a second survey in response to criticism of a previous one, or devoting a chapter to a possible claim regarding a conflict between a market-based approach and military values, as previously noted in Section III of this review.

[38] KANE, *supra* note 1, at 100–01.

[39] Ricks, *supra* note 27 (noting that a small number of graduates from a single institution, West Point, from specific years, are not a representative sample of the Army population. According to Ricks, a representative sample would have included officers from various institutions and service tracks; and it would have been beneficial to poll officers from the other services as well).

that Kane's assertion of neutrality[40] is questionable.[41] Third, questions about the "best" that leave call for subjective judgment, and no comparison to other organizations is provided as a benchmark. Finally, while a survey of opinions may indicate displeasure with current practice, it is not necessarily indicative of the required changes. It may, for instance, reflect an antagonism towards rules that the respondent did not have the power to influence.[42]

The book's second meaningful contribution is the TVF model. While Kane asks good questions about the current personnel system,[43] his reform proposal is extreme and not well defined. His focus on entrepreneurship seems exaggerated. Furthermore, Kane does not address some serious concerns his proposal presents. Enabling officers to leave the military and come back might enlarge the pool of applicants for military jobs, but it would also make leaving the military easier. Few may return. Aligning the military completely with practices in the private sector might make it hard to compete with private companies for talent, under financial constraints. Those are just two examples. Indeed, even the author concedes that his proposal it is just one of many to be considered.[44]

The book's third contribution is its collection of case studies and interviews. They are interesting, but anecdotal. A new personnel system cannot be built on personal stories. Those are probably some of the substantive reasons Kane has eventually not been able to shape the debate on personnel reform in the services.[45]

---

[40] KANE, *supra* note 1, at 101.
[41] For example, the military's degree of meritocracy is compared only to the private sector but not to other public organizations; when focusing on innovative and entrepreneurial leadership incentives, bureaucratic traits such as the "job assignment system" are compared to tangible experiences such as "experience in the field." *Id.* at 219–20 (tbls. A.3, a.4).
[42] *See* Eric Jackson, *Top Ten Reasons Why Large Companies Fail to Keep Their Best Talent*, FORBES (Dec. 14, 2011, 10:31 AM), *at* http://www.forbes.com/sites/ericjackson/2011/12/14/top-ten-reasons-why-large-companies-fail-to-keep-their-best-talent/.
[43] *See* KANE, *supra* note 1, at 136–41, 199–25.
[44] *Id.* at 215.
[45] Roxanne Bras, *Will We Ever Stop Bleeding Talent? An Interview with Tim Kane,* DEF. ENTREPRENEURS F. (Aug. 22, 2013), *available at* http://def2013.com/will-we-ever-stop-bleeding-talent/ (noting that Kane has not received any formal invitations from any of the military services to elaborate on his work).

Two writing and editing choices also affect the book's appeal and ability to convince. The author's tone is often very confident and critical of differing opinions and practices.[46] As a result, the book does not seem balanced and objective enough. The fact that at times sources seem to have been put to use in a way that is overly supportive of the author reinforces this impression.[47] In addition, the book suffers from a tendency to repetition.[48]

VI. Conclusion

Bleeding Talent is a fascinating journey into the United States' military personnel system that delivers thorough academic research in an organized, interesting, and thought-provoking manner. The book does not meet its primary objective to persuade the reader that what the military needs is a revolutionary reform based in classical economics. However, it is a worthwhile read, because of the approachable writing and well-organized analysis, as well as the poignant questions posed by the author.

Bleeding Talent is recommended reading for those interested in exploring the subject of personnel management in the military. Readers interested in human resources management in the current era may

---

[46] In this regard, the introduction to the book stands out. Not many would open a book by describing their own success, KANE, *supra* note 1, at 1–2, and go on to examine why an organization that let them go in the past fails in retaining talent, making use of their own story as an example. Also, it is not common to see an author stating that his book "will shape the debate" on the issue it tackles. *Id* at 4. *See also id.* at 25 ("Pentagon leaders know they have a problem, but I've come to the conclusion that they fundamentally have no idea how to design an alternative. And so the book offers a blueprint for that alternative."); *id.* at 98 (relating Kane's survey's success and an officer's struggle to understand it); *supra* note 24 (Kane's apparent comparison to renowned economists such as Milton Friedman.)

