# TICKET TO RIDE:

# STANDARDIZING LICENSURE PORTABILITY FOR MILITARY SPOUSES

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*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

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[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.

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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.

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[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

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[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

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[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.
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> *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

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[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

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[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

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[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

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[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

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[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

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[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

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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,

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[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

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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

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[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

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[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]

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[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

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[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

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(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

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[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

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[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

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[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

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[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

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[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

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[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.

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[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

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[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-

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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

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[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

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[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

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[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

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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.

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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

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[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

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[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

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[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]

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[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

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[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

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[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,

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[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

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[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

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[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

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[221] *Id.*
[222] *Id.*
[223] MI3: MILITARY INTERSTATE CHILDREN'S COMPACT COMM'N, http://mic3.net/documents/InterstateCompactonEducationalOpportunityforMilitaryChildren-ModelLanguage.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/resources/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.

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[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

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[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]

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*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

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[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

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[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,

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[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