[47] *Supra* note 27 (noting that Kane addresses an article critical of his work, but cites a previous one that does not contain said critique); KANE, *supra* note 1, at 11 (stating that Secretary of Defense Gates's speech has been quoted in a way that is more persuasive, but does not reflect the original (attaching two distant parts)). The omissions in these two cases may also be the result of inadvertent mistakes.

[48] The vast majority of the book's contents are summed up in the introduction and the first chapter, KANE, *supra* note 1, at 1–34, in itself a modification of Kane's 2011 article, *supra* note 8, as stated in KANE, *supra* note 1, at 99. Repetitions are common throughout the book as well. *See, e.g.*, *id.* at 25, 36 (the author uses a surprising story as a narrative device, but the underlying facts have been revealed a few pages earlier); *id.* at 137–41, 160–61 (recurring discussion of the fallacies of the current promotions system).

appreciate Kane's broad introduction to the military practice, as well as his novel perspective and comparative approach. The book would also be beneficial to military managers and those engaged in leadership development. Policy-makers may also find it thought-provoking.

THE GUNS AT LAST LIGHT: THE WAR IN WESTERN EUROPE, 1944–1945[1]

REVIEWED BY COMMANDER I. C. LEMOYNE[*]

You will enter the continent of Europe and, in conjunction with the other united nations, undertake operations aimed at the heart of Germany and the destruction of her armed forces.[2]

I. Introduction

I wanted to dislike this book. Asked to read another historical account of the Allied victory in WWII centered exclusively on the ground war in Western Europe, yet another paean to "the Greatest Generation" focused entirely on the United States Army, filling more than 600 pages of text with copious notes, was not exciting to me. It is the contrarian in me, my own venal service pride, a sense that I had been over this ground enough already; I truly expected to dislike this book.

Guns at Last Light, the final installment of Rick Atkinson's *Liberation Trilogy*,[3] is a masterpiece of contemporary narrative history. Mr. Atkinson, already an award-winning journalist and historian,[4] has crafted a seminal work that is important reading for all military officers and civilian policy-makers in military affairs.

After identifying in Part II Atkinson's reasons for writing *Guns at Last Light*, Part III of this review explores his background as a

---

[*] Judge Advocate, U.S. Navy. Student, 62d Judge Advocate Officer Graduate Course, The Judge Advocate General's Legal Center and School, U.S. Army, Charlottesville, Virginia.

[1] RICK ATKINSON, THE GUNS AT LAST LIGHT: THE WAR IN WESTERN EUROPE, 1944–1945 (2012).

[2] *Id.* at 12 (quoting from the order of the Combined Chiefs of Staff to Commander, Supreme Headquarters Allied Expeditionary Force, General Dwight D. Eisenhower before the invasion in June 1944).

[3] *Rick Atkinson, The Liberation Trilogy* consists of three books: AN ARMY AT DAWN: THE WAR IN NORTH AFRICA, 1942–1943 (2002), THE DAY OF BATTLE: THE WAR IN SICILY AND ITALY, 1943–1944 (2007), GUNS AT LAST LIGHT: THE WAR IN WESTERN EUROPE, 1944–1945 (2012), http://liberationtrilogy.com (last visited Sept. 11, 2013).

[4] Notably, 1982 Pulitzer Prize for National Journalism, 2003 Pulitzer Prize for History are available at http://www.pulitzer.org/1999 and http://www.pulitzer.org/2003. Additional awards may be found at http://www.liberationtrilogy.com.

journalist and how it informs his approach to this topic and extensive use of sources. Part IV delves into the organization and style of *Guns at Last Light* as well as the applicability of the book's principles today. Finally this review notes criticisms of the work and analyzes Atkinson's own summation of the book.

II. Purpose and Thesis

The clearest statement of Atkinson's purpose with all the works in the *Liberation Trilogy* appears in the Prologue to the first book, *An Army at Dawn: The War in North Africa, 1942–1943*. It is more than to set out "the choreography of the armies" for the reader's understanding or to explain why in battle "topography is fate." His purpose is to provide "intimate detail" of individuals through "their diaries and letters, their official reports and unofficial chronicles" and their memories, "even as we swiftly move toward the day when not a single participant remains alive to tell his tale . . . ." And his task as a historian is "to authenticate: to warrant that history and memory give integrity to the story, to aver that all this really happened."[5] Mr. Atkinson takes his role seriously, as shown by his flawless research and extensive sources.

The scope of *Guns at Last Light* is encapsulated in the quotation at the beginning of this review, but it is best understood by reference again to the Prologue to *An Army at Dawn*.[6] There, Mr. Atkinson explains his view that the "liberation of western Europe is a triptych" with *Guns at Last Light* as the final panel presenting "the invasion of Normandy and the subsequent campaigns across France, the Low Countries, and Germany."[7] Although this scope makes clear that his focus is on the campaigns in Western Europe, Atkinson is careful to point out the importance of Adolf Hitler's decision to attack the Soviet Union at enormous cost in energy, blood, and treasure of both Germany and the Soviet Union.[8]

---

[5] AN ARMY AT DAWN, *supra* note 3, at 2.

[6] *Id.*

[7] *Id.* at 3 (Atkinson avers that each panel in this triptych informs the others. The campaigns in North Africa established patterns and motifs that were echoed in Italy, and culminated with the invasion of Normandy and final victory over Germany.)

[8] *Id.* at 7–8 (noting Hitler's decision to attack the Soviet Union as one of two seminal events fundamentally altering the course of the war, the other being the attack on Pearl Harbor); *see also* ATKINSON, *supra* note 1, at 5, 228, 523, 637 (noting that final defeat of Hitler required the massive invasion by the Western Allies coupled with the tying up of

Atkinson's thesis is not set out clearly in the opening of *Guns at Last Light*, but is referred to in the epilogue. Viewed in conjunction with his prologue to *An Army at Dawn*, Atkinson's main point is that the Allied Powers in WWII prevailed largely because of the "prodigious weight of American industrial might" provided to the "Allied arsenal." Atkinson further argues that this "brute strength" had to be coupled with the "generalship and audacity, guile and celerity, initiative and tenacity" to bring the combat power produced by the American "economic juggernaut" to bear on the enemy in order for the Allies to succeed.[9]

III. Professional Background and Sources

Atkinson started his professional life as a journalist, most notably for the *Washington Post*. His personal biography lists numerous awards during his years as a reporter.[10] He subsequently expanded his endeavors to include writing historical books. Again, he was nationally recognized for the quality of his work.[11] As discussed in greater detail below, his background as a reporter is clearly evident in the style and organization of *Guns at Last Light*. That very same background as a journalist also informs his approach to his audience. This is a book that can be read, understood, and enjoyed with little or no specialized knowledge of the campaigns in Western Europe, the strategic and political issues motivating significant parties to the conflict, or much knowledge of large army confrontations at all.[12]

---

two-thirds of German combat forces on the Eastern Front. The Soviet Union suffered more than 26 million casualties and killed far more Germans in combat "than all other allied forces combined.")

[9] *Id.*

[10] Atkinson is credited with the following notable awards: 2003 Pulitzer Prize for history, 1982 Pulitzer Prize for national reporting, 1999 Pulitzer Prize for public service (awarded to the *Washington Post* for a series of investigative articles directed and edited by Atkinson), 1989 George Polk Award for national reporting, 2003 Society for Military History Distinguished Book Award, 2007 Gerald R. Ford Award for Distinguished Reporting on National Defense, and 2010 Pritzker Military Library Literature Award for Lifetime Achievement in Military Writing, http://www.liberationtrilogy.com (last visited Sept. 7, 2013).

[11] *Id.*

[12] *E.g.*, Ben Macintyre, *The Price of Victory* (review of *Guns at Last Light*, *supra* note 1), N.Y. TIMES, May 23, 2013, at BR9 ("supremely readable"), *and* ("rare ability to combine a historian's eye with a reporter's pen to simultaneously provide a sweep and detail to combat that is both unique and enjoyable for the novice student and the hardiest grognard"), Jerry D. Lenaburg, *Review of The Guns at Last Light*, N. Y. J. OF BOOKS,

Mr. Atkinson frequently explains the macro aspects of his story by involving the reader in small, relatable elements of that story. He does not assume the reader is an expert in the subjects he chooses for inclusion in the story. Mr. Atkinson provides background information where he believes it will be important to explaining the significance of an event or decision by a participant, and he has done his homework. The Prologue to *Guns at Last Light* contains 136 separate citations, many referring to multiple works supporting his assertions. The substantive portion of the Notes section consists of 164 pages alone. His Selected Sources include primary source materials, first-hand accounts, and the work of other historians and commentators. This extensive bibliography includes periodicals, newspapers, papers, letters, collections, personal narratives, diaries, interviews, questionnaires, oral history transcripts, and other assorted miscellany to support his work. And books—more than 781 separate books are listed here as well.[13]

IV. Organization, Style, and Usefulness

Mr. Atkinson turns his substantial journalistic skills to crafting a work of history for the 21st century. The structural style is impressionistic rather than completely linear, with many carefully placed details that can overwhelm the reader who focuses too intently on them. Atkinson's work is best understood taken as a composite whole, with almost microscopic details that slowly pile up with mesmerizing effect. An interactive, multi-media accompaniment to enhance comprehension is helpfully provided by the author.[14]

Guns at Last Light begins with an extensive Prologue detailing the preparations and political maneuvering leading up to Operation OVERLORD.[15] The first portion of this Prologue is largely expository and provides much of the necessary strategic, political, and operational background to provide context for the importance of the struggle that is the main focus of the text.[16] The Prologue then transitions into

---

(May 14, 2013), http://www.nyjournalofbooks.com/book-review/guns-last-light-war-western-europe-1944%E2%80%931945-liberation-trilogy.

[13] ATKINSON *supra* note 1, at 647–841.

[14] *See* http://www.liberationtrilogy.com (last visited Sept. 7, 2013).

[15] ATKINSON, *supra* note 1, at 1.

[16] *Id.* at 1–6.

"pointillism history"[17] the predominant style of the rest of the work; a careful compilation of enormous amounts of minute details woven into a comprehensive tapestry with effective narrative impact. The final pages of the Prologue hurtle from detail to detail, aiding the author's obvious attempt to convey the roiling emotions that wracked the invasion force like the angry sea they were now crossing.[18] This style helps Mr. Atkinson create genuine drama as he deftly incorporates a wealth of detailed information into a compelling narrative where we all know how the story ends.

Interspersed throughout *Guns at Last Light* are personalized details of pathos and tragedy, sparingly covered in a few lines.

> Officers ordered men in landing craft approaching the shore to keep their heads down, as one lieutenant explained, "so they wouldn't see it and lose heart" . . . . Without firing a shot, Company A was reportedly "inert and leaderless" in ten minutes; after half an hour, two-thirds of the company had been destroyed, including Sergeant Frank Draper, Jr., killed when an antitank round tore away his left shoulder to expose a heart that beat until he bled to death. Among twenty-two men from tiny Bedford, Virginia, who would die in Normandy, Draper, "didn't get to kill anybody," his sister lamented.[19]

In addition to piles of facts leavened by these personalized details, Mr. Atkinson employs narrative arcs by relatively unknown or under-appreciated contributors. These narrative arcs are welcome additions, knitting together the complex story and providing a human face to the enormous amount of information being presented.

---

[17] "[A]ssembling the small dots of color into a vivid, tumbling narrative." Ben Macintyre, *The Price of Victory*, N.Y. TIMES, May 23, 2013, http://www.nytimes.com/2013/05/26/books/review/the-guns-at-last-light-by-rick-atkinson.html.

[18] ATKINSON, *supra* note 1, at 25–40.

[19] *Id*. at 69 (describing the near complete destruction of two infantry regiments on "Hell's Beach," part of the far Western flank of Omaha Beach).

One of the most poignant examples of this device involves Brigadier General Theodore Roosevelt, Jr., who is introduced in the Prologue.[20] This Roosevelt, namesake son of the twenty-sixth President of the United States, appears repeatedly in the portion of *Guns at Last Light* dealing with the battle in Normandy, leading American troops at Utah beach in the early hours of the invasion.[21] Already decorated for valor in previous campaigns, he is described as bearing the pain of his war wounds, the weight of his father's reputation, and ominous "chest pains gnawing beneath his service ribbons" into battle in Normandy.[22] The day after the beach assault, Brigadier General Roosevelt arrives at the 82nd Airborne Division command post, "helmet pushed back and waving his cane from *Rough Rider*[23] 'as if the bullet that could kill him had not been made,' one witness reported.[24] He accompanied the 4th Division in its assault on the town of Cherbourg and subsequently served as the region's military governor.[25] Previously judged "too softhearted to take a division" by General Omar Bradley,[26] General Bradley later chooses Roosevelt for division command after D-day and Roosevelt was nominated for the Congressional Medal of Honor for his exploits at Utah beach.[27] After having dinner with his son in mid-July 1944, the fearless Brigadier General Roosevelt dies of a heart attack, never knowing of his division command; the Congressional Medal of Honor was awarded posthumously.[28] Atkinson's epitaph for this less famous Roosevelt, quoting from a letter to Roosevelt's wife, "'I don't believe there are many people in the world like that.' And now, one less."[29]

[20] *Id*. at 27 (This is the first reference to Brigadier General Roosevelt, who writes to his wife on the eve of the invasion of Normandy, "The black bird says to his brother, if this be the last song ye shall sing, sing well, for you may not sing another.").
[21] *Id*. at 59–63 (describing a "nearly fearless" man living not in the shadow of his more famous father, but trying to be worthy of such a responsibility).
[22] *Id*. at 60.
[23] *Id.* at 62 (*Rough Rider* was the name of Brigadier General Roosevelt's jeep, an homage to his father's regiment in the Battle of San Juan Hill.)
[24] *Id*. at 91 ("'Fellows,' Roosevelt bellowed upon his arrival, 'where's the picnic?'").
[25] *Id*. at 126 (General Bradley had relieved Brigadier General Roosevelt as Deputy Commander of 1st Infantry Division in Sicily due to "rowdy indiscipline" under Roosevelt's leadership.).
[26] *Id*. (Both the division command and Medal of Honor citation were on General Bradley's desk at the time of Roosevelt's death.).
[27] *Id*.
[28] *Id*. at 127 (Roosevelt's jeep, *Rough Rider*, was returned to the motor pool where the name was painted over and the jeep reissued.).
[29] *Id.*

Another passage, from the Epilogue of *Guns at Last Light*, displays Mr. Atkinson's detail-rich style in direct support of his thesis. He relates how America produced and delivered "18 million tons of war stuff to Europe, equivalent to the cargo of 3,600 Liberty ships or 181,000 rail cars." This prodigious output ranged from "800,000 military vehicles" to shoes "in sizes 2A to 22EEE." It included "40 billion rounds of small arms ammunition and 56 million grenades." During the final campaigns from June 1944 to May 1945, American troops expended "500 million machine-gun bullets and 23 million artillery rounds." Ever the journalist, Mr. Atkinson quotes Churchill (describing America as a "prodigy of organization"), an artillery gunner ("I'm letting the American taxpayer take this hill"), and a German prisoner ("Warfare like yours is easy") to frame and support his point.[30]

To be clear, Mr. Atkinson does not aver that the American way of war was actually easy. The quotes provide context for the details from the perspective of the participants, and the piling up of these details supports the central message of *Guns at Last Light*. Victory in Western Europe was due in significant part to the staggering material superiority of the Western Allies, coupled with their ability to marshal it into battle effectively and relentlessly. It is this central message that warrants the attention of military officers and civilian policy-makers alike.

For other potential readers somewhere along the spectrum from WWII expert to a reader with a casual interest in history, *Guns at Last Light* is an excellent addition to the historical canon. It provides an illuminating narration of the final push to victory in Europe in WWII and a solid foundation for understanding the international relations surrounding the subsequent Cold War.

V. Criticisms

Mr. Atkinson ambitiously takes as his subject all of the Western Allied forces, their leaders, and an array of subordinates. He throws in the major political figures of the era[31] and the geopolitical fears driving

---

[30] *Id*. at 633.

[31] President Franklin D. Roosevelt receives thirty-one separate references, British Prime Minister Winston Churchill seventy-two separate entries, and Russian Marshal Joseph Stalin ten separate entries. *Id.* at 855, 870, 872.

their decisions.[32] Even when coupled with the personalized facts and narrative arcs described above, the wealth of information can at times be dizzying. This treatment, however, helps convey the very nature of the war, "clear in hindsight, but bewildering and chaotic to those caught up in it."[33]

Additionally, as critics have noted elsewhere, his descriptions of actual battle occasionally drift into "overheated prose" and are less convincing than many other portions of *Guns at Last Light*.[34] Mr. Atkinson's weakness in this area may be excused as a credible attempt of a writer accustomed to direct observation or at least first-hand sourcing of information having to rely on second- and third-hand accounts of an experience he has had the good fortune to avoid. Some critics have also noted that he ignores the contributions of other nations and focuses too intently on the American part of the story.[35]

VI. Final Argument

Guns at Last Light ends with an economy made all the more effective considering it resolves a story that comprises three separate books. Perhaps an inspiration for this economy is the message dictated by Eisenhower himself to the Combined Chiefs of Staff regarding the surrender ceremony just transpired: "The mission of this Allied force was fulfilled at 0241, local time, May 7, 1945. Eisenhower."[36] *Guns at Last Light* contains four main parts comprised of twelve numbered sections and forty-six separately titled chapters in its 640 pages of text. Yet the book presents the factual elements of final victory in only eight pages. The Epilogue adds an additional thirteen pages of detailed

---

[32] For example, quoting a War Department report from late 1944,

> The defeat of Germany will leave Russia in a position of assured military dominance in Eastern Europe . . . [bringing] a world profoundly changed in respect to relative military strengths . . . . The British Empire will emerge from the war having lost ground both economically and militarily.

Id. at 381.

[33] Macintyre, *supra* note 12.

[34] *Id.*

[35] *See* http://www.telegraph.co.uk/culture/books/historybookreviews/10144098/The-Guns-at-Last-Light-by-Rick-Atkinson-review.html.

[36] ATKINSON, *supra* note 1, at 626.

aftermath, tallying the enormous human tragedy WWII encompassed. It also briefly discusses how the conclusion of hostilities set the stage for the next conflict, the Cold War. Mr. Atkinson's style shines as he effectively sums up the achievement and impact of the events just laid out without waxing unnecessarily eloquent. True to his opening statements, Mr. Atkinson's work in *Guns at Last Light* supports his position that the true facts taken together comprise a much more satisfying and complete story.[37]

VII. Conclusion

I hefted this 900-page book with trepidation. Having made my way through its wealth of information conveyed by an author of substantial gifts and obvious command of his subject, I read the following quote from General George C. Marshall, United States Army Chief of Staff, to General Eisenhower: "You have completed your mission with the greatest victory in the history of warfare . . . . You have made history, great history for the good of all mankind, and you have stood for all we hope and admire in an officer in the United States Army."[38] I now set down *Guns at Last Light*, disappointed only by my out-of-order introduction to Mr. Atkinson's *Liberation Trilogy*. This naval officer has already ordered the first installment, *An Army at Dawn*.[39]

---

37 AN ARMY AT DAWN, *supra* note 3, at 2.
38 ATKINSON, *supra* note 1, at 636.
39 AN ARMY AT DAWN, *supra* note 3.

United States Postal Service

Statement of Ownership, Management, and Circulation

1. Publication Title	2. Publication Number	3. Filing Date
Military Law Review	0 0 2 6 – 4 0 4 0	October 1, 2013
4. Issue Frequency	5. Number of Issues Published Annually	6. Annual Subscription Price
Quarterly	Four	Domestic: $20.00 Foreign: $28.00

7. Complete Mailing Address of Known Office of Publication *(Not printer) (Street, city, county, state, and ZIP+4)*

The Judge Advocate General's School, U.S. Army

600 Massie Road, Charlottesville, VA 22903-1781

Contact Person: Charles J. Strong

Telephone: (434) 971-3396

8. Complete Mailing Address of Headquarters or General Business Office of Publisher *(Not printer)*

Office of The Judge Advocate General, U.S. Army

2200 Army Pentagon, Washington, DC 20310-2200

9. Full Names and Complete Mailing Addresses of Publisher, Editor, and Managing Editor *(Do not leave blank)*

Publisher *(Name and complete mailing address)*

Colonel James F. Garrett

The Judge Advocate General's School, 600 Massie Road, Charlottesville, VA 22903-1781

Editor *(Name and complete mailing address)*

Captain Laura A. O'Donnell

The Judge Advocate General's School, 600 Massie Road, Charlottesville, VA 22903-1781

Managing Editor *(Name and complete mailing address)*

Captain Laura A. O'Donnell

The Judge Advocate General's School, 600 Massie Road, Charlottesville, VA 22903-1781

10. Owner *(Do not leave blank. If the publication is owned by a corporation, give the name and address of the corporation immediately followed by the names and addresses of all stockholders owning or holding 1 percent or more of the total amount of stock. If not owned by a corporation, give the names and addresses of the individual owners. If owned by a partnership or other unincorporated firm, give its name and address as well as those of each individual owner. If the publication is published by a nonprofit organization, give its name and address.)*

Full Name	**Complete Mailing Address**
Office of The Judge Advocate General, U.S. Army	2200 Army Pentagon, Washington, DC 20310-2200

11. Known Bondholders, Mortgagees, and Other Security Holders Owning or Holding 1 Percent or More of Total Amount of Bonds, Mortgages, or Other Securities. If none, check box ——► ☒ None

Full Name	**Complete Mailing Address**

12. Tax Status *(For completion by nonprofit organizations authorized to mail at nonprofit rates) (Check one)*

The purpose, function, and nonprofit status of this organization and the exempt status for federal income tax purposes:

☐ Has Not Changed During Preceding 12 Months

☐ Has Changed During Preceding 12 Months *(Publisher must submit explanation of change with this statement)*

13. Publication Title Military Law Review			14. Issue Date for Circulation Data Below Volume 218 (Winter 2013)	
15.		**Extent and Nature of Circulation**	**Average No. Copies Each Issue During Preceding 12 Months**	**No. Copies of Single Issue Published Nearest to Filing Date**
a. Total Number of Copies *(Net press run)*			4,912	4,911
b. Paid and/or Requested Circulation	(1)	Paid/Requested Outside-County Mail Subscriptions Stated on Form 3541. *(Include advertiser's proof and exchange copies)*	2,420	2,415
	(2)	Paid In-County Subscriptions Stated on Form 3541 *(Include advertiser's proof and exchange copies)*	0	0
	(3)	Sales Through Dealers and Carriers, Street Vendors, Counter Sales, and Other Non-USPS Paid Distribution	2,492	2,496
	(4)	Other Classes Mailed Through the USPS	0	0
c. Total Paid and/or Requested Circulation *[Sum of 15b. (1), (2),(3),and (4)]*			4,912	4,911
d. Free Distribution by Mail *(Samples, compliment ary, and other free)*	(1)	Outside-County as Stated on Form 3541	0	0
	(2)	In-County as Stated on Form 3541	0	0
	(3)	Other Classes Mailed Through the USPS	0	0
e. Free Distribution Outside the Mail *(Carriers or other means)*			0	0
f. Total Free Distribution *(Sum of 15d. and 15e.)*			0	0
g. Total Distribution *(Sum of 15c. and 15f)*			4,912	4,911
h. Copies not Distributed			0	0
i. Total *(Sum of 15g. and h.)*			4,912	4,911
j. Percent Paid and/or Requested Circulation *(15c. divided by 15g. times 100)*			100	100

16. Publication of Statement of Ownership

☒ Publication required. Volume 218 (Winter 2013) ☐ Publication not required.

17. Signature and Title of Editor, Publisher, Business Manager, or Owner: [signature], Editor — Date: 1 October 2013

I certify that all information furnished on this form is true and complete. I understand that anyone who furnishes false or misleading information on this form or who omits material or information requested on the form may be subject to criminal sanctions (including fines and imprisonment) and/or civil sanctions (including civil penalties).

Instructions to Publishers

1. Complete and file one copy of this form with your postmaster annually on or before October 1. Keep a copy of the completed form for your records.
2. In cases where the stockholder or security holder is a trustee, include in items 10 and 11 the name of the person or corporation for whom the trustee is acting. Also include the names and addresses of individuals who are stockholders who own or hold 1 percent or more of the total amount of bonds, mortgages, or other securities of the publishing corporation. In item 11, if none, check the box. Use blank sheets if more space is required.
3. Be sure to furnish all circulation information called for in item 15. Free circulation must be shown in items 15d, e, and f.
4. Item 15h., Copies not Distributed, must include (1) newsstand copies originally stated on Form 3541, and returned to the publisher, (2) estimated returns from news agents, and (3), copies for office use, leftovers, spoiled, and all other copies not distributed.
5. If the publication had Periodicals authorization as a general or requester publication, this Statement of Ownership, Management, and Circulation must be published; it must be printed in any issue in October or, if the publication is not published during October, the first issue printed after October.
6. In item 16, indicate the date of the issue in which this Statement of Ownership will be published.
7. Item 17 must be signed.

Failure to file or publish a statement of ownership may lead to suspension of Periodicals authorization.

By Order of the Secretary of the Army:

RAYMOND T. ODIERNO
General, United States Army
Chief of Staff

Official:

GERALD B. O'KEEFE
Administrative Assistant
to the Secretary of the Army
1409001